

IN THE SUPREME COURT OF OHIO

Industrial Energy Users-Ohio, et. al., : Case No. 2006-1594  
: :  
Appellants, : :  
v. : APPEAL FROM THE PUBLIC UTILITIES  
: COMMISSION OF OHIO  
The Public Utilities Commission Of Ohio : :  
: :  
Appellee. : :

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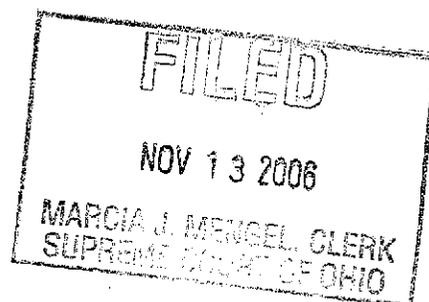
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## STATEMENT OF FACTS

Prior to the enactment of Senate Bill 3 in 1999,<sup>1</sup> electric generation service was fully regulated in Ohio by the Public Utility Commission of Ohio (herein referenced “the Commission” or “PUCO”). Electric utilities were granted certificates to build generating units and when those generating units were constructed, or at least seventy-five percent complete, the utilities’ ratepayers were obligated to pay rates for electric service based on the costs of the new generation along with a fair rate of return on the utilities’ investment.<sup>2</sup> This “investment” consisted largely of the undepreciated cost of electric generating plants.

This method of utility regulation contained benefits and tradeoffs for both electric generation utilities and their ratepayers. Ratepayers were not able to choose which utility would provide them electric generation service based on price and quality of service, but in exchange for that restriction ratepayers received the benefit of stable and generally low-priced cost-based rates as set by the Commission. Utilities were not able to charge whatever the market would bear for electric generation service, but in exchange were provided with a certified territory containing captive ratepayers that were obligated to pay a cost-based rate that ensured the recovery of their investment along with a fair return on that investment.

With the enactment of Senate Bill 3 in 1999 the Ohio General Assembly set in motion the end of regulated electric generation service in Ohio. After a brief market development period, Ohio would now be deregulated. All of the benefits and tradeoffs of the old system were replaced by a new set of benefits and tradeoffs for ratepayers and utilities. Ratepayers are now able to choose their own electric generation provider, but are not guaranteed the stable and

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<sup>1</sup> Codified in Ohio Revised Code, Chapter 4928.

<sup>2</sup> R.C. 4909.15(A)(1).

relatively low rates provided under the previous, fully regulated system. Utilities can now charge whatever the market will bear for electric generation service, but are not guaranteed a dollar-for-dollar cost recovery and return on their new investments, such as power plants.

The aforementioned market development period expired on December 31, 2005.<sup>3</sup> However, due largely to the fact that a workable competitive market for electric generation service had not developed the Commission issued an Order in Case No. 04-169-EL-UNC on January 26, 2005 approving a Rate Stabilization Plan. (Supp. 20). The Rate Stabilization Plan set the "market based" generation price for the years 2006 through 2008 for Columbus Southern Power Company and Ohio Power Company (collectively "AEP") customers that were not buying generation service from third party competitive generation suppliers. After 2008, rates for customers in the AEP territories that are not buying generation service in the open market are required to be set by market prices, (Supp. 32) consistent with the provisions of R.C. 4928.14.

In early 2004, AEP announced that it wanted to construct at least one and perhaps two Integrated Gasification Combined Cycle ("IGCC") power plants to serve future load. According to AEP, the proposed IGCC plant would come on line around 2010 or after the end of the Rate Stabilization Plan. (Supp. 8). IGCC is a relatively new electric generation technology that converts pulverized coal into synthetic gas, which fuels a combined cycle generating unit in order to produce electric power. (Supp. 2-3). IGCC units are approximately 20% more expensive than traditional pulverized coal plants (Supp. 35) and are regarded by many as risky, unproven technology. (Supp. 35-36). AEP claimed that the numerous construction and operating jobs would flow to states where the plants would be constructed. (Supp. 14).

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<sup>3</sup> R.C. 4928.14

However, AEP also made it known that it would only construct the IGCC in a state where it was assured cost recovery of the new power plant. (Supp. 17).

In this environment, on January 26, 2005 the Commission, in a non sequitur contained in the Conclusion section of the Rate Stabilization Plan Order stated that it encourages AEP to “move forward with a plan to construct an integrated gasification combined cycle (IGCC) facility in Ohio.” (Supp. 20-21). The Commission further stated that it “is exploring regulatory mechanisms by which utilities, given their [provider of last resort]<sup>4</sup> responsibilities, might recover the costs of these new facilities.” (Supp. 21). Thus, despite the fact that Senate Bill 3 deregulated electric generation service in Ohio, the Commission suggested to AEP that it should pursue the possibility that AEP could recover the costs of an IGCC generating facility on a dollar-for-dollar basis from AEP’s distribution customers (electric distribution service continues to be fully regulated after the enactment of Senate Bill 3) to which they had a provider of last resort responsibility.

On March 18, 2005 AEP accepted the Commission’s invitation to pursue the construction of an IGCC power plant by filing an Application in PUCO Case No. 05-376-EL-UNC entitled “In The Matter Of The Application Of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operation of an Integrated Gasification Combined Cycle Electric Generating Facility” (“Application”) seeking the approval of a series of surcharges to recover the costs associated with the construction and operation of a 629-MW IGCC electric generating facility. AEP estimates that it will cost \$1.27 Billion (\$1,270,000,000.00) to construct and finance this power

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<sup>4</sup> “Provider of last resort” is not defined by statute or rule, but has come to mean “those costs incurred by [an electric distribution utility] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return to [an electric distribution utility] for generation service.” *Constellation NewEnergy v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, 539, 820 N.E.2d 885.

plant. (Supp. 9). AEP proposed to recover the costs of the IGCC electric generating facility in three phases. Phase I, the Commission's approval of which is at issue in this appeal, would recover the actual pre-construction costs (engineering, design, procurement, etc.) of the generating facility prior to AEP breaking ground on the construction of the IGCC facility.<sup>5</sup> (Supp. 5). AEP's request for the recovery of Phase I preconstruction costs of the IGCC electric generating facility stated:

"PHASE I RECOVERY

7. The [AEP] Companies propose to recover certain IGCC costs in 2006 as a temporary generation rate surcharge on the standard service rate schedules authorized in the [rate stabilization plan] order. Those costs, which are projected to total approximately \$18 million, are the actual costs incurred through February 29, 2005 (Actual Costs) as well as the costs projected to be incurred from March 2005 until the Companies enter into the EPC contract which is currently estimated to occur in June 2006 (Projected Costs). To begin recovering these Actual and Projected Costs, the Companies propose that they be authorized to assess a generation rate surcharge on the standard service rate schedules authorized in the RSP order, effective with the first billing cycle in January 2006. The surcharge would remain in effect for 12 billing months. Any customer that receives its generation service from a [certified retail electric service] provider during any portion or all of this period will avoid the surcharge for such period of time." (Supp. 5-6). (Emphasis added).

On April 10, 2006, the Commission issued an Order ("Order") approving AEP's request to institute a surcharge on its customers to recover the Phase I engineering and design costs of the IGCC generation facility prior to the start of construction of the IGCC facility. (Appx. 23). It characterized the proposed IGCC electric generating facility as "not about regulating retail

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<sup>5</sup> "In Phase I, the Companies would recover during 2006 the actual dollars they will have spent on the IGCC facility up to the time of the execution of an Engineering, Procurement and Construction (EPC) contract (approximately in June 2006).

In Phase II, beginning in 2007 through the time the IGCC facility goes into commercial operation, the Companies would recover a carrying charge on their construction costs incurred from the execution of the EPC contract until the beginning of Phase III.

In Phase III, which would last through the commercial life of the IGCC facility, the Companies would collect a return on as well as a return of their investment in the facility, and would collect their operating expenses, including fuel and consumables, through rates authorized by the Commission." Application (March 18, 2005) at p. 5. (Supp. 5).

electric generation, but about providing the distribution ancillary services;" (Appx. 44) and stated that the IGCC surcharge, which will recover the cost of the IGCC electric generation facility, is independent of AEP's standard service offer generation rate for non-shoppers, which pursuant to R.C. 4928.14 must be "market-based", not cost-based like the IGCC surcharge. (Appx. 45).

On October 11, 2005, pursuant to R.C. 4903.10, the Ohio Energy Group ("OEG"), a consortium of very large electricity customers in Ohio and the other Appellants filed separate petitions requesting a rehearing of the Commission's April 10, 2006 Order on the grounds that the Order violates numerous provisions of Senate Bill 3 and other sections of the Ohio Revised Code. (Appx. 53-62). In an Entry dated June 28, 2006 the Commission denied the petitions for rehearing of each of the Appellants. (Appx. 12-28).

The OEG Notice of Appeal was thereafter filed to commence the within appeal. (Appx. 1-11).

## ARGUMENT

### Proposition Of Law No. 1

**The Commission's Order Requiring Utility Consumers To Pay For The Pre-Construction Costs Of An Electric Generating Facility Is In Violation Of R.C. 4928.05 Which Provides That Competitive Services Shall Not be Subject To The Supervision And Regulation Of The PUCO After The Starting Date Of Retail Electric Competition.**

The Commission's April 10, 2005 Order approved AEP's proposal to institute a surcharge on its distribution customers to pay for the Phase I costs of constructing an IGCC electric generating facility. (Appx. 51). According to AEP, the IGCC facility will "provide a firm supply of generation service" to its customers. (Supp. 1). AEP is required to supply a "firm supply of generation service" to customers in its distribution service territory that are not buying electric generation service at market.<sup>6</sup> The price of "a firm supply of generation service" is required to be "market-based" and is deemed a "competitive service" per R.C. 4928.14(A), which states:

"After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer<sup>7</sup> of all competitive retail electric services necessary to maintain essential electric service to consumers... including a firm supply of electric generation service." (Emphasis added)

In addition to "a firm supply of electric generation service", which again was classified as "competitive" in R.C. 4928.14(A), R.C. 4928.03 includes all other categories of generation service as "competitive." R.C. 4928.03 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..."

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<sup>6</sup> R.C. 4928.14

<sup>7</sup> OAC 4901:1-35-03 defines a "standard service offer" as a "market-based variable-rate firm generation service..."

These Sections of Senate Bill 3 establish that there is no category of generation-related service that is not “competitive” on or after the starting date of retail competition.

According to R.C. 4928.05 services that are “competitive” are not subject to the regulation of the Commission on or after the starting date of retail competition. R.C. 4928.05(A)(1) states:

“On or after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric service company shall not be subject to supervision and regulation... by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code... except... to the extent related to service reliability and public safety...”

The electric generation service that will be provided by the proposed IGCC power plant is “competitive” per R.C. 4928.14 or R.C. 4928.03. The Commission is barred from regulating “competitive” services under R.C. 4928.05. The Commission’s Order violates these Sections of Senate Bill 3 because the Commission has no authority to institute a surcharge on AEP’s distribution customers to pay for the costs of a generating facility that will provide a competitive service. Competitive services are not “subject to supervision and regulation” by the Commission (R.C. 4928.05).

Despite the Commission’s Order requiring that AEP’s customers pay a cost-based rate for a “competitive” service, the Commission, and AEP, do not disagree with the conclusion that electric generation is a “competitive service.” According to the Commission, electric generation rates are not regulated by the Commission, but are subject to market pricing. On page 18 of its January 26, 2005 Order in Case No. 04-169-EL-UNC, (Supp. 19) AEP’s Rate Stabilization Plan case, the Commission stated that, “with the expiration of the [market development period], generation rates are subject to the market...”

In this proceeding, the AEP companies also concede that Senate Bill 3 deregulated electric generation service. AEP stated in its Initial Brief at pages 22 and 23 that “[u]nless Ohio’s current electric regulatory structure is substantially modified from its current structure, [AEP’s] existing generating capacity will be devoted to the market...” (Supp. 23-24). AEP acknowledges that under current Ohio law electric generation is a deregulated, market-based service.

The Supreme Court of Ohio has also expressly recognized that electric generation service is competitive. In *Constellation NewEnergy v. Pub. Util. Comm.* (2004), 104 Ohio St.3d 530, 531, 820 N.E.2d 885, this Court stated that Senate Bill 3 “restructured Ohio’s electric-utility industry to achieve retail competition with respect to the generation component of electric service.”

Although the Commission (as well as AEP and this Court) agree that electric generation is deregulated and subject to market pricing after the expiration of the market development period, the Commission’s Order nonetheless requires AEP’s customers to pay cost-based rates including a guaranteed rate of return on the proposed IGCC power plant. The Order carves out a wonderful deal for AEP’ shareholders, which avoids the negative aspects of Senate Bill 3 from AEP’s perspective while retaining all of the benefits. The Commission allows AEP to charge market prices for the electric power produced by every electric generating unit in its generating fleet save one. The generation produced at older coal units, which are relatively inexpensive to operate and have largely been paid for by ratepayers over the decades before Senate Bill 3, will be sold on the open market at market prices which are currently, and for the foreseeable future, well above the cost-based prices that ratepayers paid before Senate Bill 3. The only AEP generating unit that will supply power at cost-based rates will be the proposed IGCC power

plant, (Supp. 32) which generates electricity through an expensive and experimental new technology, which very likely will be more expensive than the market. (Supp. 33). This cost-recovery scheme is not only in violation of R.C. 4928.05, but it is also a breach of Senate Bill 3's covenant with electric consumers and utilities. The implicit, and explicit, understanding of Senate Bill 3 is that all electric generation service, whether it is produced by an inexpensive or expensive generating unit is subject to market pricing.

Senate Bill 3 states that on the beginning date of retail electric competition, utilities "shall be fully on [their] own in the competitive market." (R.C. 4928.38). Ohio electric generating utilities are now treated like any other competitive business. They are able to, and required to, charge market prices for electric generation service. They may build generating plants if they like, but these "merchant" plants must make or lose money on their own in the market place based on market prices. The pre-Senate Bill 3 paradigm no longer exists. Utilities are not given any guarantees that they will recover and earn a return on their power plant investments through cost-based rates.

AEP is one of the largest electric utilities in the United States. If an IGCC power plant selling power at market rates is a good investment for its shareholders in today's deregulated environment, then AEP will design, build and operate the plant based upon its business judgment. The large power users who comprise OEG welcome the construction of new power plants, whether by AEP or some other investor. But whoever builds new generation in Ohio must sell electricity at market rates and undertake all of the investment risk in exchange for all of the investment reward. Absent a major legislative change, this is the outcome mandated by Senate Bill 3.

## **Proposition Of Law No. 2**

### **The Commission's Order Requiring Utility Consumers To Pay For The Pre-Construction Costs Of An Electric Generating Facility Is In Violation Of R.C. 4903.09, Which Requires That The Commission's Decision Must Be Supported By Evidence On The Record.**

The Commission attempts to mask the illegality of authorizing a surcharge to pay for the Phase I pre-construction costs of an IGCC electric generating facility by explaining that the 629 MW power plant will not be constructed to provide retail electric generation service, which is competitive and outside the jurisdiction of the Commission, but rather the facility will be constructed to provide "distribution ancillary services." The Commission states on pages 17-18 of its April 10, 2006 Order:

"While Section 4928.03, Revised Code, states that retail electric generation service is competitive and, therefore, not subject to Commission regulation, this Application is not about regulating retail electric generation service, but about providing the distribution ancillary services. These services are subject to Commission regulation, as being necessary to support the distribution function. It is the Commission's obligation to assure reliable distribution service under Section 4928.02(A), Revised Code, and noncompetitive retail electric service are subject to the regulation of this Commission under Section 4928.05(A)(2), Revised Code. Noncompetitive retail electric services are defined as components of retail electric service which neither have been declared competitive by this Commission nor declared competitive by statute. The legislature declared retail electric generation, aggregation, power marketing, and power brokerage services to be competitive. Ancillary service is not listed as competitive under Section 4928.03, Revised Code. In fact, although it is included within the list of components which could be declared competitive by this Commission, it has not been declared competitive. Section 4928.05(A), Revised Code. Since ancillary service meets neither test for being competitive, it is a noncompetitive retail electric service subject to the continuing regulation of the Commission. Section 4928.01(B) Revised Code.

It is clear to this Commission that most of these ancillary services require generating plant. Thus, we find that SB 3 contemplates that the [electric distribution utility] would provide ancillary service from generating plant at least until such time as the Commission found that the market conditions had developed sufficiently to allow a declaration of competitiveness." (Appx. 45-46).

The Commission apparently calculates that since “distribution ancillary services” have not been deemed “competitive” by Senate Bill 3, it is able to regulate the proposed IGCC electric generating facility if it simply classifies the service provided by the IGCC as “distribution ancillary services,” rather than what it really is, “electric generation service.” The only supporting text for this rationale provided in the April 10, 2006 Order is the Commission’s statement that “it is clear that most... ancillary services require generating plant.” (Appx. 46). This cryptic statement is not supported by any evidence in the record that the proposed IGCC power plant will not provide generation service (again, a competitive service), but rather it will provide non-competitive, “distribution ancillary services.”

The Commission’s conclusion that AEP’s Application is primarily “about providing distribution ancillary services,” is in violation of R.C. 4903.09, which states that “the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact.” The Commission must make its decision based on evidence in the record, and there is no evidence in the record to support the conclusion that a generating facility is primarily engaged in providing “distribution ancillary services.”

No party offered any testimony into evidence that the proposed IGCC generating facility will provide “distribution ancillary services.” The first time the term “distribution ancillary services” was ever mentioned in this proceeding was in the Post Hearing Brief submitted by the Commission’s Staff. (Supp. 26-30). AEP, the party actually proposing that it receive a surcharge to recover the costs of the IGCC electric generating facility makes no assertion anywhere in its lengthy Application that the IGCC plant is to be constructed to provide “distribution ancillary services”. Nor did AEP make any assertion in its prefiled testimony

maintaining that the IGCC plant is to be constructed to supply “distribution ancillary services.” Throughout its Application and testimony, AEP maintains that the plant is justified as a “provider of last resort” facility. (Supp. 2, 16.) Nor did the Staff put in any testimony or evidence that the IGCC was to supply “distribution ancillary services.” In fact, the proposition that a 629 MW IGCC power plant is to be constructed to supply “distribution ancillary services” is absurd and had any party introduced testimony to that effect or had AEP maintained so in its Application, OEG (and others we suspect) would have introduced evidence at the hearing showing that it is preposterous.

One hundred percent of a 629 MW power plant, whether an IGCC or some other type of generating facility, clearly does not meet the definition of “distribution ancillary services”.

Ancillary services (transmission and distribution) are defined in R.C. 4928.01(A)(1) as:

“any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.”

“Distribution ancillary services” are those that support or are ancillary to the distribution (i.e., transportation) of electricity. The Commission’s holding that a 629 MW power plant is constructed merely to support the transportation of electricity is like saying that a Major League Baseball stadium is constructed for no other purpose than to sell hotdogs.

Despite the Commission’s determination on page 17 of its April 10, 2006 Order that “this Application is not about regulating retail electric generation service, but about providing the

distribution ancillary services,” (Appx. 45) elsewhere in the Order the Commission refers to AEP’s Application as a request for the construction of a generation facility, with no mention of the power plant’s ostensible purpose of providing “distribution ancillary services.”

On page 3 of the Order the Commission states that AEP’s Application is a request for “approval of [AEP’s] proposed cost recovery mechanism to provide for the design, construction and operation of a 629 [net] megawatt (MW) electric generation facility in Meigs County, Ohio.” (Appx. 31). The Commission notes that AEP has concluded, “that the facility is necessary to allow the Companies to provide a firm supply of generation service to the Companies’ Ohio customers. The Companies contend that they must be ready and able to provide firm, generation service to customers who have not selected a competitive retail electric service (CRES) provider and any customer who returns to the AEP Companies’ service as a result of the CRES provider’s default or at the customer’s election.” (Appx. 31). (Emphasis added)

The Commission describes AEP’s request as a proposal to construct a generating facility in order to provide generation service in one section of its Order, and then denies that the Application has anything to do with generation in the next. AEP’s Application is not a request for the construction of a \$1.12 Billion power plant to provide “distribution ancillary services.” It is a request to build a 629 MW electric generation facility, which is a competitive service per Senate Bill 3. No amount of verbal gymnastics by the Commission can change the fact that a major base load electric generating facility is principally a plant to provide base load generation.

There is not a scintilla of evidence, on the record from which the Commission could find that the preconstruction costs of the IGCC or the IGCC itself is to primarily provide “distribution ancillary services” and there are numerous indications that neither the PUCO nor AEP ever believed so until an excuse for approving AEP’s Application was needed.

### **Proposition Of Law No. 3**

**The Commission's Order Requiring Utility Consumers To Pay For The Pre-Construction Costs Of An Electric Generating Facility Prior To The Start Of Construction Is In Violation Of R.C. 4909.15(A)(1), Which Provides That A Utility Cannot Recover The Costs Of A Public Utility Property In Rates Until The Project Is At Least Seventy-Five Percent Complete.**

As shown previously, AEP's Phase I costs are not recoverable under any provision of Senate Bill 3, which prohibits the recovery of any costs of generation assets through a surcharge to distribution customers. But the recovery of the Phase I pre-construction costs of the proposed IGCC generating facility is also not allowable under the regulatory scheme that was in place prior to Senate Bill 3 for generation assets, and continues to be the law for public utility distribution assets. Whether the costs of the IGCC electric generating facility are deemed to be generation-related, or related to "distribution ancillary services" as the Commission contends, (Appx. 45) such costs cannot be recovered under Ohio law, whether pre- or post-Senate Bill 3, until the IGCC facility is at least seventy-five percent complete.

Prior to the enactment of Senate Bill 3, Ohio law provided that a utility could not recover the costs of a public utility generation property until the property was "used and useful" in rendering the public utility service for which it was constructed,<sup>8</sup> however it was in the Commission's discretion to allow recovery of the costs of a generation property when the construction project was "at least seventy-five percent complete."<sup>9</sup> Under no circumstances was a utility able to recover the pre-construction costs of a public utility property prior to the start of construction of that property as the Commission's Order allows in this proceeding. Although this is no longer the rule for public utility generation property, because (as explained above) the recovery of the costs of a generation property through a Commission-authorized surcharge to

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<sup>8</sup> R.C. 4909.15(A)(1)

<sup>9</sup> R.C. 4909.15(A)(1)

ratepayers is completely barred by Senate Bill 3, this continues to be the rule for public utility distribution property which remains regulated. R.C. 4909.15 states:

“A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (J) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital, as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.”

The Commission’s Order attempts to circumvent the general Senate Bill 3 restriction on the recovery of generation costs after the expiration of the market development period by characterizing the IGCC electric generating facility not as a public utility generation property but as a distribution property that is necessary to provide “distribution ancillary services.” (Appx. 43-46). Assuming for a moment that the Commission is correct that a 629 MW, \$1.12 Billion IGCC electric generation facility is not an electric generation facility, but rather a distribution facility, the Commission’s Order approving a surcharge for the recovery of the costs of this facility prior to the start of construction of that facility is nevertheless barred by Ohio law pursuant to R.C. 4909.15(A)(1).

If the proposed IGCC facility is deemed a distribution property, the Commission’s Order violates both pre- and post-Senate Bill 3 law, per R.C. 4909.15 because the Commission’s Order allows AEP to recover the Phase I pre-construction of the IGCC facility before the facility is seventy-five percent complete.

If, contrary to the Commission's Order, the proposed IGCC facility is deemed to be a generation asset, the Commission's Order violates post-Senate Bill 3 law, because generation assets are not regulated and cannot be recovered at all through a mandatory surcharge to distribution customers.

Simply calling a generation facility a distribution facility does not save the Commission's Order from violating Ohio law because the recovery of the costs of any public utility property (whether distribution or generation-related) prior to its construction being at least seventy-five percent complete is barred by R.C. 4909.15(A)(1).

#### **Proposition Of Law No. 4**

**The Commission's Order Requiring Utility Consumers To Pay For The Pre-Construction Costs Of An Electric Generating Facility On The Grounds That The Electric Generating Facility Is "About Distribution Ancillary Services" Is In Violation Of R.C. 4928.15(B), Which Requires A Utility To File A Distribution Rate Case Prior To Allowing Its Recovery In Rates.**

As explained above, the Commission's April 10, 2006 Order on page 17 states that AEP's Application "is not about regulating retail electric generation service, but about providing the distribution ancillary services." (Appx. 45). The Phase I surcharge was approved on that basis. Again, assuming that the Commission is correct that a 629 MW electric generation facility will not provide electric generation service, but rather "distribution ancillary services," the Commission's Order nonetheless violates R.C. 4928.15(B). R.C. 4928.15(B) does not allow an electric utility to charge for "distribution ancillary services" unless it first files a distribution rate case establishing the rate for such service. R.C. 4928.15(B) states:

"[N]o electric utility shall supply the transmission service or ancillary service component of noncompetitive retail electric service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service component that is consistent with the state policy specified in section

4928.02 of the Revised Code and filed with the commission under section 4909.18.” (emphasis added)

R.C. 4928.15(B) requires a utility to make a filing pursuant to R.C. 4909.18 prior to supplying ancillary services. R.C. 4909.18 states in part:

“Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission... If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.”

A filing made pursuant to R.C. 4909.18 is commonly known as a distribution rate case. AEP has not filed a rate case under R.C. 4909.18 for the recovery of the costs of providing distribution ancillary services and the Commission’s Order approves AEP’s recovery of the Phase I costs, which according to the Commission is necessary to provide “distribution ancillary services,” without the filing of a distribution rate case. The Commission’s Order is in violation of R.C. 4928.15(B).

**Proposition Of Law No. 5**

**The Commission's Order Requiring Utility Consumers To Pay For The Pre-Construction Costs Of An Electric Generating Facility Is In Violation Of R.C. 4928.14 Which Requires That Electric Distribution Utilities Shall Provide Their Customers A Market-Based Standard Service Offer After The Expiration Of The Market Development Period.**

R.C. 4928.14(A) requires that after the market development period an electric distribution utility shall provide a "market-based standard service offer of all competitive retail electric services." R.C. 4928.14(A) states:

"After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer<sup>10</sup> of all competitive retail electric services necessary to maintain essential electric service to consumers..." (Emphasis added)

The Commission's Order approving a surcharge to recover the Phase I preconstruction costs of the proposed IGCC which will be added to standard service offer rates violates R.C. 4928.14(A). The Commission approved AEP's request for recovery of:

"certain IGCC costs in 2006 as a temporary generation rate surcharge on the standard service rates... Those costs, which are projected to total approximately \$18 million, are the actual costs incurred through February 28, 2005 (Actual Costs) as well as the costs projected to be incurred from March 2005 until the Companies enter into the EPC contract which is currently estimated to occur in June 2006 (Projected Costs). To begin recovering these Actual and Projected Costs, the Companies propose that they be authorized to assess a generation rate surcharge on the standard service rate schedules authorized in the RSP order, effective with the first billing cycle in January, 2006." (Supp. 5-6). (Emphasis added).

The Commission's Order allows AEP to charge customers a market-based standard service offer plus a generation rate surcharge to recover IGCC costs.

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<sup>10</sup> OAC 4901:1-35-03 defines a "standard service offer" as a "market-based variable-rate firm generation service..."

The Commission attempts to justify this holding by claiming that the IGCC surcharge is separate from the market based standard service offer and therefore does not violate R.C. 4928.14. The Commission states:

“We believe that the arguments that the AEP Companies' proposal violates Section 4928.14, Revised Code, are not on point because they mischaracterize the Companies' application. The application is not proposing that the Commission use cost-of-service ratemaking to establish pricing for the [standard service offer] that Section 4928.14, Revised Code, requires at the end of the [market development period]; the Companies' Application has no impact on the determination of AEP's market-based [standard service offer]. The Commission will establish AEP's [standard service offer] in accordance with the market-based standard of Section 4928.14, Revised Code, independent from the cost recovery mechanism that the Companies have proposed for the IGCC plant. The proposed IGCC Recovery Factor and the IGCC Adjustment Factor are for the stated purpose of recovery of the costs of the IGCC plant. The issue is where the Commission's jurisdiction to grant cost recovery for the plant lies.” (Appx. 45).

In one breathe the Commission's states that the intervenors mischaracterize AEP's Application as a request for an illegal market-based standard service offer that consists of a market-based rate plus an IGCC adder, and in the next breath the Commission describes AEP's request as not in violation of R.C. 4928.14(A) because it requires a market-based standard service offer, plus an IGCC adder. The Commission denies and then admits the charge virtually in the same breathe.

As an electric distribution utility, AEP is required to provide a market-based standard service offer that is entirely market-based without added components to reflect the above-market costs of the Phase I pre-construction costs of the IGCC. AEP cannot require its customers to pay a surcharge in addition to the market-based standard service offer in order to recover the above-market costs of the utility's generating unit, per R.C. 4928.14. Whether the Commission categorizes that charge as separate from the market-based standard service offer or a part of the market-based standard service offer does not change the reality that AEP's proposal requires its

customers to pay a market-based standard service offer, plus the above market cost of the IGCC. Unbundling the market-based standard service offer from the IGCC charge into separate components does not transform an illegal charge into a legal charge.

R.C. 4928.14 does not allow for a utility to charge its standard service offer customers for the above market (or below market) cost of a new electric generating facility. AEP must provide "a market-based" standard service offer, not a standard service offer consisting of a market-based rate plus a separate surcharge that recovers the pre-construction costs of AEP's proposed IGCC.

## CONCLUSION

The Commission's Order approving a surcharge to recover the Phase I pre-construction costs of a 629 MW IGCC power plant to be added to AEP's distribution customers' standard service offer rates violates the sections of Senate Bill 3 that bar the Commission from regulating electric generation services after the beginning date of electric competition. The Commission's characterization of these costs which are associated with the construction of a power plant as needed to support "distribution ancillary services" rather than providing generation services is a transparent attempt to validate an illegal surcharge and is not supported by any evidence in the record. Even if this Court were to accept the fallacy that the proposed power plant will be constructed to support "distribution ancillary services" rather than electric generation services, the Commission's Order approving the recovery of pre-construction costs prior to the start of construction is nonetheless illegal because Ohio law prohibits the recovery of any public utility property through rates, prior to the property being at least seventy-five percent complete. Moreover, even assuming arguendo that these are distribution-related costs, the only legitimate forum to receive a rate increase to recover these costs is a distribution rate case. Finally, the Commission's Order violates the statutory requirement that a distribution utility provide a "market-based standard service offer" to customers that are not buying electric generation services at market. The surcharge approved by the Commission will be added to its standard service offer resulting in a standard service offer that is cost-based, not market-based.

Senate Bill 3 states that on the beginning date of retail electric competition, utilities "shall be fully on [their] own in the competitive market." (R.C. 4928.38). This means that if AEP desires to build a new power plant it must engineer and design it with its own money and when construction is finished and the plant is producing electricity earn a return on that investment

through the sale of electric generation in the competitive market, like any other market participant. This is true whether the new power plant is an IGCC, a conventional coal plant, a natural gas plant, or a nuclear generating facility. Senate Bill 3 deregulated all electric power generation. Senate Bill 3 did not carve out special treatment for IGCC power plants.

Appellant, OEG urges the Court to reverse the Commission's April 10, 2006 and June 28, 2006 orders approving a surcharge on AEP's distribution customers to recover the Phase I costs of constructing an IGCC electric generating facility.

Respectfully submitted,

  
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# APPENDIX

54

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Via Overnight Mail

August 24, 2006

Clerk of Courts  
Supreme Court of Ohio  
65 South Front Street, 8<sup>th</sup> Floor  
Columbus, Ohio 43215-3431

Re: Notice of Appeal from Case No 05-376-EL-UNC of The Ohio Energy Group

Dear Sir or Madam:

Please find enclosed the original and one (1) copy of the Notice of Appeal of the Ohio Energy Group in the above referenced matter. Please place this document of file.

Very truly yours,



David F. Boehm, Esq.  
Michael L. Kurtz, Esq.  
Kurt J. Boehm, Esq.  
**BOEHM, KURTZ & LOWRY**

DFBkew  
Enclosures  
cc: Certificate of Service

000001

IN THE SUPREME COURT OF OHIO

Ohio Energy Group : Case No. 06-1594  
: :  
Appellant. : :  
v. : **APPEAL FROM THE PUBLIC**  
: **UTILITIES COMMISSION OF OHIO**  
The Public Utilities Commission of Ohio : :  
: **Public Utilities Commission of Ohio**  
Appellee. : **Case No. Case No. 05-376-EL-UNC**  
: :

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NOTICE OF APPEAL OF  
APPELLANT OHIO ENERGY GROUP

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000002

**NOTICE OF APPEAL OF APPELLANT OHIO ENERGY GROUP**

Appellant, the Ohio Energy Group ("OEG"), a party of record in the above-styled proceedings, hereby gives notice of its appeal, pursuant to R.C. 4903.11 and 4903.13 and Supreme Court Rule of Practice 2, Section 3(B), to the Supreme Court of Ohio and Appellee, from an Opinion and Order entered April 10, 2006 (Exhibit A) and an Entry of Rehearing entered June 28, 2006 (Exhibit B) of Appellee, Public Utility Commission of Ohio ("PUCO" or "Commission") in PUCO Case No. 05-376-EL-UNC.

Appellant was and is a party of record in PUCO Case No. 05-376-EL-UNC, and timely filed its Application for Rehearing of the Appellee's April 10, 2006 Opinion and Order in accordance with R.C. 4903.10. Appellant's Application for Rehearing was denied, with respect to the issues on appeal herein, by Entry of June 28, 2006.

The Appellant complains and alleges that the Appellee's April 10, 2006 Opinion and Order, and the Commission's June 28, 2006 Entry on Rehearing in PUCO Case No. 05-376-EL-UNC are unlawful, unjust and unreasonable in the following respects, as set forth in Appellant's Application for Rehearing.

- A. Appellee's decision is unreasonable and unlawful in that it concludes that American Electric Power's ("AEP") proposed integrated gasification combined cycle ("IGCC") power plant will not provide competitive retail electric services, within the meaning of R.C. 4928.03, but will exclusively provide "distribution ancillary services." There is no evidence in the record to support Appellee's conclusion that AEP's Application is primarily "about providing distribution ancillary services." Appellee's sua sponte conclusion is incorrect in fact and is in violation of R.C. 4903.09 which states that "the commission shall file, with the records of such cases, findings of fact and

written opinions setting forth the reasons prompting the decision arrived at, based upon said findings of fact.”

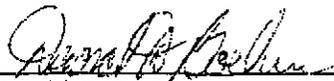
- B. The proposed IGCC power plant will be constructed to provide retail electric generation service. Retail electric generation service is “competitive” pursuant to R.C. 4928.03. Competitive retail electric service is not subject to Commission regulation pursuant to R.C. 4928.05. Appellee erred in ordering ratepayers to pay for the design or construction of a facility that will provide competitive retail electric service.
- C. Appellee’s decision is unreasonable and unlawful in that it violates R.C. 4928.14. R.C. 4928.14 requires that electric distribution utilities shall provide their customers a market-based standard service offer after the expiration of the market development period. The Commission’s decision provides for a standard service offer that is not market-based in violation of R.C. 4928.14. When the above market costs of the experimental IGCC power plant are added to the market based standard offer, customer are forced to pay above market costs.
- D. Assuming arguendo that some or all of the IGCC facility will provide distribution ancillary services and is not a competitive retail electric service within the meaning of R.C. 4928.03, Appellee’s decision is unreasonable and unlawful because R.C. 4928.15(B) requires a utility to file a distribution rate case under R.C. 4909.18 in order to recover the costs of the ancillary service component of noncompetitive retail electric service. AEP has not filed a distribution rate case to recover these costs.
- E. Appellee’s decision violates R.C. 4909.15. Appellee’s decision authorizes the recovery of Phase I costs of constructing the proposed IGCC power plant prior to the start of construction of the facility. R.C. 4909.15 bars the recovery of the costs of a facility unless the facility is “used and useful in rendering the public utility service for which rates are to be fixed and determined.” The soonest Appellee can grant a utility rate recovery for the construction costs of a public utility facility is when the facility is “at least seventy-five percent complete” at which time Appellee has discretion to allow recovery of a reasonable allowance for construction work in progress.
- F. Appellee’s decision is unreasonable and unlawful because it allows AEP to recover the above-market portion of IGCC generation service from customers that will be receiving electric generation service from third-party Certified Retail Electric Service (“CRES”) providers, which are transition costs, after the expiration of the Market Development Period (“MDP”) on January 1, 2006. R.C. 4928.38 specifically prohibits the recovery of transition costs by a utility and requires utilities to be “fully on its own in the competitive market,” after the expiration of the MDP.
- G. Appellee’s decision is unreasonable and unlawful because it requires AEP’s distribution customers to pay an unreasonably high price for AEP’s provider of last resort service (“POLR”). If AEP’s distribution customers are required

to compensate AEP for POLR service then such compensation must be reasonable. AEP's POLR obligation only requires it to obtain generation service for its distribution customers consistent with R.C. 4928.14, it does not require AEP to construct a new 600 MW IGCC facility to ostensibly serve AEP's POLR function. If the IGCC power plant is used for POLR service, then AEP can only be paid the market price for power. The Commission's Order forces consumers to pay an above-market price for the IGCC power.

- H. Appellee's decision is unreasonable and unlawful because it violates Appellee's Order in Case 04-169-EL-UNC. In that case Appellee held that subject to limited exceptions (that do not apply here), AEP distribution rates and charges that were in effect on December 31, 2005 will remain in effect through 2008. Appellee's decision raises distribution rates in violation of this distribution rate freeze.
- I. Appellee's decision is unreasonable and unlawful because it violates R.C. 4928.17. R.C. 4928.17 prohibits a utility from providing, "a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service" unless the utility implements and operates under a corporate separation plan that is approved by the Appellee. Such a corporate separation plan has not been implemented by AEP.
- J. Appellee's decision is unreasonable and unlawful because it requires AEP's distribution customers to pay for the construction of an IGCC facility that the record shows is significantly more expensive and more unreliable than other generation technology options.

WHEREFORE, Appellant respectfully submits that the Appellee's April 10, 2006 Opinion and Order, and the Appellee's June 28, 2006 Entry on Rehearing in PUCO Case No. 05-376-EL-UNC are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to the Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that true copy of the foregoing was served via ordinary U.S. mail, postage prepaid to all parties to the proceeding before the Public Utilities Commission of Ohio, listed below, and pursuant to Section 4903.13 of the Ohio Revised Code this 24<sup>th</sup> day of August, 2006.

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Judy A. Jones, Commissioner  
Valeria A. Lemmie, Commissioner  
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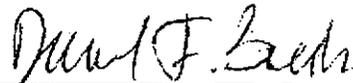
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**On behalf of the Public Utilities Commission  
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**CERTIFICATE OF FILING**

I hereby certify that a copy of the Notice Of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with Rules 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code via overnight mail this 24 day of August, 2006.



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**C00011**

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )  
Columbus Southern Power Company and )  
Ohio Power Company for Authority to )  
Recover Costs Associated with the Ultimate ) Case No. 05-376-EL-UNC  
Construction and Operation of an Integrated )  
Gasification Combined Cycle Electric )  
Generation Facility. )

ENTRY ON REHEARING

The Commission finds:

- (1) On March 18, 2005, Columbus Southern Power Company (CSP) and Ohio Power Company (OP or Ohio Power) (jointly AEP-Ohio or Companies) filed an application for authority to recover costs associated with the construction and ultimate operation of an integrated gasification combined cycle (IGCC) electric generating facility to be built in Meigs County.
- (2) On April 10, 2006, the Commission issued an opinion and order (Order) in this case in which it found that it has the authority to establish a mechanism for recovering the costs related to the construction and operation of an IGCC generating plant, where that plant is needed to fulfill AEP-Ohio's provider of last resort (POLR) obligation. That Order further approved the Phase 1 cost recovery mechanism of AEP's application.
- (3) On May 8, 2006, Industrial Energy Users-Ohio (IEU) filed an application for rehearing. On May 10, 2006, applications for rehearing were filed by FirstEnergy Solutions Corp. (Solutions), Direct Energy Services (Direct), The Ohio Energy Group (OEG) and the Ohio Consumers' Counsel (OCC).
- (4) On May 9, 2006, AEP-Ohio filed a motion for an extension of time to file a memorandum contra the applications for rehearing. The purpose of the request, according to AEP-Ohio, was to facilitate the filing of a single response to all the applications for rehearing. AEP-Ohio specifically requested an extension of time of two days that would result in the filing of

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the consolidated memorandum contra no later than May 22, 2006.

- (5) On May 10, 2006, AEP-Ohio filed a request for clarification of the opinion and order in this case. IEU, Solutions, OCC, Ohio Partners for Affordable Energy (OPAE), Direct and OEG filed responses or memorandum contra the request for clarification.
- (6) By entry issued May 10, 2006, AEP-Ohio's motion for an extension to file its memorandum contra the applications for rehearing was granted.
- (7) On May 22, 2006, AEP-Ohio filed a memorandum contra the motions for rehearing. On that same day, IEU filed a motion to strike the memorandum contra filed by AEP-Ohio.
- (8) On June 6, 2006, the Commission found that the AEP-Ohio request for clarification should be treated and considered as an application for rehearing. In that Entry, the Commission granted IEU's, Solutions', Direct's, OEG's, OCC's and AEP-Ohio's applications for rehearing. The Commission stated that sufficient reason had been set forth by the parties to warrant further consideration of the matters specified in the applications for rehearing.

#### Motion to strike

- (9) In its motion to strike, IEU acknowledged that AEP-Ohio was granted a two-day extension of time to file a response to the rehearing applications. However, IEU argues that, with the extension, the memorandum contra was due no later than Friday, May 19, 2006, as Rule 4901-1-35, Ohio Administrative Code (O.A.C.), requires that the memorandum contra be filed "within ten days after the filing of an application for rehearing." IEU states that Rule 4901-1-07, O.A.C.,<sup>1</sup> does not apply to applications for rehearing and memorandum contra applications for rehearing. By entry issued May 10, 2006, IEU argues that AEP-Ohio was granted only "an extension of no

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<sup>1</sup> Rule 4901-1-07(A), O.A.C., states: Unless otherwise provided by law or by the Commission:

(A) In computing any period of time prescribed or allowed by the commission, the date of the event from which the period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it falls on a Saturday, Sunday, or legal holiday, in which case the period of time shall run until the end of the next day with is not a Saturday, Sunday, or legal holiday.

more than two days" to file its memorandum contra. Therefore, IEU contends the memorandum was filed out of time and should be stricken.

- (10) AEP-Ohio states that its motion was clearly for an extension of time to allow the Companies to file a single memorandum contra by no later than May 22, 2006. AEP-Ohio argues that Rule 4901-1-35, O.A.C., does not make reference to memoranda contra an application for rehearing and, therefore, does not apply to such memoranda. According to AEP-Ohio's rationale the two day extension would have made the memorandum contra due on Saturday, May 20, 2006. Therefore, AEP-Ohio reasons that Rule 4901-1-07, O.A.C., is applicable, and the memorandum is due on the next business day, Monday, May 22, 2006.
- (11) The Commission agrees that the request for an extension of time to file its memorandum was clearly for an extension until Monday, May 22, 2006. We note that the introductory phrase in Rule 4901-1-07, O.A.C., provides that the application of time, as set forth in each paragraph of the rule, is applicable "unless otherwise provided by law or the commission..." Therefore, the entry granting AEP-Ohio's request for a 2 day extension caused the memorandum to be due the next business day, Monday, May 22, 2006. AEP-Ohio's memorandum contra was timely filed and IEU's motion to strike should be denied.

Proprietary Information in the Record

- (12) OCC argues that the attorney examiners and the Commission incorrectly allowed AEP-Ohio and GE/Bechtel to redact certain information from documents ultimately introduced into evidence. In OCC's application for rehearing, OCC acknowledges that GE/Bechtel redacted certain information from documents introduced into evidence but contends that the Commission failed to reduce the amount of information redacted. OCC continues to argue that the pleadings of GE/Bechtel and AEP-Ohio failed to include the requisite specificity. Therefore, OCC argues that the Commission incorrectly shielded large amounts of information from public scrutiny and requests that the Commission correct or modify its decision on rehearing.

- (13) AEP-Ohio responds that nearly one quarter of the Order addressed the treatment of the proprietary information filed in this case. AEP-Ohio acknowledges that Ohio's policy favors public access to information filed with state agencies. However, the Companies argue that OCC's position, that all information should be made available to the public, will have a chilling effect on technology companies that may wish to participate in Ohio markets. AEP-Ohio posits that it is necessary that the Commission carefully balance the competing interest between public access to information and a vendor's right to maintain the confidentiality of commercially valuable trade secret information. The Companies request that the Commission deny rehearing of this issue.
- (14) The Commission notes that OCC is merely reiterating the same arguments raised in its briefs. After consideration of the issues raised, applicable law and the process implemented under the circumstances, we continue to conclude that the redacted information meets the exemption requirements of Section 149.43, Revised Code. Thus, OCC's request for rehearing of this issue is denied.

Request for Administrative Notice

- (15) IEU requests that the Commission take administrative notice of certain pages filed in AEP-Ohio's long-term forecast report (LTFR) docketed at Case No. 05-501-EL-FOR, *In the Matter of the Long-Term Forecast Report of Ohio Power Company and Related Matters* and Case No. 05-502-EL-FOR, *In the Matter of the Long-Term Forecast Report of Columbus Southern Power Company and Related Matters* (jointly AEP-Ohio 2005 LTFR) filed on April 15, 2005. More specifically, IEU asks that the Commission take administrative notice of two pages of specific questions from the Special Topics section, including AEP-Ohio's responses thereto.<sup>2</sup> IEU argues that AEP-Ohio's responses confirm IEU's representations that AEP-Ohio is subject to its regional transmission organization's (RTO) ancillary services. IEU states that, during the course of the proceeding, IEU encouraged the Commission to examine the role of the RTO and the RTO's requirements for reliability and how such ancillary service obligations are met. Further, IEU concludes that the

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<sup>2</sup> AEP-Ohio 2005 LTFR, Special Topics, pp. 8-9.

Companies' responses contradict the Commission's finding that the proposed IGCC facility will provide ancillary distribution services.

- (16) As IEU admits, AEP-Ohio's responses to issues raised in its 2005 LTR cases were public and available to the parties at the time of the hearing.<sup>3</sup> IEU had an opportunity to attempt to introduce into the record AEP-Ohio's responses in the 2005 LTR before the closing of the record. Therefore, the Commission finds that it is improper to take administrative notice of the Companies' responses in the AEP-Ohio 2005 LTR, at this point in the proceeding. Accordingly, IEU's request for administrative notice is denied.

#### Due Process

- (17) IEU claims that the Commission Staff's position in regard to distribution functions and the POLR responsibility was first offered in its reply brief and the Commission based its decision on the position argued by Staff. Accordingly, IEU claims it had no meaningful opportunity to cross-examine Staff or to rebut Staff's position and was deprived of any opportunity to determine what data, information or facts the Staff reviewed or considered in support of its recommendation. IEU argues that the Staff must offer its recommendations to the Commission in the public evidentiary record by report or testimony pursuant to Section 4901.16, Revised Code. Accordingly, IEU argues that it was denied fundamental due process.
- (18) AEP-Ohio counters that IEU cross-examined Staff witnesses as well as AEP-Ohio witnesses Baker and Walker. AEP-Ohio states that Companies' witnesses Baker and Walker specifically presented testimony that the proposed facility was necessary to support AEP-Ohio's distribution function. AEP-Ohio notes that IEU's counsel questioned Staff witnesses about the Companies' POLR obligation. Therefore, AEP-Ohio states that IEU has no due process claims to raise in this matter.
- (19) The Commission finds that IEU's claim, that it was denied fundamental due process, is without merit. Section 4901.16,

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<sup>3</sup> The evidentiary hearing commenced on August 8, 2005 and continued each business day through August 16, 2005.

Revised Code, is not applicable in this case.<sup>4</sup> Staff sponsored witnesses and cross-examined the witnesses of other parties. As any other party to this case was permitted to do, Staff filed an initial and reply brief. Staff's brief summarizes significant aspects of the record that support Staff's position. The purpose of any brief is to persuade the Commission. However, as IEU states, briefs are not evidence. While the Commission may be persuaded by a party's arguments presented on brief, the Commission bases its decision on the record evidence. Therefore, IEU's request for rehearing is denied.

#### Corporate Separation

- (20) Direct, Solutions, and OCC argue that AEP-Ohio's application violates Section 4928.17, Revised Code, which requires that an electric distribution utility (EDU) supply non-competitive retail electric services and competitive retail electric services through separate affiliates. OCC asserts that mere ownership of a generation plant by an EDU is prohibited and further that the Order conflicts with the Companies approved corporate separation plan. Solutions concedes, on brief, that an EDU may own a generation facility; however, Solutions posits that the EDU must offer its retail generation services through a separate business entity. Direct and Solutions state that Section 4928.17, Revised Code, does not include an exemption for "non-competitive generation service" or generation that will be used to serve POLR customers. Therefore, the applicants for rehearing of this issue argue that any provision of generation service must be offered through a separate affiliate, not AEP-Ohio.
- (21) The Commission believes the applicants for rehearing of this issue continue to focus on the type of facility as opposed to the purpose. The primary purpose for the proposed facility is to provide distribution ancillary services and to meet POLR obligations. The Commission agrees, as AEP-Ohio argues, that

<sup>4</sup> Section 4901.16, Revised Code, states:

Except in his report to the public utilities commission or when called on to testify in any court or proceeding of the public utilities commission, no employee or agent referred to in section 4905.13 of the Revised Code shall divulge any information acquired by him in respect to the transaction, property, or business of any public utility, while acting or claiming to act as such employee or agent. Whoever violates this section shall be disqualified from acting as agent, or acting in any other capacity under the appointment or employment of the commission.

Section 4928.17, Revised Code, does not prohibit the Companies from owning the proposed facility or providing services from the facility to meet the Companies' POLR obligations. The Commission notes that in its memorandum contra the Companies confirm that they "intend to use the power generated to fulfill their POLR obligation." The Commission is not convinced by the rehearing applicants' arguments that the purpose for the facility is irrelevant. The purpose for the proposed facility is to permit CSP and Ohio Power to meet their POLR obligation to customers within the Companies' respective service territory. Therefore, the Commission denies the applicants' requests for rehearing of the Order as to Section 4928.17, Revised Code.

Section 4903.09, Revised Code

- (22) Direct, Solutions and IEU each argue that the Order violates Section 4903.09, Revised Code. Section 4903.09, Revised Code, states:

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

Direct contends that the record does not contain any testimony or evidence that the proposed IGCC facility is necessary to support the Companies' ancillary services. Further, Direct states that the Order fails to present the Commission's rationale for its conclusion that "[t]he EDU is the POLR for consumers who either fail to choose an alternative supplier or return from another supplier." Solutions argues that the Commission failed to support its characterization of the application in the Order as "providing the distribution ancillary services ... necessary to support the distribution function" as required by Section 4903.09, Revised Code. Similarly, IEU argues that the Order fails to set forth sufficient facts and law to authorize AEP-Ohio to increase customer rates for pre-construction cost of the proposed IGCC facility.

- (23) AEP-Ohio notes that the Ohio Supreme Court has held that “where enough evidence and discussion in an order to enable the PUCO’s reasoning to be readily discerned, this Court has found substantial compliance with R.C. 4903.09...” *MCI Telecommunications Corp. v. Pub. Util. Comm’n* (1988), 38 Ohio St.3d 266, 270, 527 N.E.2d 777. Further, AEP-Ohio notes that the Court has stated that the purpose of Section 4903.09, Revised Code, is to provide the Court with sufficient details to determine, upon appeal, how the Commission reached its decision. *Migden-Ostrander v. Pub. Util. Comm’n* (2004), 102 Ohio St.3d 451, 455, 812 N.E.2d 955. AEP-Ohio contends that the Commission’s reasoning is readily discernable and the Order includes sufficient details to enable the Court to determine how the Commission reached its decision, if the case is appealed. AEP-Ohio reasons that the interveners object to the decision and how the Commission came to the decision, not that the interveners are unable to determine how the Commission reached its decision.
- (24) The Commission notes that the Order includes six pages of discussion of the Commission’s jurisdiction, including the views of the parties, and the Commission’s interpretation of the law. The Order includes three findings of fact and conclusions of law that address the Commission’s authority over distribution ancillary services, an EDU’s POLR obligation and the Commission’s authority to establish rates and charges. See findings 7-9 of the Order. Thus, we believe that our Order complies with Section 4903.09, Revised Code, as explained in *MCI Telecommunications Corp.*

Section 4928.14, Revised Code

- (25) Solutions argues, as it did on brief, that approval of the application violates Section 4928.14, Revised Code. Solutions opines that Section 4928.14, Revised Code, requires that POLR services be based on market prices. Solutions argues that the Order approving AEP-Ohio’s application does not provide for the POLR service to be based on market prices. The proposed IGCC facility is, by definition, according to Solutions, a generation facility. Solutions reasons that such fact is not distinguishable based on the purpose for the facility – POLR generation service. Solutions and Direct posit that the IGCC

Recovery Factor and the IGCC Adjustment Factor, as proposed by the Companies and approved by the Commission, will not constitute a market-based price.

- (26) OEG, likewise, postulates that the proposed IGCC facility, does not meet the definition of distribution ancillary services as set forth in Section 4928.01(A)(1), Revised Code.<sup>5</sup> OEG reasons that, although a small portion of the 629 MW generation facility may be used to provide distribution ancillary services, the vast majority of the facility will be engaged in the generation of electric power which is a competitive service, as defined in Section 4928.03, Revised Code.

Similarly, Solutions postulates that the Commission's conclusion, that the generation facility would provide ancillary services necessary to support distribution reliability and, thus, the EDU's POLR obligations, is flawed. Solutions reasons that the Order fails to recognize the distinction between distribution ancillary services, which fall under the Commission's jurisdiction, and transmission ancillary services, which are within the exclusive jurisdiction of the Federal Energy Regulatory Commission. Further, Solutions argues that the analysis is not supported by the physical structure of the facility. Solutions notes that the proposed facility will interconnect with high voltage transmission lines as opposed to distribution voltage of the distribution system. Solutions reasons, therefore, that the generation facility will support transmission-related ancillary services, not distribution ancillary services.

- (27) The arguments raised by Solutions, Direct and OEG do not persuade the Commission that their requests for rehearing on this aspect of the Order should be granted. The Commission believes that the Order thoroughly sets forth its rationale for concluding that the proposed facility will support ancillary distribution services, the Commission's jurisdiction over distribution services and the necessity to ensure the reliability of

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<sup>5</sup> "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; load following back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

the distribution system. See Order at pp. 17-18. Therefore, we will not repeat our rationale here. Rehearing is denied.

Ratemaking Statutes

- (28) Direct argues that the Commission lacks the authority to establish cost-based rates for retail generation service under Chapters 4905 and 4909 of the Revised Code. Thus, Direct asserts that the Commission unlawfully expanded its scope of authority in this Order. Direct argues that even if Chapter 4909, Revised Code, applied, the Phase I costs do not represent construction work in progress, but pre-construction costs related to preliminary activities. Solutions and OCC argue that the Order fails to comply with Section 4909.15, Revised Code, which requires that a construction project be at least 75 percent complete before a portion of the value of the project is included in rates. OCC and Solutions insist that the Phase I costs are subject to ratemaking statutes at Chapter 4909, Revised Code.

OCC argues that the approved Phase I surcharge is unlawful to the extent that the Order does not comply with Section 4928.15, Revised Code, and the application was not filed pursuant to Section 4909.18, Revised Code. OCC further argues that the Order is unreasonable as to the rates to be imposed on residential customers, especially CSP residential customers, and unlawful as it contradicts the Companies' electric transition plan (ETP) order at Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP, *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, (Order issued September 28, 2000) and the Companies' rate stabilization plan (RSP) at Case No. 04-169-EL-UNC, *In the Matter of the Application of Columbus Southern Power company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan* (Order issued January 26, 2005 and Entry on Rehearing issued March 23, 2005). OCC argues the

application is inconsistent with Ohio utility policy set forth in Section 4928.02, Revised Code.<sup>6</sup>

- (29) AEP-Ohio responds that the protracted ratemaking rules and procedural requirements set forth in Chapter 4909, Revised Code, are not applicable to charges incurred to fulfill the Companies' POLR obligation. As discussed in the Order, AEP-Ohio bases its arguments on the Court decision in *Constellation New Energy, Inc. Pub. Util. Comm.* (2004), 104 Ohio St. 3d 530, 539, 2004-Ohio-6767, 820 N.E.2d 885 (*Constellation*).
- (30) The Commission agrees with AEP-Ohio that the ratemaking statutes are not applicable in this proceeding. Further, as we noted in the Order, the IGCC revenues collected through the Phase I surcharge will be tracked and will offset additional generation increases that the Companies would otherwise be permitted to request pursuant to the RSP decisions.<sup>7</sup> Accordingly, we find that our decision in this case is compatible with our decision in AEP-Ohio's RSP case.

As to OCC's claims of the effect on residential customers, we note that the Phase I charge is bypassable. While percentage of income payment plan (PIPP) customers are not eligible to receive service from a competitive retail electric service (CRES) provider, the PIPP customer's payment is determined by the PIPP customer's income. Accordingly, PIPP customers will not be affected by the institution of Phase I cost recovery in the short-term. The Commission continues to be supportive of electric retail competition in Ohio. It is imperative that Ohio's consumers are ensured that should they select a CRES provider, and the CRES provider defaults, those consumers will continue to receive electric service. EDUs provide the customers in their service area with such electric "insurance" as the POLR. The Commission, by assuring that EDUs are complying with their POLR obligations is supporting the principles of Section 4928.02, Revised Code, and the state's energy policies. Thus, we deny the applications for rehearing on these issues.

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<sup>6</sup> Section 4928.02, Revised Code, in relevant part, sets forth the State policy to: Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service.

<sup>7</sup> Order at p. 20.

- (31) Direct states that the Order is unlawful to the extent that the Commission found that the EDU is the POLR for consumers who fail to select a CRES provider. Direct argues that Section 4928.14, Revised Code, merely requires the EDU to provide a market-based standard service offer and, at paragraph C, requires that customers returning to the EDU's service be offered a market-based rate. In support of Direct's "risk of return" definition of POLR, Direct cites the Ohio Supreme Court's decision in *Constellation New Energy, Inc. Pub. Util. Comm.* (2004), 104 Ohio St. 3d 530, 539, 2004-Ohio-6767, 820 N.E.2d 885 (Constellation). Footnote number five in *Constellation* states:

POLR costs are those costs incurred by [the EDU] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return to DP&L for generation service.

- (32) The Commission notes that the above quoted footnote from which Direct extracts its interpretation of the decision in *Constellation* is part of the discussion of the rate stabilization surcharge (RSS) in which the order states "the Commission does find that the existence of POLR costs makes it reasonable to apply the RSS to all customers." (Emphasis added). The Court found no error in the Commission decision upholding the reasonableness and legality of the RSS mechanism. We believe Section 4928.14, Revised Code, supports this interpretation. Section 4928.14, Revised Code, states, in part:

An electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service ...

Based on the plain meaning of the language used in the statute, the Commission believes that all customers, including those customers that consciously elect to continue to receive electric service from the EDU, in this case CSP or Ohio Power, are entitled to the market-based standard service offer. However, Direct's interpretation of the POLR obligation is one-sided. The Commission views the POLR obligation, as "insurance" for customers returning to the EDU's standard service offer and

encouragement for all customers to participate in Ohio's competitive electric market. For these reasons, the Commission denies Direct's application for rehearing of this aspect of the Order.

- (33) Solutions and OEG assert that approval of AEP-Ohio's application grants AEP-Ohio a competitive advantage. OEG argues that the Order does not comply with Section 4928.38, Revised Code, which requires the utility to terminate receipt of transition revenues and to be self-reliant in the competitive market after the market development period. OEG contends that AEP-Ohio's distribution customers will be forced to pay above-market prices for the proposed facility, which discourages competition and creates undue market power for AEP-Ohio.
- (34) The Commission disagrees that the implementation of the Phase I surcharge will harm competition. The Phase I surcharge is bypassable and will likely induce some customers to shop for electric service. The Commission is encouraged that some customers will enter into new agreements for service from CRES providers. Thus, we were not convinced by the interveners' arguments that approval of Phase I harms competition on brief and the interveners' have not presented any reasons for the Commission to change its position on rehearing. Thus, the request for rehearing is denied.

Issues for the next phase of this proceeding

- (35) OCC argues on rehearing that the Order approves Phase I cost recovery for a facility that the Companies can sell at any time pursuant to Section 4928.17, Revised Code. According to the application, CSP and Ohio Power will jointly own the proposed IGCC plant. As the Order indicated, additional hearings are necessary to consider AEP-Ohio's request for Phase II and III cost recovery. The Commission finds that the transfer of any portion of the ownership of the proposed facility, to any entity other than CSP and/or Ohio Power, is an issue that should be addressed in the next phase of this proceeding. Accordingly, OCC's request for rehearing on this aspect of the Order is denied, at this time.

- (36) Direct asserts that the Order is unreasonable to the extent that it fails to instruct AEP-Ohio to consider alternative means to meet the Companies' long-term POLR obligation. Direct requests that the Companies be instructed to investigate and present, before the next phase of this proceeding, information regarding AEP-Ohio's future need for base load generation, the timeline to fulfill that need and an analysis of future estimated shopping rates and the concurrent POLR obligation. AEP-Ohio already must address, as a part of the next phase of this proceeding, the Companies future need for base load generation, the timeline to fulfill that need an analysis of future estimated shopping rates and the concurrent POLR obligation. Such information is a subset of the directives included in the Order in regards to how the output of the proposed facility would benefit Ohio customers. Direct's remaining requests are to wait until a decision is made on the location of the FutureGen project, to establish a stakeholders working group, and to consider incentives for all industry competitors. We find that such considerations are not directly relevant to consideration of AEP-Ohio's application; the requests for rehearing are denied.
- (37) Direct argues that the Order is unlawful as it fails to determine whether approval of Phase I cost recovery jeopardizes funding under the Energy Policy Act of 2005.<sup>8</sup> We deny Direct's request for rehearing regarding this single aspect of the funding that is potentially available for the IGCC facility. The Commission's Order specifically directed AEP-Ohio to determine its eligibility for funding from various sources, not just from the Energy Policy Act of 2005. Therefore, we find it inappropriate to make a determination on this single source of funding before AEP-Ohio determines its eligibility for multiple sources of funding.

Request for Clarification

- (38) AEP-Ohio's request for clarification specifically notes four areas that require clarification. The first refers to the statement in the April 10 opinion and order that additional hearings will be

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<sup>8</sup> The Energy Policy Act, Title IV, Subtitle A, Section 414 states:

The Secretary is authorized to provide loan guarantees for a project to produce energy from a plant using integrated gasification combined cycle technology of at least 400 megawatts in capacity that produces power at competitive rates in deregulated energy generation markets and that does not receive any subsidy (direct or indirect) from ratepayers.

necessary. AEP-Ohio requests that any additional hearings be conducted on an expedited basis and be limited to issues delineated in the opinion and order. AEP-Ohio offers that extensive discovery has already been collected, and thereby only needs to be updated; and that AEP-Ohio's contractual rights with the plant's contractors cannot be held indefinitely. AEP-Ohio next requests clarification that it can collect any monies spent subsequent to the conclusion of Phase I activities, and up to the time the IGCC project is shut down, if the outcome of the second round of hearings results in the Companies not constructing the plant. This recovery would include the costs associated with shutting down the project, along with carrying charges. AEP-Ohio asserts that it is likely that it will enter into a contract for a construction plan and move forward with the project during the pendency of this proceeding. AEP-Ohio states that if recovery of these costs is not assured, that construction postponement or termination of the project must be considered due to regulatory uncertainties. AEP-Ohio further requests that the Commission clarify that it will not revisit the decision that AEP-Ohio may recover its reasonable costs through the three-phase recovery plan, if AEP-Ohio goes forward with the construction. Finally, AEP-Ohio requests clarification that any declaration of competitiveness in regard to the provision of ancillary services from generating plant would not impact regulatory authority and cost recovery with this plant.

- (39) In its opinion and order, this Commission approved the Phase I cost recovery mechanism of AEP-Ohio's application. The Commission further found that it has the authority to establish a charge related to the construction and operation of an IGCC generating plant, as described in AEP-Ohio's application, for recovering the costs of fulfilling the POLR obligation. However, the Commission also found that AEP-Ohio must "economically justify its construction choices, its technology choices, its timing, its financing structure, and the various other matters that have been left open..." and listed certain issues that needed to be addressed in the next phase of the proceeding. The Commission clearly reserved the right to consider and determine the feasibility and prudence of this project based on a record that included the details of the proposal. Future recovery of sunk costs based on termination of the project will depend on the reasons for the termination and cannot be

decided at this time. AEP-Ohio's first three requests for clarification require determinations beyond the Phase I cost recovery. The Commission remains supportive of an IGCC plant being built in Meigs County, Ohio for POLR purposes, but we believe the best method to expedite and advance the project is for AEP-Ohio to file the details of its proposal as to budgets, designs, feasibility studies and financing options. The first three requests for clarification should be denied. In regard to the fourth request for clarification, the Commission reiterates that although Section 4928.04(A), Revised Code, contemplates that the Commission may consider, at some time, relinquishing its regulatory obligations as to ancillary service, we believe the POLR responsibility cannot be left unregulated, as it must be available if the market option fails. Therefore, the fourth request for clarification should be denied, as this Commission cannot take any further action on this matter at this time.

#### Summary and Conclusions

- (40) The Commission notes that AEP-Ohio's tariff for collection of Phase I charges is being approved today. All Phase I costs will be the subject of subsequent audit(s) to determine whether such expenditures were reasonably incurred to construct the proposed IGCC facility in Ohio. AEP-Ohio's request for clarification does raise the issue of the status of the Phase I charges that are collected. Although we continue to find that AEP-Ohio should be permitted to recover the reasonable costs of further developing and detailing the project proposal, the Commission believes that there may be elements of the design and engineering that may be transferable to other projects. Therefore, we find that if AEP-Ohio has not commenced a continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be refunded to Ohio ratepayers with interest.

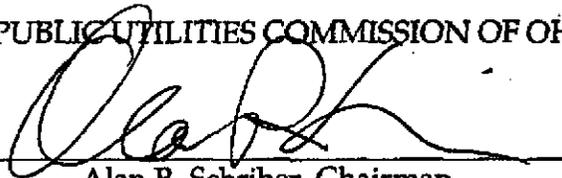
It is, therefore,

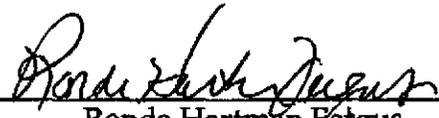
ORDERED, That if AEP-Ohio has not commenced a continuous course of construction of the proposed facility within five years of the date of issuance of this entry on rehearing, all Phase I charges collected for expenditures associated with items that may be utilized in projects at other sites, must be refunded to Ohio ratepayers with interest. It is, further,

ORDERED, That all requests for rehearing and AEP-Ohio's motion for clarification are denied. It is, further,

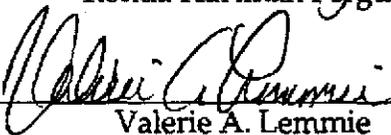
ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Ronda Hartman Fergus

\_\_\_\_\_  
Judith A. Jones

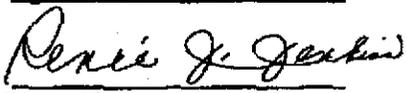
  
Valerie A. Lemmie

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Donald L. Mason

SDL/GNS:ct

Entered in the Journal

JUN 28 2006

  
Renee J. Jenkins  
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of )  
Columbus Southern Power Company and )  
Ohio Power Company for Authority to )  
Recover Costs Associated with the Ultimate ) Case No. 05-376-EL-UNC  
Construction and Operation of an )  
Integrated Gasification Combined Cycle )  
Electric Generating Facility. )

OPINION AND ORDER

The Public Utilities Commission of Ohio (Commission), having considered the testimony and all other evidence presented in this matter and relevant provisions of the Revised Code, hereby issues its Opinion and Order.

APPEARANCES

Marvin I. Resnik and Sandra K. Williams, 1 Riverside Plaza, Columbus, Ohio 43215-2373; and Daniel Conway, Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, Ohio 43215, on behalf of Columbus Southern Power Company and Ohio Power Company.

Jim Petro, Attorney General of the state of Ohio, Duane W. Luckey, Senior Deputy Attorney General, Steven T. Nourse, Werner L. Margard III, and Thomas W. McNamee, Assistant Attorneys General, 180 East Broad Street, 9<sup>th</sup> Floor, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, Kimberly J. Bojko and Jeffery L. Small, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215-3485, on behalf of the residential customers of Columbus Power Company and Ohio Power Company.

Kathy J. Kolich, 76 South Main Street, Akron, Ohio 44308, on behalf of FirstEnergy Solutions Corporation.

Samuel C. Randazzo and Lisa Gatchell McAlister, McNees Wallace & Nurick LLC, Fifth Third Center, 21 East State Street, Suite 1700, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

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John W. Bentine, Joseph C. Pickens and Bobby Singh, Chester, Wilcox & Saxbe, LLP, 65 East State Street, Suite 1000, Columbus, Ohio 43215, on behalf of American Municipal Power-Ohio, Inc.

Sally W. Bloomfield and Thomas J. O'Brien, Bricker & Eckler LLP, 100 South Third Street, Columbus, Ohio 43215-4291; and Joseph Condo, Calpine Corporation, 250 Parkway Drive, Suite 380, Lincolnshire, Illinois 60069, on behalf of Calpine Corporation.

M. Howard Petricoff, Stephen Howard and Michael Settineri, Vorys, Sater, Seymour and Pease LLP, 52 East Gay Street, Columbus, Ohio 43216-1008, on behalf of Constellation Generation Group, LLC, Constellation Energy Commodities Group, Inc., Constellation NewEnergy Inc., and Beard Generation, LLC.

Michael D. Dortch, Baker & Hostetler, Capitol Square, 65 East State Street, Suite 2100, Columbus, Ohio 43215-4260, on behalf of General Electric Company, GE Energy (USA), LLC, Bechtel Corporation, and Bechtel Power Corporation.

David C. Rinebolt, 237 South Main Street, 4<sup>th</sup> Floor, Suite 5, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

David Boehm and Michael L. Kurtz, Boehm, Kurtz & Lowry, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202-4454, on behalf of Ohio Energy Group.

Thomas L. Rosenberg and Jessica L. Davis, Roetzel & Andress, LPA, National City Center, 155 East Broad Street, 12<sup>th</sup> Floor, Columbus, Ohio 43215, on behalf of the International Brotherhood of Electrical Workers Local #970, Ironworkers Local #787; the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local #168, Parkersburg-Marion Building and Construction Trades Council AFL-CIO.

Thomas Lodge, Thompson Hine, LLP, One Columbus, 10 West Broad Street, Suite 700, Columbus, Ohio 43215-3435, on behalf of Global Energy and Lima Energy Company.

Dane Stinson and William A. Adams, Bailey, Cavaliere, LLC, 10 West Broad Street, Suite 2100, Columbus, Ohio 43215, on behalf of Direct Energy Services, LLC.

Evelyn R. Robinson, 5450 Frantz Road, Suite 240, Dublin, Ohio 43016, on behalf of Green Mountain Energy Company.

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OPINIONHistory of the Proceeding

On March 18, 2005, Columbus Southern Power Company (CSP) and Ohio Power Company (Ohio Power) (collectively AEP, AEP Companies or Companies) filed an application with the Commission for approval of a mechanism to recover the costs associated with the construction and operation of an integrated gasification combined cycle (IGCC) electric generation facility in Ohio. The Companies request approval of its proposed cost recovery mechanism to provide for the design, construction and operation of a 629<sup>1</sup> [net] megawatt (MW) electric generation facility in Meigs County, Ohio. The AEP Companies have concluded that the facility is necessary to allow the Companies to provide a firm supply of generation service to the Companies' Ohio customers. The Companies contend that they must be ready and able to provide firm, generation service to customers who have not selected a competitive retail electric service (CRES) provider and any customer who returns to the AEP Companies' service as a result of the CRES provider's default or at the customer's election. The Companies contend that the proposed IGCC facility will allow the companies to help meet their respective obligations as the provider of last resort (POLR). The Companies are proposing to recover the costs of the IGCC facility in three phases to continue throughout the commercial life of the facility. Further details of the Companies' proposal are provided below.

On April 12, 2005, a conference was held to develop the procedural schedule for this case. The procedural schedule was published by entry issued April 19, 2005. The procedural schedule was established as follows: the Companies' testimony was due by May 5, 2005; a technical conference was scheduled for May 16, 2005; motions to intervene were due by July 1, 2005; intervenor testimony was due to be filed by July 13, 2005; all discovery requests were to be submitted by the parties by no later than July 25, 2005; staff testimony was due by July 25, 2005; the Companies supplemental testimony was due by August 1, 2005; and the evidentiary hearing was scheduled to begin on August 8, 2005.

Motions to intervene were timely filed by Industrial Energy Users-Ohio (IEU); Ohio Energy Group (OEG); FirstEnergy Solutions Corporation (FirstSolutions); Ohio Consumers' Counsel (OCC); Calpine Corporation (Calpine); Global Energy and Lima Energy Company (jointly Lima Energy); International Brotherhood of Electrical Workers Local #970, Ironworkers Local #787; the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local #168, Parkersburg-Marion Building and Construction Trades Council AFL-CIO, (collectively the Unions); Direct Energy Services, LLC (Direct Energy); Beard Generation, LLC (Beard); Ohio Partners for Affordable Energy (OPAE); Constellation Generation

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<sup>1</sup> Subsequent to the filing of the initial application, the Companies revised the facility output from 600 MW to 629 MW. See Company Ex. 5-B at 4.

Group, LLC, Constellation Energy Commodities Group, Inc., and Constellation NewEnergy Inc. (jointly Constellation); and Green Mountain Energy Company (Green Mountain). All of the requests for intervention were granted. American Municipal Power-Ohio, Inc. (AMP-Ohio) filed a late request for intervention. Nonetheless, AMP-Ohio's request was granted. Pursuant to entry issued August 1, 2005, General Electric Company, GE Energy (USA), LLC, Bechtel Corporation, and Bechtel Power Corporation (jointly GE/Bechtel) were granted limited intervention in this matter for the purpose of protecting their interest in certain confidential and proprietary documents exchanged as a part of the discovery process.

On May 5, 2005, the AEP Companies filed testimony in support of the application. The AEP Companies filed the direct testimony of Kevin E. Walker (Company Ex. 1), J. Craig Baker (Companies Ex. 2), Bruce H. Braine (Companies Ex. 3), Michael J. Mudd (Companies Ex. 4), William M. Jasper (Companies Ex. 5), Philip J. Nelson (Companies Ex. 6), David M. Roush (Companies Ex. 7), and Stephen T. Haynes (Companies Ex. 8).

Pursuant to the procedural schedule, intervenor testimony was filed on July 15, 2005. OCC filed the direct testimony of Donald C. Lechnar (OCC Ex. 1) and Michael Haugh (OCC Exs. 2 and 2-A). Baard filed the direct testimony of John Baardson (Baard Ex. 1). Direct Energy filed the direct testimony of Mark R. Frye (Direct Energy Ex. 1). IEU filed the direct testimony of J. Bertram Solomon (IEU Ex. 24). Calpine filed the direct testimony of William J. Taylor, III (Calpine Ex. 1). OEG filed the direct testimony of Kevin C. Higgins (OEG Ex. 10 and OEG 10A). Staff filed, on July 25, 2005, the direct testimony of Kim Wissman (Staff Ex. 1), Klaus Lambeck (Staff Ex. 2), and Richard Cahaan (Staff Ex. 3).

By entry issued May 26, 2005, as supplemented by entry issued June 30, 2005, local public hearings were scheduled in CSP's and Ohio Power's service areas. Public hearings were held in Hilliard, Canton, and Pomeroy, Ohio. The AEP Companies published notice of the hearings and filed proof of publication (Companies Ex. 16). At the public hearing held in Hilliard on August 1, 2005, five witnesses offered testimony: two witnesses testified in opposition to the application, two witnesses testified in favor of the facility, and one witness made comments. A local public hearing was held on August 3, 2005 in Canton, Ohio. At the Canton hearing, three witnesses offered testimony: two persons who are opposed to the application and one person who is in favor of the project.

On August 4, 2005, a local public hearing was held in Pomeroy, Ohio, the same county as the proposed location for the IGCC facility. At the Pomeroy hearing there were over 100 people in attendance of which 30 offered testimony. Twenty-six witnesses testified in favor of the project and four witnesses raised environmental and safety concerns about the project. The witnesses offering testimony in support of the proposed facility included Senator Joyce Padgett and Representative Jimmy Stewart. Senator Padgett endorsed the construction and operation of the proposed facility for its beneficial

effect on the county, the State of Ohio, and the families and businesses in Meigs County and the surrounding areas. Senator Padgett also noted that the facility will support the Ohio coal industry and clean coal technology. Representative Stewart's testimony focused on the overall benefits of IGCC technology and the environmental advantages of IGCC. A statement by Representative Jennifer Garrison endorsing the construction of the IGCC facility was also offered into the record. Also offering testimony at the Pomeroy local hearing were numerous representatives and members of the skilled trades and labor unions in the area. The Unions strongly endorse this project for the 1,250-2,000 construction jobs and 125 permanent jobs that it will bring to the county and the benefit to the local economy.

The evidentiary hearing commenced on August 8, 2005 and continued each business day through August 16, 2005. At the conclusion of the hearing, the Companies and certain other parties to this proceeding had not reached a resolution regarding the recalling of witnesses (Tr. VII at 93). To that end, on September 6, 2005, OCC, IEU-Ohio and the Companies docketed late-filed exhibits in lieu of calling or recalling additional witnesses (Late filed OCC/IEU Exs. 1-2, 4-11, 14-15, 18-26, 28, 29, 31-38, 41 and 44-45). By entry issued September 7, 2005, all parties were directed that, unless the Commission received a motion in opposition to the late-filed exhibits, the exhibits would be admitted into the record. No party filed a motion in opposition to the late-filed exhibits. Initial briefs were filed by the parties on September 20, 2005. Reply briefs were filed by the parties no later than October 11, 2005.

On December 27, 2005, Direct Energy filed a request that the Commission take administrative notice of certain press releases by the AEP Companies. The press releases cited were those issued by the AEP Companies on December 15 and December 20, 2005 and the newspaper article carried by a Cincinnati newspaper, *The Enquirer*. The press releases and article discuss American Electric Power's earnings, 2006 projected earnings and the purchase of a natural gas generation facility. Direct Energy contends that the representations made in the article and press releases support the claims of Direct Energy and the other interveners as to the need for the proposed IGCC facility and the risk to Ohio's ratepayers.

On January 6, 2006, the Companies filed a memorandum contra the request for administrative notice. The AEP Companies ask that the Commission recognize that the nature of the activities noted in the press releases and article were known at the time of the hearing and referenced in the record (Tr. V at 204, 206). The Companies also note that the record in this case has been closed for almost four months.

The Commission agrees that it is improper to take administrative notice of the press releases and newspaper article at this time; the AEP Companies' earnings and the

purchase of a generating facility are issues that could have been addressed during the hearing. Accordingly, Direct Energy's request for administrative notice is denied.

Proprietary Information in this Proceeding

On July 14, 2005, OCC filed a motion to compel discovery and to permit the supplementation of OCC testimony. OCC claimed that the AEP Companies had not fully responded to OCC's request for the production of documents, pending the execution of a protective agreement. The Companies filed a memorandum contra OCC's motion. The Companies represented that OCC was given the opportunity to view any documents requested at the Companies' offices. On July 19, 2005, the Attorney Examiners held an off-the-record conference between OCC and the Companies to discuss the discovery dispute. At the end of the conference, the Attorney Examiners concluded that there were three classes of documents at issue in this discovery dispute: (a) documents which the AEP Companies claimed were confidential; (b) documents that contained or reflected information from GE/Bechtel;<sup>2</sup> and (c) critical energy infrastructure information (CEII), as determined by the Companies. As OCC and the Companies were informed at the conference, and as confirmed by entry issued July 21, 2005, the AEP Companies were ordered to provide, pursuant to the protective agreement attached to OCC's motion to compel, the documents the Companies claimed to be confidential, the GE/Bechtel documents and the CEII documents identified as responsive to OCC's requests for production of documents. Further, as to the CEII, OCC was directed to review the CEII documents at the Companies' offices to determine which documents were needed by OCC to prepare for the hearing.

On July 22, 2005, GE/Bechtel filed a motion to intervene in this case for the limited purpose of protecting certain confidential information. GE/Bechtel also filed an interlocutory appeal of the July 21, 2005 entry and a motion for protective order on July 26, 2005. On August 1, 2005, OCC filed a memorandum contra GE/Bechtel's motion for protective order and interlocutory appeal.

By entry issued August 1, 2005, the Attorney Examiners granted GE/Bechtel's motion to intervene. By the same entry, the Attorney Examiners granted GE/Bechtel's request for protective order by issuing a protective order that would protect the documents at issue unless and until OCC and GE/Bechtel executed a negotiated protective agreement. Further, to allow the case to continue in accordance with the schedule established, OCC and GE/Bechtel were directed to develop a proposal on the introduction of exhibits and the redaction of confidential and/or proprietary information. OCC and GE/Bechtel were informed that if they could not agree on the proprietary nature

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<sup>2</sup> GE/Bechtel is a third-party vendor with whom the Companies have contracted to provide certain engineering, procurement and construction services in relation to the proposed IGCC facility.

of information in the documents, the Attorney Examiners would conduct an in-camera review to determine the nature of the documents at issue.

On August 8, 2005, GE/Bechtel and the Companies each filed motions to maintain the confidentiality of their respective confidential documents and the testimony drawn therefrom. OCC subsequently filed a memorandum contra the motions of GE/Bechtel and AEP. During the hearing, on August 9, 2005, after an in-camera review of certain documents, the Attorney Examiners ruled that certain information provided to OCC by GE/Bechtel and AEP, and to other intervenors pursuant to a protective agreement, contained trade secrets and/or confidential or proprietary information that should be protected from public disclosure (Tr. II at 78-80). To avoid the delay of the hearing, the proceedings were periodically closed to facilitate the cross-examination of witnesses in regard to confidential matters. At the conclusion of the hearing, the Companies and GE/Bechtel were directed to review the confidential documents introduced into evidence in the case and to redact confidential and/or proprietary information and file the redacted documents in the public record. The redacted documents were then filed in the docket by the AEP Companies on August 30, 2005 and by GE/Bechtel on September 1, 2005.

In its initial brief, OCC argues that vast amounts of the record in this case have been sealed from public scrutiny in violation of Section 149.43, Revised Code, and Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.). OCC notes that in Case No. 93-487-TP-ALT, *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, entry issued November 25, 2003, the Commission acknowledged that:

All proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (Section 149.43, Revised Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio public records law is intended to be liberally construed to "ensure that governmental records be open and made available to the public and . . . are subject only to a few very limited and narrow exceptions." *State ex rel. Williams v. Cleveland* (1992), 64 Ohio St.3d 544, 549; *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St.3d 513, 518.

OCC argues that the Companies and GE/Bechtel have been permitted the "wholesale" removal of documents from the public record. OCC argues that the AEP Companies' and GE/Bechtel's motions filed August 8, 2005 fail to specifically state the contents of each document that each company seeks to protect from public disclosure. OCC asserts that the AEP Companies and GE/Bechtel failed to meet their burden under Ohio law. Therefore, OCC concludes that the Attorney Examiners' ruling granting the Companies' and GE/Bechtel's requests for confidential treatment was in error and should be reversed (OCC Brief at 43-46).

AEP Companies argue that OCC's request to place in the public record the limited amount of confidential information protected under seal in this case overlooks the need to protect the proprietary and confidential information of third-party vendors against the public policy that favors public access to information presented to a public agency (Companies Reply Brief at 41-43). The Companies emphasize that the proposed power plant design relies on proprietary IGCC technology that GE/Bechtel, Battelle and Sargent & Lundy<sup>3</sup> seek to protect to retain the commercial value of their investments (*Id.* at 41).

The AEP Companies contend that, at the direction of the presiding Attorney Examiners, they, in consultation with Sargent & Lundy, Battelle and GE/Bechtel, reviewed all the exhibits and testimony included in the confidential portion of the record to reduce the amount of information under seal (*Id.* at 42). The Companies emphasize that releasing such information into the public record, as OCC requests, will have a chilling effect on the deployment of new technologies in Ohio. The Companies assert that significant effort has been expended to protect the confidential nature of certain information in the record and to minimize the confidential portion of the record. The Companies maintain that it is crucial that the Commission carefully balance the release of confidential, proprietary information owned by third-party vendors with the public record requirements for state agencies. For these reasons, the Companies ask that the Commission reject OCC's request to place the limited amount of protected information in the public record.

GE/Bechtel also opposes OCC's request. GE/Bechtel argues that OCC's request misrepresents the facts, is procedurally defective and ignores the exceptions to Ohio's public records law. GE/Bechtel also notes that OCC has mischaracterized the process implemented by the Attorney Examiners and failed to mention that an in-camera examination of the documents was conducted, and that GE/Bechtel, at the direction of the Attorney Examiners, examined the exhibits and the transcripts filed under seal and redacted any GE/Bechtel proprietary information from the documents and filed the redacted copies in the public record (GE/Bechtel Reply Brief at 3-4).<sup>4</sup>

GE/Bechtel further argues that OCC's request to place all documents and exhibits in the public record is untimely. According to GE/Bechtel, OCC's recourse was an interlocutory appeal of the Attorney Examiners' August 9 ruling in accordance with Rule 4901-1-15, O.A.C. GE/Bechtel states that, pursuant to Rule 4901-1-15, O.A.C., OCC had only five days after the August 9, 2005 ruling to file an appeal. GE/Bechtel reasons that

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<sup>3</sup> Battelle and Sargent & Lundy performed various analyses for the AEP Companies in regards to the proposed IGCC facility.

<sup>4</sup> Furthermore, GE/Bechtel states that after the close of the hearing, the OCC identified an additional 45 exhibits that it demanded to be filed in the public record as late-filed exhibits. GE/Bechtel examined those exhibits and, consistent with the Attorney Examiners ruling, redacted confidential and proprietary information from copies of those exhibits. GE/Bechtel provided those redacted copies to both OCC and IEU-Ohio on September 1, 2005. OCC and IEU-Ohio subsequently filed those redacted copies as exhibits in the public record, and unredacted copies under seal, on September 6, 2005.

paragraph (A) of Rule 4901-1-15, O.A.C., is not applicable. GE/Bechtel argues that Rule 4901-1-15(A), O.A.C., applies, under the circumstances presented in this matter, when any party's motion for a protective order is denied. The motions of the AEP Companies and GE/Bechtel for protective orders were granted. GE/Bechtel acknowledges that pursuant to Rule 4901-1-15(B), O.A.C., OCC could seek to appeal the August 9, 2005 Attorney Examiners' ruling by requesting that the issue be certified to the Commission. GE/Bechtel notes OCC has not made any such request to certify the record. GE/Bechtel argues that, pursuant to Rule 4901-1-15(C), O.A.C., if OCC wished to take an interlocutory appeal, it was required to file an interlocutory appeal of the Attorney Examiners' August 9, 2005 ruling within five days.<sup>5</sup> Thus, GE/Bechtel reasons that OCC's request that the confidential information in this case become part of the public record is procedurally defective and should be denied.

Finally, GE/Bechtel posits that, contrary to OCC's claims, GE/Bechtel's July 26, 2005 and August 8, 2005 motions included the affidavits of GE/Bechtel representatives that: (1) detailed the nature and the kinds of information contained in the documents; (2) stated that GE/Bechtel protects the information at issue from disclosure, even internally; (3) noted that the information was provided to the AEP Companies pursuant to a protective agreement; (4) listed the protections undertaken by GE/Bechtel to prevent the disclosure of the information at issue; (5) discussed the value of the information to GE/Bechtel; and (6) stated the potential harm to GE/Bechtel if the information was known to the public. Thus, GE/Bechtel believes it presented sufficient information to justify its request to treat the information as proprietary trade secrets under Ohio law.

With respect to GE/Bechtel's procedural arguments, Rule 4901-1-15, O.A.C., does not require a party to file an interlocutory appeal to an attorney examiner's ruling. Paragraph (A) of the rule states that a party "may" file an interlocutory appeal; it does not require that one be filed. Further, paragraph (B) of the rule permits the filing of interlocutory appeals to certain rulings only if certified by the attorney examiner first. Accordingly, we find that Rule 4901-1-15, O.A.C., does not preclude OCC from raising the issue on brief. Lastly, we also note that the AEP Companies and GE/Bechtel were not requested to determine what information submitted under seal at the hearing would remain under seal until after the hearing had concluded. Accordingly, we find no merit to the procedural arguments made by GE/Bechtel.

With respect to the substantive issue, we find that the record in this case supports the Attorney Examiners' ruling that the documents filed under seal included proprietary trade secret information. First, the Commission notes that, pursuant to Section 4901.12,

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<sup>5</sup> Rule 4901-1-15(C), O.A.C., provides in part:

Any party wishing to take an interlocutory appeal from any ruling must file an application for review with the commission within five days after the ruling is issued.

Revised Code, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code, all proceedings of the Commission and all documents and records in its possession are public records. Section 149.43(A), Revised Code provides that:

"Public record" means records kept by any public office ... "Public record" does not mean any of the following:

- (v) Records the release of which is prohibited by state or federal law.

The Commission recognizes that Ohio's public records law is intended "to be liberally construed to ensure that governmental records be open and made available to the public and that public records are subject only to a few very limited and narrow exceptions." *State ex. rel Williams* at 549. However, one of the exceptions is for trade secrets. See Sections 1333.62 and 1333.63, Revised Code. Section 1333.61(D), Revised Code, defines trade secret as:

Information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>6</sup>

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<sup>6</sup> We recognize that the Ohio Supreme Court has adopted several factors to determine whether a trade secret claim meets the statutory definition in Section 1333.61(D), Revised Code. See *State ex. rel The Plain Dealer v. Ohio Dept. of Ins.*, at 524-525, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App.3d 131. *Pyromatics* states the factors are: (a) the extent to which the information is known outside the business; (b) the extent to which it is known to those inside the business, i.e., by the employees; (c) the precautions taken by the holder of the "trade secret" to guard against the secrecy of the information; (d) the savings effected and the value to the holder in having the information as against competitors; (e) the amount of effort or money expended in obtaining and developing the information; (f) the amount of time and expense it would take for others to acquire and duplicate the information.

The Commission finds that the Attorney Examiner's ruling and the confidential record developed in this case are consistent with Ohio public records law and Title 49. We note that in an effort to avoid further delay of the hearing and allow OCC an opportunity to cross-examine the Companies' witnesses, portions of the hearing were closed to any party that did not have a protective agreement, and subsequently the AEP Companies and GE/Bechtel were directed to review and redact the documents introduced into evidence that contained proprietary, trade secret information. Thus, the Commission concludes that the August 9, 2005 ruling is reasonable, in light of the fact that the hearing was in progress and the subsequent directive to the AEP Companies and GE/Bechtel to reduce the amount of proprietary information in the record. Accordingly, OCC's request to overturn the Attorney Examiners' August 9, 2005 ruling is denied. Furthermore, the documents filed under seal in this proceeding should remain under seal for 18 months after the issue date of this order.

### Companies' Application

On March 18, 2005, Ohio Power and CSP filed an application for authority to recover costs associated with the construction and operation of an IGCC generating facility (Application). The Companies intend to use the output from this generating station to serve their POLR customers.

The Application proposes that all reasonably incurred costs related to the IGCC facility be recovered in three phases (App. at 5; Tr. I at 200). The first phase will recover preconstruction costs, such as engineering and scoping study. First phase cost recovery will be through a 12-month bypassable generation surcharge, set to commence in January 2006 (App. at 5-8). The surcharge would be applied to the Companies' standard service rate schedules approved in their rate stabilization plan proceeding (RSP) (*In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order [January 26, 2005]) (RSP Order). The surcharge is intended to recover the Companies' preconstruction costs; that is, costs incurred prior to the Companies entering into an engineering, procurement and construction (EPC) contract estimated to be \$23.7 million (Companies Ex. 5B, WMJ Ex. 4). The net of the over- and underrecovered revenues during Phase I will be subtracted from or added to the Construction Work in Process (CWIP) accounts for the IGCC facility which will be used in determining the IGCC Recovery Factor during Phase III (App. at 4, 5).

Phase II of the cost recovery mechanism also provides a bypassable temporary generation rate surcharge. Under the Companies' proposal, this surcharge would begin with the first billing cycle in 2007. The level of the surcharge would change each year, until the surcharge terminates after the last billing before the IGCC plant goes into commercial operation, which is currently estimated to occur in mid-2010 (Companies Ex. 2 at 5). Phase II costs are the carrying costs on the cumulative investment in the generating

facility (App. at 8). The carrying costs will include carrying costs deferred after the EPC contract is executed, which is expected to be in approximately July 2006, until the Phase II surcharges begin. As with the Phase I surcharges, the Phase II generation rate surcharges will be applied to the Commission-approved standard service rate schedules.

Phase III covers the operating life of the IGCC facility. Phase III costs are the actual capital costs, carrying costs and operating costs of the plant, all of which the Companies propose will be recovered through surcharges known as the IGCC Recovery Factor and IGCC Adjustment Factor. These surcharges will be included in the Companies' distribution rates once the plant is placed in commercial operation (App. at 10-11). The IGCC Recovery Factor will be based on a return of and a return on the investment in the IGCC facility as well as operating expenses, including fuel and consumables (Tr. I at 242). Under the Companies' proposal, the Commission would consider and approve the IGCC Recovery Factor after a hearing and the Companies' showing that it is reasonable. The IGCC Recovery Factor will be subject to future adjustment throughout Phase III for relevant changes, such as investment level, customer load, appropriate rate of return, life expectancy of the IGCC facility and operating expenses (Companies' Ex. 2, at 9).

The IGCC Recovery Factor would be adjusted annually to reflect changes in the costs of fuel and consumables since the time it was last set, as well as any prior over- or underrecovery of actual fuel costs, including purchased power and consumables. Once an IGCC Recovery Factor is determined, it would be compared to the then-current Commission-approved standard service offer. Based on that comparison an IGCC Adjustment Factor would be calculated to reflect the revenue difference between the Recovery Factor and the then-current Commission-approved standard service offer (*Id.*). The IGCC Adjustment Factor will be either a charge (if there is a revenue deficiency) or credit (if there is a revenue surplus) to the Companies' Commission-approved distribution rate schedules. The IGCC Adjustment Factor would be revised throughout Phase III as the Commission approves changes to the Companies' standard service offer and to the IGCC Recovery Factor (*Id.* at 11, 12).

#### Jurisdiction Issues

The Companies argue that when enacting Senate Bill 3 (SB 3), the General Assembly contemplated that, even at the end of the five-year Market Development Period (MDP), not all customers will have switched to a competitive retail electric service ("CRES") provider for generation service. To provide a safety net for those customers, the General Assembly imposed the POLR generation service obligation on electric distribution utilities:

After its market development period, an electric distribution utility in this state shall provide consumers...a market-based standard service offer of all competitive retail electric services

necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. (Section 4928.14(A), Revised Code).

The General Assembly also provided a safety net for those customers who did switch to a CRES provider that subsequently failed to supply generation service to those customers. Those customers would default back to their electric distribution utility (EDU) for the provisions of generation service:

After the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under division (A) of this section until the customer chooses an alternative supplier. (Section 4928.14(C), Revised Code).

The Companies aver that the Commission has recognized that Divisions (A) and (B) of Section 4928.14, Revised Code, require the Companies to fulfill POLR responsibilities after the MDP (RSP Order at 27). The Commission specifically noted in the RSP order that the Companies will be held as the POLR to consumers who either fail to choose an alternative supplier or who choose to return to them after taking service from another generation supplier (*Id.* at 37). Consistent with that obligation to serve, the AEP Companies assert that the Companies' responsibility extends beyond ensuring that they have the capacity to serve non-switching or returning customers whose requirements may be readily predicted, that they must also have sufficient capacity to meet unanticipated demand (*Id.*). The AEP Companies add that the Commission also has recognized that the EDU's POLR responsibility is one for which it incurs necessary costs and which warrants compensation. (RSP Order at 27; *In Re The Dayton Power and Light Co.*, Case No. 02-2779-EL-ATA, Opinion and Order, at page 28 (September 2, 2003); *In Re Ohio Edison Co et al.*, Case No. 03-2144-EL-ATA, Opinion and Order at pages 23-24 (June 9, 2004)).

The AEP Companies note that the Ohio Supreme Court (Court) has confirmed the EDU's POLR responsibility and the lawfulness of establishing a separate charge for recovering the costs of fulfilling that obligation (*Constellation NewEnergy, Inc. v. Pub. Util Comm'n*, 104 Ohio St. 3d 530 (2004)).

In the *Constellation NewEnergy* case, the Court considered the Commission's authorization of a "rate stabilization surcharge" ("RSS") that was imposed on all of a utility's customers. In affirming the Commission's order, the Court noted the Commission's explanation that the utility "will incur costs in its position as the provider of last resort ["POLR"], which costs would not be recoverable other than through the RSS . . .

. [T]he Commission does find that the existence of POLR costs makes it reasonable to apply the RSS to all customers" (*Id.* at 539). The Court also included the following observation in footnote 5 as part of its discussion:

POLR costs are those costs incurred by [the electric distribution utility] for risks associated with its legal obligation as the default provider, or electricity provider, of last resort, for customers who shop and then return . . . for generation service (*Id.* at footnote 5).

CSP and Ohio Power argue that it follows that the Court's decision in *Constellation NewEnergy* not only confirms the Companies' POLR obligation but also confirms the Commission's authority to establish a charge on all customers for the costs associated with meeting that obligation (AEP Reply Brief at 4).

The Companies contend that the Commission recognized this inherent authority, in its Opinion and Order approving the Companies' RSP, to empower EDUs to secure sufficient capacity to meet their POLR obligations (AEP Reply Brief at 2).

The Companies postulate the proposition that the EDU's capacity resources that are necessary to fulfill an EDU's POLR obligation may include generation assets that the EDU owns or controls, and that support for that proposition is found in Section 4928.17(E), Revised Code. That provision generally allows the EDU to divest its generation assets without the requirement of Commission approval pursuant to the provisions of Title 49, Revised Code, that might have applied prior to SB 3's enactment, such as Section 4905.48, Revised Code. Section 4928.17(E), Revised Code, specifically notes that the relief from the Commission's jurisdiction is subject to those provisions of Title 49 "relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset." (emphasis added). Therefore, according to AEP, Section 4928.17(E), Revised Code, confirms that there is no blanket requirement in SB 3 that the EDU may not own generation assets and that Section 4928.17(E), Revised Code, confirms that there are circumstances in which ownership and control of generation assets is necessary to support the EDU's distribution function (*Id.* at 36, 37).

AEP reasons that the Commission must have relied upon the law's flexibility when it encouraged the Companies to move forward with plans for the construction of an IGCC facility in Ohio (RSP Order at 37-38). In doing so, according to the Companies, the Commission must have recognized that it is appropriate for an EDU to have access to a portfolio of capacity and energy responses in order to meet its post-MDP POLR obligations. However, under SB 3 and the Companies' RSP, none of the existing generation assets that AEP owns is dedicated to meeting that POLR obligation beyond the end of 2005 except to the extent that the Companies have voluntarily done for 2006-2008 in order to fulfill their RSP commitments (*Id.* at 38).

AEP maintains that access to owned generation that is dedicated to the POLR task during periods subsequent to the RSP is an appropriate component of a portfolio of capacity and energy resources that the EDU uses to satisfy its POLR obligation. AEP further contends that, because it will be owned by the Companies, the commitment of the IGCC plant's output to serve its POLR loads is highly reliable, provides a long-term hedge against the volatility in both the availability and pricing of wholesale capacity and energy supplies, and thereby help to forestall or mitigate market imperfections, to the benefit of the Companies' retail customers (AEP Reply Brief at 18-20).

The Staff concurs that an EDU may own generating facilities in Ohio, but that EDU's do have a limitation if they also provide a competitive service. In that situation, they must have an approved corporate separation plan. Section 4928.17(A), Revised Code. Staff notes that AEP's corporate separation plan was approved as part of the RSP (RSP Order at 35 and RSP Rehearing Entry issued March 23, 2005 at 12). Therefore, Staff argues that since there is no bar to the AEP Companies owning generating plant regardless of whether that plant is used to provide competitive or noncompetitive services, there is similarly no bar to building a generating plant (Staff Reply Brief at 8).

The next issue, according to Staff, is the extent to which the Commission may regulate that plant. Staff asserts that Section 4928.03, Revised Code, does state that retail electric generation service is competitive and, therefore, not subject to Commission regulation, but that this case is not about regulating retail electric generation service. Staff postulates that AEP's application concerns the provision of ancillary services, necessary to support the distribution function. Staff notes that it is the Commission's obligation to assure reliable distribution service, and therefore, noncompetitive retail electric services remain subject to the regulation of this Commission. Section 4928.03, Revised Code. Noncompetitive retail electric services are defined as components of retail electric service which neither have been declared competitive by this Commission (and no services have been declared competitive) nor declared competitive by statute. Section 4928.01(B), Revised Code. Ancillary service is not listed as competitive by statute and has not been declared competitive by the Commission (*Id.*). Staff concludes that since ancillary service meets neither test for being competitive, it is a noncompetitive retail electric service subject to the continuing regulation of the Commission (*Id.* at 3-7).

Ancillary service, as a regulated service, is defined as follows:

"Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service;

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energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service. Section 4928.01(A)(1), Revised Code.

Staff contends that these ancillary services require generating plant and, therefore, SB 3 contemplated that the utility would provide services from generating plant at least until such time as the Commission found that the market conditions had developed sufficiently to allow a declaration of competitiveness (*Id.* at 4).

Many of the intervenors have argued that Section 4928.14, Revised Code, requires a market-based standard service offer (SSO) in the post MDP, and that precludes the Commission from approving the Companies' application (FirstSolutions Brief at 4-7; see also Calpine's Brief at 4, 5 and note 3; and Baard Brief at 5, 6). IEU argues that AEP's application seeks authority from the Commission to reestablish a utility-friendly form of cost-of-service rate regulation for the purposes of establishing prices under Section 4928.14, Revised Code. IEU contends that the Commission found in the AEP RSP case that cost-of-service regulation has been displaced by a statutory scheme that makes SSO prices subject to the market, not cost-of-service regulation. IEU adds that, in the RSP Order, the Commission held in favor of the Companies' position that the Commission is powerless to set SSO prices after considering the cost of providing SSO service, including a return on and of generating plant, even where there is no market or information on which the Commission may reasonably rely to establish SSO prices. IEU concludes that, notwithstanding the Commission's belief in IGCC technology, or its cost, the Commission does not have the authority to substitute its judgment for the judgment of the General Assembly, to re-write the law or to bypass the requirements of current law (IEU Brief at 9-13). OEG offers that the Companies have proposed to provide a SSO based on the cost of the IGCC plant plus the market price of electric power, not on the market price of electric power alone as Section 4928.14, Revised Code, requires (OEG Brief at 3, 4). Constellation's theory is that the Companies should be required to offer the output of the IGCC plant at market-based rates (Constellation Brief at 20).

The intervenors further assert that the Commission does not have the authority to provide for recovery of the costs of an IGCC plant. FirstSolutions argues that this limitation follows expressly from Section 4928.05(A), Revised Code, which provides that competitive retail electric service "shall not be subject to supervision and regulation...by the public utilities commission under Chapters 4901 to 4909...4935...of the Revised Code..." (FirstSolutions Brief at 9-11). OCC also makes this argument, adding that "[t]he general application of Chapter 4909, Revised Code, ratemaking applies to distribution rate cases, not to the regulation of the generation function" (OCC Brief at 10, 11; see also Direct Energy Brief at 6, 7). In addition, OCC contends that there is no specific authority in Ohio

law for the Commission to adopt the Companies' cost recovery proposal for the IGCC plant (OCC Brief at 16-19). Finally, OCC states that the Companies' corporate separation plan, established pursuant to the requirements of Section 4928.17, Revised Code, mandates that any provision of generation service be through a fully separated affiliate. OCC submits, that although the Commission has granted a temporary waiver of the requirement for AEP to structurally separate their generation and distribution functions, compliance with Section 4928.17, Revised Code, cannot be reconciled with the long-term ownership commitment and cost recovery by the Companies to the generating plant that is the subject of this application (*Id.* at 8, 9).

We believe that the arguments that the AEP Companies' proposal violates Section 4928.14, Revised Code, are not on point because they mischaracterize the Companies' application. The application is not proposing that the Commission use cost-of-service ratemaking to establish pricing for the SSO that Section 4928.14, Revised Code, requires at the end of the MDP; the Companies' Application has no impact on the determination of AEP's market-based SSO. The Commission will establish AEP's SSO in accordance with the market-based standard of Section 4928.14, Revised Code, independent from the cost-recovery mechanism that the Companies have proposed for the IGCC plant. The proposed IGCC Recovery Factor and the IGCC Adjustment Factor are for the stated purpose of recovery of the costs of the IGCC plant. The issue is where the Commission's jurisdiction to grant cost recovery for the plant lies.

While Section 4928.03, Revised Code, states that retail electric generation service is competitive and, therefore, not subject to Commission regulation, this Application is not about regulating retail electric generation service, but about providing the distribution ancillary services. These services are subject to Commission regulation, as being necessary to support the distribution function. It is the Commission's obligation to assure reliable distribution service under Section 4928.02(A), Revised Code, and noncompetitive retail electric service are subject to the regulation of this Commission under Section 4928.05(A)(2), Revised Code. Noncompetitive retail electric services are defined as components of retail electric service which neither have been declared competitive by this Commission nor declared competitive by statute. The legislature declared retail electric generation, aggregation, power marketing, and power brokerage services to be competitive. Ancillary service is not listed as competitive under Section 4928.03, Revised Code. In fact, although it is included within the list of components which could be declared competitive by this Commission, it has not been declared competitive. Section 4928.05(A), Revised Code. Since ancillary service meets neither test for being competitive, it is a noncompetitive retail electric service subject to the continuing regulation of the Commission. Section 4928.01(B), Revised Code.

It is clear to this Commission that most of these ancillary services require generating plant. Thus, we find that SB 3 contemplates that the EDU would provide ancillary service from generating plant at least until such time as the Commission found that the market conditions had developed sufficiently to allow a declaration of competitiveness. The Commission could then relinquish its regulatory obligations as to retail ancillary service if there is effective competition and available alternatives. Section 4928.04(A), Revised Code. However, the POLR responsibility cannot be left unregulated, as it must be available if the market option fails. Therefore, we find that the statutory scheme of SB 3 does contemplate that the EDU would provide services from generating plant to provide "ancillary service" as it relates to POLR service. Consequently, there is no conflict between the market-based standard that Section 4928.14(A), Revised Code, requires for post-MDP SSOs and the Companies' proposal for assuring recovery of the costs of the IGCC plant.

Distribution reliability is a core concern of the Commission and the EDU's POLR function is a distribution-related service. The EDU is the only entity that can fill the POLR obligation. Neither a CRES provider nor a regional transmission organization (RTO), such as PJM, can provide POLR service. RTOs have a role at the wholesale, not retail level, to facilitate market transactions and indirectly promote reliability; but RTOs do not have direct responsibility to the customers of a particular EDU. Even though a CRES provider does have a retail relationship and direct responsibility to customers, the EDU still stands as the backup POLR provider and that standby duty is distinct from the CRES function of fulfilling day-to-day or minute-to-minute power requirements. The EDU is the entity that operates the distribution wires and these wires must remain charged for connected customers to receive service; the EDU must have capacity available ancillary to the provision of the distribution service.

In addition, the Ohio Supreme Court has confirmed the Commission's authority to establish a mechanism that assures recovery of costs that the EDU incurs in its position as the POLR. *Constellation NewEnergy, supra*. As was the case in the rate stabilization surcharge addressed in *Constellation NewEnergy*, the costs of the IGCC plant are costs that the Companies will incur in their position as POLR; they are costs that will be incurred to assist them in meeting their POLR obligation to all consumers in their certified territory; they are costs the recovery of which can be assured through the recovery mechanism that the IGCC Cost Recovery and Adjustment Factors provide; and the existence of these costs makes it reasonable to recover them through a POLR cost recovery mechanism that applies to all customers. Therefore, the Companies' proposed mechanism for assuring recovery of the IGCC plant's costs is comparable to the Rate Stabilization Surcharge that the Ohio Supreme Court confirmed when it affirmed the Commission decision in *Constellation NewEnergy, supra*. It is also comparable to the POLR charges that the Commission approved in the Companies' RSP Order, *supra*, at 27, 29, and 37. We find that this Commission has the authority to approve a mechanism that grants recovery of the costs of the IGCC plant.

### Conclusion

The AEP Application lays out a regulatory mechanism by which it might recover the costs of a coal-fired electric generating facility, to address the long-term reliability and security of the energy supply for the POLR obligation. However, the current proposal has no detailed schedules, budgets, designs, feasibility studies or financing options. AEP stated that it is presently negotiating a "wrap" agreement with GE/Bechtel that would provide for construction of, and performance guarantees associated with, the IGCC unit in exchange for AEP's agreement to pay a firm price (Tr. III at 268-269; Tr. II at 45). The AEP Companies recognize that they will need to subsequently bring a rate-case-style application before the Commission in a subsequent phase of litigation (Tr. II at 52). At issue in that subsequent phase will be the appropriate level of cost recovery as well as the method of recovery (rate design) (*Id.*).

The Staff stated its continuing interest in the clean coal technology of the IGCC plant. Staff witness Wissman documented AEP's aging generation fleet and the upcoming need for base load capacity. Discussing the increasingly stringent environmental requirements, Ms. Wissman concluded that "there does appear to be a need to invest in new clean coal technology given the aforementioned circumstances" (Staff Ex. 1 at 3). Staff witness Lambeck also observed that IGCC technology is "very attractive for high sulfur bituminous coals" and concluded that "the value of IGCC may be its importance as a hedging strategy - a way to keep using the nation's most abundant energy resource while providing options to deal with long-term environmental demands" (Staff Ex. 2 at 3-4). Staff argued that the Companies should be permitted to recover the relatively small costs, compared to the risks of not exploring further the IGCC proposal (i.e., the Phase I costs).

The AEP Companies contend that the proposed IGCC plant will advance the commercialization of IGCC technology and greatly reduce the emissions of nitrogen oxide, sulfur dioxide, carbon dioxide, particulates and mercury. The IGCC facility will be designed to incorporate carbon sequestration equipment for future installation (Tr. 3 at 270-271). It was generally agreed among the expert witnesses in this case that the key advantage offered by the IGCC technology is its potential to sequester carbon as part of the gasification process, in order to virtually eliminate the carbon dioxide emissions normally associated with a coal plant. Although it cannot be stated for certain whether carbon sequestration regulations will be passed during the operational life of the plant (or what the content and timing of such requirements may be), no expert witness stated a belief that carbon sequestration regulations would not be passed during the life of the plant. In addition, there are other technologies which anticipate removal of carbon dioxide in addition to IGCC (Staff Ex. 3 at 3-4); this technology choice should be explored and subjected to a test of economic comparison in the future phase of this proceeding.

As was clear from the public testimony offered at the Meigs County hearing, the local residents support the project for the jobs that the proposed facility will bring to the area. In addition to the direct economic and environmental impact of building an IGCC unit in Ohio, there are also significant secondary or indirect benefits including generation of new tax revenue and promotion of advanced technology. Therefore, the Staff recommends that the Commission allow the AEP Companies to recover the costs of the first phase of its proposal (the pre-construction costs). The Commission agrees that such economic benefits and technological advances are beneficial for the environment, the state of Ohio, the region, and the nation. Further, the Commission finds that, with the recent volatility of natural gas prices, the environmental cost of pulverized coal generation facilities, the age of the generating facilities in Ohio, the likely implementation of carbon sequestration legislation, the lead time required to place a generation facility in operation and the life-cycle of generation facilities, the diversification of electric generation facilities is wise. The Commission is not opposed to the consideration of an IGCC facility, and we, therefore, believe it is appropriate to take the initial step of approving Phase I cost recovery mechanism of the application.

It should be noted that the Companies have proposed that IGCC-related revenues collected through the Phase I surcharge would be tracked so as to reduce the total of additional generation increases that the Companies may request under the RSP. Therefore, with the approval of Phase I cost recovery, the Companies will have the funds to investigate, analyze, evaluate, and develop a realistic plan to address the very real concerns presented in this case. The Companies propose that the Phase I surcharge be collected for 12 consecutive months. Given that this Order directs the Companies to file additional information and anticipates that additional evidentiary hearings will be necessary, the Phase II and Phase III surcharges shall not become effective 90 days after the filing of the application as proposed by the Companies. Further, the Commission notes that the Phase I surcharge is bypassable. Therefore, the arguments raised by certain intervenors in regard to the non-bypassable nature of the proposed Phase III surcharge and the affect on competition are not applicable. Accordingly, the Commission will not address such arguments at this time.

OPAE argues that because the Companies' application will increase residential rates, approving the application will exacerbate a difficult financial situation for low income and percentage of income payment plan (PIPP) customers. OPAE requests that the Companies be required to fund a program to reduce the energy burden on CSP's and Ohio Power's low income customers (OPAE Brief at 15-21). The Commission will consider this issue in the next phase of the proceeding.

The Commission concludes that AEP should economically justify its construction choices, its technology choices, its timing, its financing structure, and the various other matters that have been left open in the current application. The reasonable costs to

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develop that plan and supporting analyses should be recoverable from ratepayers as a proper cost of providing distribution service. In addition to the level of cost recovery and rate design issues, there are certain specific issues that the Commission believes should be addressed in the next phase of this proceeding which are enumerated below:

1. The details of how the output of the proposed facility would flow to the benefit of Ohio customers either through or despite any interconnection or pooling agreements.
2. The delineation of the means, including transportation, through which Ohio coal would be used in the project.
3. The multiple issues concerning the production and sale of by-products from an IGCC unit.
4. The Companies are aware of and have committed to pursue financing opportunities available under the Energy Policy Act of 2005. The Energy Policy Act of 2005 provides significant incentives for deployment of clean coal technologies, including IGCC. The Companies are directed to determine its eligibility for and develop a proposal to obtain federal, state and other funding and/or tax incentives available to construct, operate and maintain the proposed IGCC facility. The Companies shall include, as a part of the detailed information provided in the next phase of this proceeding, a list of the potential funding sources considered and an explanation of whether or not such sources of funding were pursued by the Companies.
5. The Companies' consideration and evaluation of investors in the proposed IGCC facility.

Adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service cannot be provided to consumers in Ohio unless there is a functioning distribution system. The Commission's decision in this case is about ensuring the long-term viability of the distribution system and adequate capacity for AEP's POLR obligation. The AEP Companies should be permitted to recover the reasonable costs of further developing and detailing their proposal, to be considered by this Commission in a future proceeding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) CSP and Ohio Power are electric distribution utilities as defined in Section 4928.01(A), Revised Code, and, therefore, the provider of last resort to electric consumers in their respective service areas.
- (2) On March 18, 2005, the Companies filed an application for approval of a cost recovery mechanism for a proposed IGCC electric generation facility. The Companies propose a three phase cost recovery process to commence prior to the construction of the IGCC facility and continue during the operating life of the IGCC facility.
- (3) Fourteen entities filed for intervention in this proceeding. All requests for intervention were granted.
- (4) Local public hearings were held in Hilliard, Canton, and Pomeroy, Ohio. The evidentiary hearing was held in Columbus, Ohio, August 8, 2005 through August 16, 2005.
- (5) OCC's request to overturn the Attorney Examiners' ruling and place certain confidential and proprietary information in the public record should be denied.
- (6) The confidential, proprietary information filed under seal in this proceeding shall remain under seal for 18 months from the date this order is issued.
- (7) The Commission is vested with the authority to oversee distribution ancillary services, pursuant to Section 4928.01(A), Revised Code, and vested with the obligation to ensure Ohio consumers with an adequate, reliable and reasonably priced electric service, pursuant to Section 4928.02(A), Revised Code.
- (8) The EDU is the POLR for consumers who either fail to choose an alternative supplier or return from another supplier.
- (9) The Commission has the authority to establish a charge for recovering the costs of fulfilling the POLR obligation.

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- (10) The AEP Companies should provide additional detailed information, as enumerated above, for the Commission to consider the Companies' proposed Phase II and Phase III costs recovery.

ORDER

It is, therefore,

ORDERED, That OCC's request to overturn the Attorney Examiners' ruling and place certain confidential and proprietary documents in the public record is denied. The unredacted documents filed under seal in this phase of the proceeding shall remain under seal for 18 months after the date this order is issued. It is, further,

ORDERED, That should the AEP Companies and/or GE/Bechtel want the unredacted documents to remain under seal after the 18 months have elapsed, the Companies or GE/Bechtel must file a motion for a protective order pursuant to Rule 4901-1-24(F), O.A.C., in this docket. It is, further,

ORDERED, That the Companies' request for a cost recovery mechanism is granted, as modified herein, as to Phase I preconstruction costs. It is, further,

ORDERED, That the Companies file, for Commission approval in this docket, tariffs and customer notices to recover costs associated with Phase I. It is, further,

ORDERED, That the Companies' request for a cost recovery mechanism as to the proposed Phase II and Phase III cost is deferred to the next proceeding. It is, further,

ORDERED, That the Companies submit in this case the additional detailed information set forth above for the Commission's consideration. It is, further,

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ORDERED, That a copy of this Opinion and Order be served upon the AEP Companies and their counsel, and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



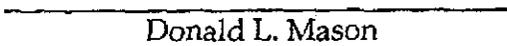
Alan R. Schriber, Chairman



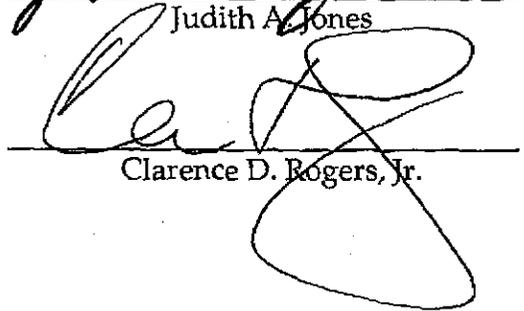
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Judith A. Jones



Donald L. Mason

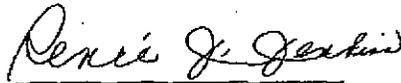


Clarence D. Rogers, Jr.

SDL/GNS:ct

Entered in the Journal

APR 10 2006



Renee J. Jenkins  
Secretary

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of )  
Columbus Southern Power Company ) Case No. 05-376-EL-UNC  
and Ohio Power Company for )  
Authority to Recover Costs )  
Associated with the Construction )  
and Ultimate Operation of an )  
Integrated Gasification Combined )  
Cycle Electric Generating Facility )

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**APPLICATION FOR REHEARING  
OF THE OHIO ENERGY GROUP**

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Pursuant to R.C. §4903.10, the Ohio Energy Group ("OEG") Petitions the Public Utilities Commission of Ohio ("the Commission") for rehearing of its April 10, 2006 Opinion and Order ("the Order") in the above-captioned matter.

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## I. INTRODUCTION

On March 18, 2005 Columbus Southern Power Company and Ohio Power Company (collectively "AEP" or "the Company") filed their Application in the above-captioned matter seeking approval of a series of surcharges to recover the costs associated with the construction and operation of a 629 MW integrated gasification combined cycle ("IGCC") electric generating facility estimated to cost \$1.12 billion.

Specifically, the Company seeks to levy the proposed surcharges in three phases, summarized as follows:

Phase I – Recovery of pre-construction costs through a twelve-month bypassable surcharge.

Phase II – Recovery of construction period carrying costs through a bypassable surcharge.

Phase III – Recovery through distribution rates of a non-bypassable IGCC Adjustment Factor, defined as the per-kWh difference in cost between IGCC Recovery Factor and standard offer service offer, where the IGCC Recovery Factor includes all costs associated with a "single asset utility."

On April 10, 2006, the Commission issued its Order approving the recovery of Phase I costs of the IGCC to be paid for by AEP's distribution customers and approving the legal framework for Phase II and Phase III recovery. OEG petitions the Commission for rehearing of the April 10, 2006 Order on the grounds that the Order violates Ohio law and is unreasonable.

## II. ARGUMENT

### 1. The Commission Erred In Holding That AEP's Application Does Not Violate §4928.14 Because The Charge For The Entire 629 MW Power Plant Is Related Exclusively To Providing Distribution Ancillary Services.

On page 17 of its Order the Commission rejected the argument put forth by several intervenors that AEP's Application violates R.C. §4928.14 which requires AEP to provide a market-based standard service offer ("MBSSO"). The Commission held that the Application does provide for a MBSSO that meets the "market-based" standard contained in R.C. §4928.14 and that the IGCC cost recovery mechanisms proposed by AEP are independent of its standard service offer. The Commission states that the intervenors "*mischaracterize the Companies' application,*" because the "*application is not proposing that the Commission use cost-of-service ratemaking to establish pricing for the SSO that Section 4928.14, Revised Code, requires at the end of the MDP; the Companies' Application has no impact on the determination of AEP's market-based SSO.*" (Order at 17.)

The Commission states that the IGCC cost-recovery mechanisms are not a component of its MBSSO, but are included in non-competitive "*ancillary services*" that AEP must provide as part of its duty as an electric distribution utility ("EDU"). The Commission states that:

*"While Section 4928.03, Revised Code, states that retail electric generation service is competitive and, therefore, not subject to Commission regulation, this Application is not about regulating retail electric generation service, but about providing the distribution ancillary services."* (Order at 17)

The Commission categorizes the IGCC costs that are the subject of AEP's Application as a part of "*ancillary services*" because ancillary services are not listed as "*competitive services*" in R.C. §4928.03 and are thus subject to Commission regulation. The Commission holds that "*SB3 contemplates that the EDU would provide ancillary service from generating plant at least until such*

*time as the Commission found that the market conditions had developed sufficiently to allow a declaration of competitiveness.” (Order at 18).*

That portion of the Commission’s Order which holds that none of the 629 MW IGCC power plant is generation, but instead is entirely distribution ancillary services, has no evidentiary support in the record and contradicts experience, logic and common sense.

One hundred percent of a 629 MW power plant, whether an IGCC or some other type of generating facility, clearly does not meet the definition of distribution ancillary services. Distribution ancillary services are defined in R.C. §4928.01(A)(1) as:

*“any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.”*

Ancillary services are defined as transmission or distribution functions that are supported by generation equipment. The 629 MW power plant at issue here is almost pure generation. Although a very, very small portion of the generation facility may be used to provide distribution ancillary services, the vast majority of a facility of the size planned will be engaged in the task of generating electric power, which is a competitive service according to R.C. §4928.03 and is not subject to Commission regulation.

Despite the Commission’s determination on page 17 of the Order that *“this Application is not about regulating retail electric generation service, but about providing the distribution ancillary*

services,” elsewhere in the Order the Commission refers to AEP’s Application as a request for the construction of a generation facility, with no mention of the power plant’s ostensible purpose of providing ancillary services.

On page 3 of the Order the Commission states that AEP’s Application is a request for “approval of [AEP’s] proposed cost recovery mechanism to provide for the design, construction and operation of a 629 [net] megawatt (MW) electric generation facility in Meigs County, Ohio.” The Commission notes that AEP has concluded, “that the facility is necessary to allow the Companies to provide a firm supply of generation service to the Companies’ Ohio customers. The Companies contend that they must be ready and able to provide firm, generation service to customers who have not selected a competitive retail electric service (CRES) provider and any customer who returns to the AEP Companies’ service as a result of the CRES provider’s default or at the customer’s election.” (emphasis added)

The Commission describes AEP’s request as a proposal to construct a generating facility in order to provide generation service in one section of its Order, and then denies that the Application has anything to do with generation in the next. AEP’s Application is not a request for the construction of a \$1.12 billion power plant to provide ancillary distribution services. It is a request to build a 629 MW electric generation facility, which is a competitive service per Senate Bill 3. No amount of verbal gymnastics by the Commission can change the fact that a major base load electric generating facility is principally a plant to provide base load generation.

The record in this case contains no evidence as to how much, if any, of the IGCC plant output is related to distribution ancillary services. Therefore, there is not substantial evidence to support the decision that 100% of the IGCC output is related to distribution ancillary services.

The Commission cannot subvert the statutory mandate that generation is a competitive service by redefining a generating unit as a distribution ancillary service in order to reach the Commission's desired result. The Supreme Court of Ohio in Ohio Consumers' Counsel v. Public Utilities Commission of Ohio, 2006-Ohio-2110 (2006) recently stated that "*although the PUCO faces a market that has not fully developed as envisioned by the General Assembly, however, this does not empower the PUCO to create remedies outside the parameters of the law.*" The Commission must apply Senate Bill 3, and the plain language of Senate Bill 3 states that generation services is competitive and cannot be regulated by the Commission. (R.C. §4928.03)

2. **Assuming Arguendo That Some Part Of The IGCC Is For Distribution Ancillary Services, The Phase I Surcharge Violates R.C. §4928.15(B).**

As explained above, on page 17 of the Order the Commission states that AEP's application "*is not about regulating retail electric generation service, but about providing the distribution ancillary services.*" The Phase I surcharge was approved on that basis. However, R.C. §4928.15(B) does not allow an electric utility to charge for ancillary services unless it first files a distribution rate case establishing the rate for such service. R.C. §4928.15(B) states:

*"Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code and except as preempted by federal law, no electric utility shall supply the transmission service or ancillary service component of noncompetitive retail electric service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service component that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the commission under section 4909.18 (4909.18 requires a utility to file a rate case in order to change or establish a rate for a non-competitive service) of the Revised Code."* (emphasis added)

R.C. §4928.15(B) requires a utility to make a filing pursuant to R.C. §4909.18 (a distribution rate case) in order to supply the ancillary service component of noncompetitive retail electric service.

AEP has not filed a rate case under 4909.18 for the recovery of the costs of providing ancillary services and the Commission's Order approves AEP's recovery of the Phase I costs, which according to the Commission is necessary to provide distribution ancillary services, without the filing of a distribution rate case. The Commission's Order violates this requirement contained in R.C. §4928.15(B).

3. **The Commission's Order Violates R.C. §4928.14(A) Because It Results In Standard Service Offer Pricing Which Is Above Market.**

Several intervenors, including OEG, argued in their briefs that AEP's Application violates R.C. §4928.14(A), which requires that after the MDP an electric distribution utility shall provide a "market-based standard service offer of all competitive retail electric services." OEG argued that AEP's proposal to charge customers a MBSSO consisting of a market rate plus an IGCC adder violates R.C. §4928.14(A). This is market plus pricing.

The Commission rejected this argument by explaining that AEP's proposal does not require a MBSSO that is not market-based. The Commission explained that the IGCC surcharges are separate from the MBSSO and therefore do not violate R.C. §4928.14. The Commission states:

*"We believe that the arguments that the AEP Companies' proposal violates Section 4928.14, Revised Code, are not on point because they mischaracterize the Companies' application. The application is not proposing that the Commission use cost-of-service ratemaking to establish pricing for the SSO that Section 4928.14, Revised Code, requires at the end of the MDP; the Companies' Application has no impact on the determination of AEP's market-based SSO. The Commission will establish AEP's SSO in accordance with the market-based standard of Section 4928.14, Revised Code, independent from the cost recovery mechanism that the Companies have proposed for the IGCC plant. The proposed IGCC Recovery Factor and the IGCC Adjustment Factor are for the stated purpose of recovery of the costs of the IGCC plant. The issue is where the Commission's jurisdiction to grant cost recovery for the plant lies."*

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In one breathe the Commission's states that the intervenors mischaracterize AEP's Application as a request for an illegal MBSSO that consists of a market-based rate plus an IGCC adder, and in the next breath the Commission describes AEP's request as a legal MBSSO, plus an IGCC adder. This is a distinction without a difference. As an EDU, AEP is required to provide a MBSSO that is entirely market-based without added components to reflect the above-market cost of the IGCC. AEP cannot require its distribution customers to pay an adder in addition to the market-based SSO in order to recover the above-market costs of the utility's generating unit, per R.C. §4928.14. Whether the Commission categorizes that adder as separate from the MBSSO or a part of the MBSSO does not change the reality that the AEP's proposal requires its customers to pay a MBSSO, plus the above market cost of the IGCC. R.C. §4928.14(A) states:

*"After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer<sup>1</sup> of all competitive retail electric services necessary to maintain essential electric service to consumers..."* (Emphasis added)

The Ohio Revised Code does not allow for a utility to charge its standard service offer customers for the above market (or below market) cost of a new electric generating facility. AEP must provide "a market-based" standard service offer, not a standard service offer consisting of a market-based rate plus and a separate surcharge that recovers the cost of AEP's most expensive generating unit.

4. **The Order Violates R.C. §4928.38 Because It Results In A Whole Series Of Post-MDP Transition Charges.**

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<sup>1</sup> OAC 4901:1-35-03 defines a "standard service offer" as a "market-based variable-rate firm generation service..."

The Commission failed to address OEG's argument that AEP's proposal violates the statutory requirement that transition charges must terminate with the expiration of the MDP on January 1, 2006. In its initial Brief OEG argued that AEP's proposal requires electric choice customers to pay AEP the above-market portion of IGCC generation service, even though these customers would be receiving all of their power from third party CRES suppliers after the expiration of the MDP. R.C. §4928.38 specifically prohibits transition costs after the MDP and requires the Company to be "*fully on its own in the competitive market*" after the MDP. R.C. §4928.38 states:

*"The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The Commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except expressly authorized in Sections 4928.31 to 4928.40 of the Revised Code."*

The Legislature could not have been any clearer when it enacted the passage that an electric utility "*shall be fully on its own in the competitive market,*" after the termination of the MDP. The Commission's approval of Phase I, Phase II and Phase III surcharges ignores that legislative requirement.

Assuming that a distribution utility is authorized to own generation after the end of the MDP, the price that must be charged by the utility for such generation is the market price. Forcing the ratepayers of a distribution utility to pay an above market price for utility owned generation is *per se* anti-competitive and creates undue market power for AEP. R.C. §4928.01(18) defines "market power" as the "*ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.*" Of course, the whole intent of AEP's application is to have it's IGCC power plant be subsidized by ratepayers since the plant is projected to produce electricity at an above-market price. Ratepayers will suffer doubly from this process. First, through the payment of

the above-market subsidy to AEP. Second, since other generators will receive no such subsidy, they will be driven from the market thus reducing the available supply of power.

### III. CONCLUSION

If Ohio consumers are destined to face the high costs and problems associated with market pricing, then the Commission should be looking for ways to mitigate the negative economic impact. This order exacerbates the negative consequences of market pricing and is bad for jobs, bad for the economy and against the public interest.

The Commission's April 10, 2006 Order improperly holds that AEP's application relates exclusively to distribution ancillary services. This Order also violates R.C. §4828.14(A), 4928.15(B), and 4928.38. OEG petitions the Commission for rehearing on these issues.

Respectfully submitted,



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May 8, 2006

## Chapter 4901:1-35

# Electronic Distribution Utility (EDU) Standard Service Offer

Promulgated pursuant to RC 111.15

4901:1-35-01	Definitions
4901:1-35-02	Purpose and scope
4901:1-35-03	Filing and contents of applications
4901:1-35-04	Service of application
4901:1-35-05	Technical conference and filing of comments
4901:1-35-06	Hearings

### 4901:1-35-01 Definitions

(A) "Application" means an application for standard service offer and competitive bidding process pursuant to this chapter.

(B) "Commission" means the public utilities commission of Ohio.

(C) "Competitive retail electric service" has the meaning set forth in division (A)(4) of section 4928.01 of the Revised Code.

(D) "EDU" means an electric distribution utility as defined in division (A)(6) of section 4928.01 of the Revised Code.

(E) "ETP" means an electric transition plan filed by an EDU pursuant to Chapter 4928. of the Revised Code and approved by the commission.

(F) "Market development period" has the meaning set forth in division (A)(17) of section 4928.01 of the Revised Code.

(G) "Person" includes an individual, corporation, company, copartnership, association, or joint venture.

HISTORY: 2003-04 OMR 2966 (E), eff. 5-27-04

RC 119.032 rule review date(s): 9-30-08

### CROSS REFERENCES

RC 4928.06, Effectuation of state policy; rules; monitoring and evaluation of service; reports; determination of effective competition; authority of commission

RC 4928.14, Market-based standard service offer; option to purchase electric service

### 4901:1-35-02 Purpose and scope

(A) Pursuant to division (A) of section 4928.14 of the Revised Code, after its market development period, each EDU in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Pursuant to division (B) of section 4928.14 of the

Revised Code, each EDU also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process. The purpose of this chapter is to establish rules for the form and process under which an EDU shall file an application for standard service offer and competitive bidding process and the commission's review of that application.

(B) The commission may waive any requirement of Chapter 4901:1-35 of the Administrative Code for good cause shown or upon its own motion.

(C) Notwithstanding the requirements of rule 4901:1-35-03 of the Administrative Code and the attached appendices A and B of that rule, the EDU may propose a plan for a standard service offer and/or competitive bidding process that varies from these rules where there is substantial support from a number of interested stakeholders.

HISTORY: 2003-04 OMR 2966 (E), eff. 5-27-04

RC 119.032 rule review date(s): 9-30-08

### CROSS REFERENCES

RC 4928.06, Effectuation of state policy; rules; monitoring and evaluation of service; reports; determination of effective competition; authority of commission

RC 4928.14, Market-based standard service offer; option to purchase electric service

### 4901:1-35-03 Filing and contents of applications

(A) Each EDU in this state shall file an application for standard service offer and competitive bidding process by July 1, 2004 for all classes of customers where the market development period terminates at the end of year 2005. For an EDU which has a market development period terminating for certain customer classes earlier than the end of year 2005, an application for standard service offer under appendix A to this rule shall be filed at least six months prior to the end of that market development period. Such applications shall be filed with the commission in the form of an application for approval of a "standard service offer," a "competitive bidding process," or an application for approval of a "standard service offer and competitive bidding process" (xx-xx-EL-ATA).

(B) Applications for approval of a "standard service offer and competitive bidding process" shall include:

(1) A market-based variable rate. The market-based variable rate shall be consistent with the requirements of appendix A of this rule.

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(2) A market-based fixed rate. The market-based fixed rate shall be consistent with the requirements of appendix B of this rule.

(C) Applications for approval of only "standard service offer" shall include a market-based variable rate. The market-based variable rate shall be consistent with the requirements of appendix A of this rule. The filing of such an application does not relieve the EDU from filing an application pursuant to appendix B of this rule, by July 1, 2004.

(D) A complete set of work papers must be filed with the application. Work papers must include, but are not limited to, any and all documents prepared by the EDU for the application and a narrative or other support of assumptions made of working paper schedule amounts. Work papers shall be marked, organized, and indexed according to schedules to which they relate. Data contained in the work papers should be footnoted so as to identify the source document used.

(E) All schedules, tariff sheets, and work papers included in the application must be available in spreadsheet, word processing, or an electronic form compatible with personal computers. The electronic form does not have to be filed with the application but must be made available within two business days to any intervening party that requests it.

**HISTORY:** 2003-04 OMR 2966 (E), eff. 5-27-04

RC 119.032 rule review date(s): 9-30-08

Note: Appendices A and B, eff. 5-27-04, are referenced only. Appendices are generally available on Westlaw and/or CD-ROM. Subscribers who wish to obtain a copy may request one from the publisher, the Legislative Service Commission, or the issuing agency.

#### CROSS REFERENCES

RC 4928.06, Effectuation of state policy; rules; monitoring and evaluation of service; reports; determination of effective competition; authority of commission

RC 4928.14, Market-based standard service offer; option to purchase electric service

#### 4901:1-35-04 Service of application

(A) Concurrent with the filing of an application and the filing of any waiver requests, the EDU shall provide notice of proposed filings to each party in its ETP case and all competitive retail electric service providers. At a minimum, that notice shall state that a copy of the application and any waiver requests is available through the company's and commission's web sites, available at the company's main office, available at the commission's offices, and any other sites at which the company will maintain a copy of the application and any waiver requests.

(B) The EDU shall provide copies of the application upon request, without cost, and within a reasonable period of time.

**HISTORY:** 2003-04 OMR 2967 (E), eff. 5-27-04

RC 119.032 rule review date(s): 9-30-08

#### CROSS REFERENCES

RC 4928.06, Effectuation of state policy; rules; monitoring and evaluation of service; reports; determination of effective competition; authority of commission

RC 4928.14, Market-based standard service offer; option to purchase electric service

#### 4901:1-35-05 Technical conference and filing of comments

(A) Upon filing of an application, the commission, legal director, deputy legal director, or an attorney examiner will schedule a technical conference. The purpose of the technical conference is to allow interested persons an opportunity to better understand the EDU's application. The EDU will have the necessary personnel in attendance at this conference so as to explain, among other things, the structure of the filing, the work papers, the data sources, and the manner in which methodologies were devised. The conference will be held at the commission offices, unless the commission, legal director, deputy legal director, or an attorney examiner determines otherwise.

(B) Within twenty days after the technical conference, any person may file comments and propose alternative methodologies to the EDU's application.

(C) Within thirty days after the technical conference, the commission's staff may file comments and propose alternative methodologies to the EDU's application.

(D) Within fifty days after the technical conference, any person may file a response to the comments and alternative proposals.

**HISTORY:** 2003-04 OMR 2967 (E), eff. 5-27-04

RC 119.032 rule review date(s): 9-30-08

#### CROSS REFERENCES

RC 4928.06, Effectuation of state policy; rules; monitoring and evaluation of service; reports; determination of effective competition; authority of commission

RC 4928.14, Market-based standard service offer; option to purchase electric service

#### 4901:1-35-06 Hearings

(A) If it appears to the commission that the proposals in the application may be unjust and unreasonable, the commission shall set the matter for hearing and shall publish notice of the hearing in accordance with Section 4909.18 of the Revised Code. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the EDU.

(B) Interested persons wishing to participate in the hearing shall file a motion to intervene no later than thirty days after the issuance of the entry scheduling the hearing, unless ordered otherwise by the commission, legal director, deputy legal director, or attorney examiner. This rule does not pro-

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utilities commission should be reviewed regularly by the commission to aid full and reasonable discovery by all parties. Without limiting the commission's discretion the Rules of Civil Procedure should be used wherever practicable.

**HISTORY:** 139 v S 378. Eff 1-11-83.

The effective date is set by section 3 of SB 378.

#### Cross-References to Related Sections

Commission to provide notice and opportunity for hearing; corrective action orders; forfeitures, RC § 4905.95.

#### Ohio Administrative Code

Discovery requests. OAC 4901-1-19 to 4901-1-23.

Scope of and time periods for discovery. OAC 4901-1-16 to 4901-1-18.

#### Research Aids

Discovery:

O-Jur3d: Pub Util § 30

C.J.S.: Pub Util § 86

### [§ 4903.08.3] § 4903.083 Public hearings on rate increases; publication of notice.

For all cases involving applications for an increase in rates pursuant to section 4909.18 of the Revised Code the public utilities commission shall hold public hearings in each municipal corporation in the affected service area having a population in excess of one hundred thousand persons, provided that, at least one public hearing shall be held in each affected service area. At least one such hearing shall be held after 5:00 p.m. Notice of such hearing shall be published by the public utilities commission once each week for two consecutive weeks in a newspaper of general circulation in the service area. Said notice shall state prominently the total amount of the revenue increase requested in the application for the increase and shall list a brief summary of the then known major issues in contention as set forth in the respective parties' and intervenor's objections to the staff report filed pursuant to section 4909.19 of the Revised Code. The public utilities commission shall determine a uniform format for the content of all notices required under this section. Defects in the content of said notice shall not affect the legality of notices published under this section provided the public utilities commission meets the substantial compliance provision of section 4905.09 of the Revised Code.

**HISTORY:** 139 v S 378. Eff 1-11-83.

The effective date is set by section 3 of SB 378.

#### Ohio Administrative Code

Public utilities commission: utilities—

Alternative rate plan: hearings. OAC 4901:1-19-08.

#### Research Aids

Public hearings on increases in utility rates:

O-Jur3d: Pub Util § 26

### § 4903.09 Written opinions filed by commission in all contested cases.

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.

**HISTORY:** GC § 614-46a; 110 v 451; Bureau of Code Revision, 10-1-53; 125 v 613. Eff 10-26-53.

#### Cross-References to Related Sections

Public utilities commission to provide notice and opportunity for hearing concerning natural gas pipe line safety code violations, RC § 4905.95.

#### Ohio Administrative Code

Expert testimony. OAC 4901-1-29.

Stipulations. OAC 4901-1-30.

#### Research Aids

Written opinions:

O-Jur3d: Pub Util § 36

#### Law Review

Public utility legislation. William H. Schneider. 14 OSLJ 377 (1953).

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1. (1999) Where the commission fails to meet the requirements of RC § 4903.09 by not disclosing the sources of its information to those who most require it, thereby preventing a complaining party from demonstrating prejudice, the matter must be remanded for development of an appropriate record, to leave open a potential demonstration of prejudice by a party based on that record in a subsequent appeal: *Tongren v. Pub. Util. Comm.*, 85 OS3d 87, 706 NE2d 1255.

2. (1988) The purpose of RC § 4903.09 is to enable the supreme court to review the action of the public utilities commission without reading the voluminous records in its cases, and therefore where PUCO's order deciding that intrastate access rates should be capped at present levels or reduced expressly considers the original access charge proceedings, all interim orders, proposals, and comments, the fact that interexchange carriers have consistently benefited by steadily decreasing access charges, and the specific proposals, comments and reply comments submitted in the case, these factors adequately specify the commission's basis for ruling and give the supreme court more than adequate notice of its reasoning, satisfying the requirements of RC § 4903.09: *MCI Corp. v. Pub. Util. Comm.*, 38 OS3d 266, 527 NE2d 777.

3. (1987) To meet the requirements of RC § 4903.09, the commission's order must show, in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed in reaching the conclusion: *MCI Telecommunications Corp. v. P.U.C.*, 32 OS3d 306, 513 NE2d 337.

4. (1984) The commission's opinion and order fully complied with RC § 4903.09 by setting forth in detail the commission's position regarding the utility's retention of excess tax

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### § 4909.12 Admissibility of findings in evidence.

The findings of the public utilities commission made and filed under section 4909.11 of the Revised Code, when properly certified under the seal of the commission, are admissible in evidence in any action, proceeding, or hearing before the commission or any court, in which the commission, the state or any officer, department, or institution thereof, or any county, municipal corporation, or other body politic, and the public utility or railroad affected may be interested, whether arising under Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code or otherwise. Such findings, when so introduced, shall be evidence of the facts stated in them, as of the date stated in them under conditions then existing.

**HISTORY:** CC § 499-17; 103 v 804, § 30; Bureau of Code Revision. Eff 10-1-53.

#### Cross-References to Related Sections

Revision and correction of valuations, RC § 4909.07.

#### Research Aids

Admissibility of commission's findings in evidence:

**O-Jur3d:** Pub Util § 115

**Am-Jur2d:** Pub Util § 289

### § 4909.13 Additional hearings.

The public utilities commission may cause further hearings and investigations to be had for the purpose of making revaluations or ascertaining the value of any betterments, improvements, additions, or extensions made by any public utility or railroad subsequent to any prior hearing or investigation, and may examine into all matters which may change, modify, or affect any finding of fact previously made, and may at such time make findings of fact supplementary to those previously made. Such hearings shall be had upon the same notice and be conducted in the same manner, and the findings so made shall have the same effect, as the original notice, hearing, and findings. Such findings made at supplemental hearings or investigations shall be considered in connection with and as a part of the original findings except insofar as such supplemental findings change or modify the findings made at the original hearing or investigation.

**HISTORY:** CC § 499-18; 103 v 804, § 31; Bureau of Code Revision. Eff 10-1-53.

#### Cross-References to Related Sections

Revision and correction of valuations, RC § 4909.07.

#### Research Aids

Further valuation hearings and investigations:

**O-Jur3d:** Pub Util § 114

#### Law Review

Some phases of valuations by the Ohio public utilities commission. Irwin S. Rosenbaum. 6 CinLRev 22, 29 (1932).

#### CASE NOTES AND OAG

1. (1918) If the public utilities commission believes that a valuation is incorrect, it should revalue the property of the

public utility and base rates on such corrected valuation. It is error to base rates on the assumption that the valuation is incorrect without making a finding as to the correct valuation: *Kent Water & Light Co. v. Public Util. Comm.*, 97 OS 321, 119 NE 731.

### § 4909.14 Wrongful valuation.

No member of the public utilities commission shall willfully overvalue the property of a public utility for the purpose of enabling such public utility to exact a higher rate for service than could lawfully be exacted, or willfully undervalue such property for the purpose of preventing such public utility from charging a lawful rate for such service.

**HISTORY:** CC § 614-79; 102 v 549(574), § 83; Bureau of Code Revision. Eff 10-1-53.

#### Cross-References to Related Sections

Penalty, RC § 4909.99.

#### Research Aids

Wrongful valuation prohibited:

**O-Jur3d:** Pub Util § 196

### § 4909.15 Fixation of reasonable rate.

*Note:* This version, SB 143 (144 v —), is the version of RC § 4909.15 as it reads before the amendments made by SB 3 (148 v —), effective 1-1-2001 and 1-1-2002, and HB 384 (148 v —), effective 11-24-99.

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (J) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital, as determined by the public utilities commission.

The commission may, in its discretion, include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In the case of a construction project involving the installation, renovation, or maintenance of pollution control equipment, the commission may include the project in the valuation as construction work in progress as of the date that the particular construction project is at least seventy-five per cent complete.

As used in this division, "pollution control equipment" means any construction project undertaken, in whole or in part, to reduce sulfur or nitrous oxide emissions to levels established by federal, state, or local statute, law, ordinance, regulation, or order. The commission shall determine by rule what projects qualify as pollution control equipment.

In determining the percentage completion of a particular construction project, the commission shall con-

sider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress other than for construction projects involving the installation, renovation, or maintenance of pollution control equipment shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

The allowance for construction work in progress for construction projects involving the installation, renovation, or maintenance of pollution control equipment shall be the dollar value of the project and shall not exceed, together with any other allowance for construction work in progress granted under this division, twenty per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (J) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

In the case of a nuclear generating facility that has not been granted a full construction permit by the nuclear regulatory commission on or before April 10, 1985, the utility, within six months after the granting of such permit, shall submit to the public utilities commission a projected in service date for such facility. Thereafter, no allowance for construction work in progress as it relates to such nuclear generating facility shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, or for a period commencing on the date the initial rates reflecting such allowance become effective and ending on the projected in service date previously submitted to the commission, whichever period expires first.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to

a particular construction project shall be tolled if, and to the extent, a delay in the in service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes in service, the commission shall, from the date of expiration, exclude the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission shall immediately exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, which resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided herein exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Any depreciation expense of a compliance facility shall be calculated under division (A)(4) of this section on the basis of the useful service life of the compliance facility or the remaining useful life of the electric generating unit in connection with which the compliance facility was acquired, constructed, or installed, whichever is the shorter time. Division (A)(4)(a) of this section applies only to depreciation expense of a compliance facility contained in the environmental compliance plan of the electric light company approved under Chapter 4913. of the Revised Code or in its compliance strategy examined under section 4909.158 [4909.15.8] of the Revised Code.

(b) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method

of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(c) The amount of any tax credits granted to an electric light company under section 5727.391 [5727.39.1] of the Revised Code shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(c) of this section, "compliance facility" has the same meaning as in section 5727.391 [5727.39.1] of the Revised Code.

(B) The public utilities commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost of rendering the public utility service for the test period under division (A)(4) of this section.

(C) The test period, unless otherwise ordered by the public utilities commission, shall be the twelve-month period beginning six months prior to the date the application is filed and ending six months subsequent to that date. In no event shall the test period end more than nine months subsequent to the date the application is filed. The revenues and expenses of the utility shall be determined during the test period. The date certain shall be not later than the date of filing.

(D) When the public utilities commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property which is included in the valuation report under divisions (F) and (G) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(E) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

**HISTORY:** CC § 614-23; 102 v 549, § 25; Bureau of Code Revision, 10-1-53; 136 v S 94 (Eff 9-1-76); 137 v H 230 (Eff 10-9-77); 138 v H 657 (Eff 9-24-79); 138 v H 736 (Eff 10-16-80); 139 v S 378 (Eff 1-11-83); 140 v H 250 (Eff 7-30-84); 140 v H 655 (Eff 6-8-84); 140 v S 27 (Eff 4-10-85); 141 v H 750 (Eff 4-5-86); 144 v S 143. Eff 7-10-91.

### § 4909.15 Fixation of reasonable rate.

*Note:* See preceding version, SB 143 (144 v —), as it reads before the amendments made by SB 3 (148 v —), effective 1-1-2001 and 1-1-2002 and HB 384 (148 v —), effective 11-24-99.

(A) The public utilities commission, when fixing and de-

termining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (J) of section 4909.05 of the Revised Code, and a reasonable allowance for materials and supplies and cash working capital, as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (J) of section 4909.05 of the Revised Code.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valua-

tion pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period less the total of any interest on cash or credit refunds paid, pursuant to section 4909.42 of the Revised Code, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under section 5727.391 [5727.39.1]† of the Revised Code for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under section 4905.30 of the Revised Code. As used in division (A)(4)(c) of this section, †† "compliance facility" has the same meaning as in section 5727.391 [5727.39.1]† of the Revised Code.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost of rendering the public utility service for the test period under division (A)(4) of this section.

(C) The test period, unless otherwise ordered by the commission, shall be the twelve-month period beginning six months prior to the date the application is filed and ending six months subsequent to that date. In no event shall the test period end more than nine months subsequent to the date the application is filed. The revenues and expenses of the utility shall be determined during the test period. The date certain shall be not later than the date of filing.

(D) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and

(B) of this section, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (F) and (G) of section 4909.05 of the Revised Code, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(E) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

**HISTORY:** GC § 614-23; 102 v 549, § 25; Bureau of Code Revision, 10-1-53; 136 v S 94 (Eff 9-1-76); 137 v H 230 (Eff 10-9-77); 138 v H 657 (Eff 9-24-79); 138 v H 736 (Eff 10-16-80); 139 v S 378 (Eff 1-11-83); 140 v H 250 (Eff 7-30-84); 140 v H 655 (Eff 6-8-84); 140 v S 27 (Eff 4-10-85); 141 v H 750 (Eff 4-5-86); 144 v S 143 (Eff 7-10-91); 148 v S 3 (Eff 1-1-2001; 1-1-2002†); 148 v H 384. Eff 11-24-99.

† The provisions of § 5 of SB 3 (148 v —) read as follows:

SECTION 5. Sections \* \* \* 4909.15 \* \* \* of the Revised Code, as amended by this act, shall take effect on January 1, 2001, but if the Public Utilities Commission issues an order under division (C) of section 4928.01 [see division (C) of RC § 4928.01 set out in note following RC § 4909.15.7] of the Revised Code, as enacted by this act, the amendments to such sections shall

be applied accordingly. In addition, the amendment of division (A)(4)(b) of section 4909.15 of the Revised Code, as amended by this act, shall not be applied until January 1, 2002. [The replacement of RC § 5727.39.1 by RC § 5733.39 does not become effective until 1-1-2002, as amended by SB 3 (148 v —). The new wording "for Ohio coal burned prior to January 1, 2000 . . ." is enacted by HB 384 (148 v —), effective 11-24-99.]

†† Division (A)(4)(c) was changed to division (A)(4)(b) in SB 3 (148 v —), to become effective 1-1-2002. See additional information in provisions of § 5 of SB 3, following the history for RC § 4909.15.

The provisions of § 2 of HB 384 (148 v —) read in part as follows:

SECTION . . . and section 4909.15 of the Revised Code as amended by Am. Sub. S.B. 3 of the 123rd General Assembly are hereby repealed.

The provisions of §§ 4, 5, 6 of HB 384 (148 v —) read as follows:

SECTION 4. (A) The amendment by this act of section 5727.39.1 of the Revised Code increasing the per-ton credit for burning Ohio coal applies to Ohio coal burned on or after January 1, 2000, and on or before April 30, 2001. The tax credit claimed for the twelve-month period ending April 30, 2000, shall be adjusted so that the credit equals one dollar per ton for Ohio coal burned on or before December 31, 1999, of that twelve-month period, and three dollars per ton for Ohio coal burned on or after January 1, 2000.

(B) The amendment of section 5727.39.1 of the Revised Code and the repeal of the existing version of that section by this act does not affect the delayed repeal of that section by Section 8 of Am. Sub. S.B. 3 of the 123rd General Assembly. Section 5727.39.1 of the Revised Code, as amended by this act, shall be repealed as provided in Section 8 of Am. Sub. S.B. 3 of the 123rd General Assembly.

SECTION 5. The repeal and reenactment by this act of section 5733.39 of the Revised Code takes effect January 1, 2002, and applies to Ohio coal burned after April 30, 2001, but before January 1, 2005, notwithstanding Section 12 of Am. Sub. S.B. 3 of the 123rd General Assembly.

SECTION 6. The amendment by this act of section 4909.15 of the Revised Code, as amended by Am. Sub. S.B. 3 of the 123rd General Assembly, is contingent on Am. Sub. S.B. 3 of the 123rd General Assembly becoming law.

**Cross-References to Related Sections**

- Additional jurisdiction and powers of commission concerning utility or affiliate, RC § 4928.18.
- Alternative method of establishing rates and charges, RC § 4927.04.
- Alternative rate plan defined, RC § 4929.01.
- Approval of alternate rate plan, RC § 4929.05.
- Ascertainment of valuation, RC § 4909.09.
- Change in risk arising from environmental compliance plan, RC § 4909.19.3.
- Commission to determine rates and charges; recurring rates; credit to recover nonrecurring charges, RC § 4931.47.
- Consideration of prudence of strategy for compliance with acid rain control requirements, RC § 4909.15.8.
- Energy conservation programs, RC § 4905.70.
- Findings as to rate; valuation of property, RC § 4909.39.
- Procedure after approval of exemption or alternate plan, reduction of rate or charge, RC § 4929.07.
- Rates for telephone network portion of uniform emergency telephone number system, RC § 4931.47.
- Regulation of public utilities restructured, RC § 4935.04.

force and prevent the breach of contracts between electric company and city relating to electric rates: *Defiance v. Toledo Edison Co.*, 47 OApp 100, 190 NE 781, 40 OLR 181.

21. (1933) An ordinance relating to the rate for electric energy, accepted by electric company, constituted a binding contract between the company and the city: *Defiance v. Toledo Edison Co.*, 47 OApp 100, 190 NE 781, 40 OLR 181.

22. (1933) Where action of gas company, in making changes as to time of reading meters, was in violation of statute, injunction would lie without proof of damage to enjoin collection of charges in excess of rates provided by ordinance, accepted by company: *Defiance v. Toledo Edison Co.*, 47 OApp 100, 190 NE 781, 40 OLR 181.

23. (1933) Gas company was not authorized to make minimum charges for any period other than period expressly provided for in rate ordinance and schedule of rates: *Defiance v. Toledo Edison Co.*, 47 OApp 100, 190 NE 781, 40 OLR 181.

24. (1933) Where gas company's change in rate, made without order of public utilities commission, was wholly illegal, court had jurisdiction to enjoin its enforcement, but such injunction would not prevent company from applying to commission for order to make change: *Defiance v. Toledo Edison Co.*, 47 OApp 100, 190 NE 781, 40 OLR 181.

25. (1918) A change of rates by the public utilities commission, authorized by RC § 4909.17, applies to existing contracts. Hence, an electric company which has contracted to supply current at the then schedule of rates cannot be enjoined from cutting off the current on refusal to pay the new rates, although plaintiff had arranged its plant therefor at considerable expense. Instability of contracts under this drastic statute can be remedied only by the legislature: *Hocking Glass Co. v. Ohio Lt. & Power Co.*, 11 OApp 80, 29 OCA 265.

**[§ 4909.17.1] § 4909.171 Waterworks rate charge based on change in water cost imposed by local government.**

Any waterworks company whose water supply is provided by a municipal corporation or other local governmental unit of this state whose rates are not subject to regulation by the public utilities commission shall request an increase or decrease in rates when the rate change is based solely on a change in the cost of water imposed on the waterworks company by the municipal corporation or other governmental unit and, in such instance, sections 4909.18 and 4909.19 of the Revised Code do not apply. When the waterworks company requests a rate change, it shall file with the commission evidence of the new rates imposed by the municipal corporation or other governmental unit and appropriate tariff revisions, without change in the distribution of revenue responsibility of the various classes of customers, which revisions shall become effective immediately.

HISTORY: 142 v S 337. EIT 3-29-88.

**Research Aids**

Waterworks rate change based on local government's change of water cost:

O-Jur3d: Pub Util § 160

**§ 4909.18 Application for establishment or change in rate.**

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify,

amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and

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other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) A proposed notice for newspaper publication fully disclosing the substance of the application. The notice shall prominently state that any person, firm, corporation, or association may file, pursuant to section 4909.19 of the Revised Code, an objection to such increase which may allege that such application contains proposals that are unjust and discriminatory or unreasonable. The notice shall further include the average percentage increase in rate that a representative industrial, commercial, and residential customer will bear should the increase be granted in full;

(F) Such other information as the commission may require in its discretion.

**HISTORY:** GC § 614.20; 102 v 549, § 22; 108 v Phil, 1094; 110 v 366; 113 v 16; 119 v 275; Bureau of Code Revision, 10-1-53; 136 v S 94 (Eff 9-1-76); 139 v S 378. Eff 1-11-83.

#### Cross-References to Related Sections

Alternative method of establishing rates and charges, RC § 4927.04.

Application for change in rate; approval, RC § 4909.17.

Approval of alternate rate plan, RC § 4929.05.

Commission to review fuel related practices of electric light companies, RC § 4905.66.

Complaint, appeal or notification requirements, RC § 4909.38.

Market-based standard service offer; competitive bidding process; failure to provide service, RC § 4928.14.

Natural gas company inspections; recovery of actual expenses, RC § 4905.94.

Power of municipal corporation or corporations to fix rate, price, and charge, RC § 4909.34.

Proposed rate increase effective date, RC § 4909.42.

Publication; investigation, RC § 4909.19.

Public hearings to be held in municipal corporation affected by rate increase, RC § 4903.08.3.

Purchased gas adjustment clause; rule, RC § 4905.30.2.

Rate increase application filing date, RC § 4909.43.

Review of continued appropriateness of environmental compliance plan, RC § 4913.05.

Rule defined, RC § 121.24.

Schedules for providing noncompetitive service; access of self-generator to back-up electricity supply, RC § 4928.15.

Service offering for nonfirm electric service customers, RC § 4928.44.

Utility report showing property valuation, RC § 4909.15.6.

Utility to file schedules containing unbundled rate components; equitable reduction to reflect utility's receipt of refund; standard service offer during market development period; amendment of separation plan; plan for independent operation of transmission facilities, RC § 4928.35.

Violation, RC § 4909.41.

Waterworks rate charge based on change in water cost imposed by local government, RC § 4909.17.1.

#### Ohio Administrative Code

Public utilities commission: administration—

General rate proceeding: rules of practice. OAC ch. 4901-1.

Time periods for discovery. OAC 4901-1-17.

Standard filing requirements for rate increases. OAC ch. 4901-7.

Public utilities commission: utilities—

Applications by telephone utility for other than an increase in rates. OAC ch. 4901:1-8.

Electric fuel component rate. OAC ch. 4901:1-11.

Ohio coal research and development rate. OAC ch. 4901:1-12.

Zones of operation, or service areas of the telephone companies. OAC 4901:1-3-03.

#### Research Aids

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**O-Jur3d:** Pub Util §§ 62, 96, 100, 143, 146, 159-161, 182, 183

#### Law Review

Deregulation of telephone services in Ohio. Frank P. Darr. 24 AkronLRev 229 (1991).

Emergency rate making for Ohio public utilities. Sally W. Bloomfield. 37 OSLJ 108 (1976).

Municipal home rule in Ohio: Police regulations — specific subject. George D. Vaubel. 3 ONorthLRev 814 (1976).

Public Utilities. Ohio Law Survey. 51 CinLRev 203 (1982).

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2. (1994) The commission's approval of custom calling services under RC § 4909.18 does not constitute state action under the fourteenth amendment: *Ohio Domestic Violence Network v. Pub. Util. Comm.*, 70 OS3d 311, 638 NE2d 101.

3. (1984) The utility had the burden to demonstrate to the commission that an adjustment was justified based on the utility's estimates of a reduction in local service revenues: *Cincinnati Bell Tel. Co. v. P.U.C.*, 12 OS3d 280, 12 OBR 356, 466 NE2d 848.

4. (1981) A first filing, under RC § 4909.18, cannot be an application for an increase in rates; the fact that the service was previously provided on a contract basis is irrelevant: *Cleveland v. P.U.C.*, 67 OS2d 446, 21 OO3d 279, 424 NE2d 561.

5. (1980) The commission may consider the consolidated capital structure of the parent utility in determining a utility's interest expense: *Ohio Water Service Co. v. P.U.C.*, 64 OS2d 12, 18 OO3d 132, 412 NE2d 397.

6. (1980) A water-works company must conform to the rates filed with the application for a certificate: *Public Utility Service v. P.U.C.*, 62 OS2d 421, 16 OO3d 447, 406 NE2d 522.

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## CHAPTER 4928: COMPETITIVE RETAIL ELECTRIC SERVICE

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### § 4928.01 Definitions.

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) "Billing and collection agent" means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent that the agent is under contract

with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code as amended by Sub. S.B. No. 3 of the 123rd general assembly.

(4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.

(7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent it consumes electricity it so produces or to the extent it sells for resale electricity it so produces.

(8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.

(9) "Electric services company" means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.

(11) "Electric utility" means an electric light company that is engaged on a for-profit basis in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. "Electric utility" excludes a municipal electric utility or a billing and collection agent.

(12) "Firm electric service" means electric service other than nonfirm electric service.

(13) "Governmental aggregator" means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on the effective date of this section pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on the day before the effective date of this section, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program as prescribed in rules 4901:1-18-02(B) to (C) and 4901:1-18-04(B) of the Ohio Administrative Code in effect on the effective date of this section or, if modified pursuant to authority under section 4928.53 of the Revised Code, the program as modified; the home energy assistance program as prescribed in section 5117.21 of the Revised Code and in executive order 97-1023-V or, if modified pursuant to authority under section 4928.53 of the Revised Code, the program as modified; the home weatherization assistance program as prescribed in division (A)(6) of section 122.011 [122.01.1] and in section 122.02 of the Revised Code or, if modified pursuant to authority under section 4928.53 of the Revised Code, the program as modified; the Ohio energy credit program as prescribed in sections 5117.01 to 5117.05, 5117.07 to 5117.12, and 5117.99 of the Revised Code or, if modified pursuant to authority under section 4928.53 of the Revised Code, the program as modified; and the targeted energy efficiency and weatherization program established under section 4928.55 of the Revised Code.

(17) "Market development period" for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile commercial customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section

4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Project" means any real or personal property connected with all or part of an industrial, distribution, commercial, or research facility, not-for-profit facility, or residence that is to be acquired, constructed, reconstructed, enlarged, improved, furnished, or equipped, or any combination of those activities, with aid furnished pursuant to sections 4928.61 to 4928.63 of the Revised Code for the purposes of not-for-profit, industrial, commercial, distribution, residential, and research development in this state. "Project" includes, but is not limited to, any small-scale renewables project.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent commission action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of financial accounting standards no. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the underpreciated† costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) "Small electric generation facility" means an electric generation plant and associated facilities de-

signed for, or capable of, operation at a capacity of less than two megawatts.

(29) "Starting date of competitive retail electric service" means January 1, 2001, except as provided in division (C) of this section.

(30) "Customer-generator" means a user of a net metering system.

(31) "Net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator which is fed back to the electric service provider.

(32) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(33) "Self-generator" means an entity in this state that owns an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to retail electric service providers, whether the facility is installed or operated by the owner or by an agent under a contract.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

(C) Prior to January 1, 2001, and after application by an electric utility, notice, and an opportunity to be heard, the public utilities commission may issue an order delaying the January 1, 2001, starting date of competitive retail electric service for the electric utility for a specified number of days not to exceed six months, but only for extreme technical conditions precluding the start of competitive retail electric service on January 1, 2001.

**HISTORY:** 148 v S 3, EN 7-6-99; 10-5-99.††

† So in enrolled bill, division (A)(26).

†† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

The provisions of § 9 of SB 3 (148 v —) read as follows:

SECTION 9. Sections 4905.301, 4905.66, 4905.67, 4905.68, 4905.69, 4909.157, 4909.158, 4909.159, 4909.191, 4909.192, 4909.193, 4913.01, 4913.02, 4913.03, 4913.04, 4913.05, 4913.06, 4913.07, 4933.27, and 4933.34 of the Revised Code, as repealed by this act, shall take effect on January 1, 2001, but if the Public Utilities Commission issues an order under division (C) of section 4928.01 of the Revised Code, as enacted

by this act, the repeal of such sections shall be applied accordingly.

#### Cross-References to Related Sections

Determinations necessary for approval or prescribing of plan; approval of abandonment, RC § 4928.34.  
Jurisdiction of commission upon complaint or commission initiative; arbitration of commercial disputes; alternative dispute resolution procedures, RC § 4928.16.

### § 4928.02 State policy commencing with start of competitive retail electric service.

It is the policy of this state to do the following throughout this state beginning on the starting date of competitive retail electric service:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service;

(F) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(G) Ensure 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;

(H) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(I) Facilitate the state's effectiveness in the global economy.

**HISTORY:** 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

#### Cross-References to Related Sections

Commission to ensure effectuation of state policy; rules; abuses of market power, RC § 4928.06.  
Complaint or commission initiative concerning transition plan, RC § 4928.36.  
Corporate separation plan, RC § 4928.17.  
Identification of competitive services access to noncompetitive services, RC § 4928.03.  
Public benefits advisory board, RC § 4928.58.

Schedules for providing noncompetitive service; access of self-generator to back-up electricity supply, RC § 4928.15.

Utility to file schedules containing unbundled rate components; equitable reduction to reflect utility's receipt of refund; standard service offer during market development period; amendment of separation plan; plan for independent operation of transmission facilities, RC § 4928.35.

### § 4928.03 Identification of competitive services access to noncompetitive services.

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 accordance with a filing under division (F) of section 4933.81 of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers.

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.

**HISTORY:** 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

### § 4928.04 Commission may declare additional competitive services.

(A) The public utilities commission by order may declare that retail ancillary, metering, or billing and collection service supplied to consumers within the certified territory of an electric utility on or after the starting date of competitive retail electric service is a competitive retail electric service that the consumers may obtain from any supplier or suppliers subject to this chapter. The commission may issue such order, after investigation and public hearing, only if it first determines either of the following:

(1) There will be effective competition with respect to the service.

(2) The customers of the service have reasonably available alternatives.

The commission shall initiate a proceeding on or before March 31, 2003, on the question of the desirability, feasibility, and timing of any such competition.

(B) In carrying out division (A) of this section, the commission may prescribe different classifications, procedures, terms, or conditions for different electric utilit-

ies and for the retail electric services they provide that are declared competitive pursuant to that division, provided the classifications, procedures, terms, or conditions are reasonable and do not confer any undue economic, competitive, or market advantage or preference upon any electric utility.

**HISTORY:** 148 v S 3, Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

#### Cross-References to Related Sections

Commission to ensure effectuation of state policy; rules; abuses of market power, RC § 4928.06.

### § 4928.05 Extent of exemption from municipal and state supervision and regulation.

(A)(1) 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 section 4905.10, division (B) of 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.

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

(2) 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.

The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in

this state that consists of a noncompetitive retail electric service is unregulated.

On and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4933.81 to 4933.90 and 4935.03 of the Revised Code. The commission's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative shall be such authority as is provided for their enforcement under Chapters 4933. and 4935. of the Revised Code.

(B) Nothing in this chapter affects the authority of the commission under Title XLIX [49] of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior to the starting date of competitive retail electric service.

**HISTORY:** 148 v S 3, Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

### § 4928.06 Commission to ensure effectuation of state policy; rules; abuses of market power.

(A) Beginning on the starting date of competitive retail electric service, the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated. To the extent necessary, the commission shall adopt rules to carry out this chapter. Initial rules necessary for the commencement of the competitive retail electric service under this chapter shall be adopted within one hundred eighty days after the effective date of this section. Except as otherwise provided in this chapter, the proceedings and orders of the commission under the chapter shall be subject to and governed by Chapter 4903. of the Revised Code.

(B) If the commission determines, on or after the starting date of competitive retail electric service, that there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by commission order issued pursuant to division (A) of section 4928.04 of the Revised Code, the commission shall ensure that that service is provided at compensatory, fair, and nondiscriminatory prices and terms and conditions.

(C) In addition to its authority under section 4928.04 of the Revised Code and divisions (A) and (B) of this section, the commission, on an ongoing basis, shall monitor and evaluate the provision of retail electric service in this state for the purpose of discerning any noncompetitive retail electric service that should be available on a competitive basis on or after the starting date of competitive retail electric service pursuant to a declaration in the Revised Code, and for the purpose of discerning any competitive retail electric service that is no longer subject to effective competition on or after that date. Upon such evaluation, the commission periodically shall report its findings and any recommendations

of transmission facilities from control of generation facilities.

(3) The transmission entity implements, to the extent reasonably possible, policies and procedures designed to minimize pancaked transmission rates within this state.

(4) The transmission entity improves service reliability within this state.

(5) The transmission entity achieves the objectives of an open and competitive electric generation marketplace, elimination of barriers to market entry, and preclusion of control of bottleneck electric transmission facilities in the provision of retail electric service.

(6) The transmission entity is of sufficient scope or otherwise operates to substantially increase economical supply options for consumers.

(7) The governance structure or control of the transmission entity is independent of the users of the transmission facilities, and no member of its board of directors has an affiliation, with such a user or with an affiliate of a user during the member's tenure on the board, such as to unduly affect the transmission entity's performance. For the purpose of division (B)(7) of this section, a "user" is any entity or affiliate of that entity that buys or sells electric energy in the transmission entity's region or in a neighboring region.

(8) The transmission entity operates under policies that promote positive performance designed to satisfy the electricity requirements of customers.

(9) The transmission entity is capable of maintaining real-time reliability of the electric transmission system, ensuring comparable and nondiscriminatory transmission access and necessary services, minimizing system congestion, and further addressing real or potential transmission constraints.

(C) To the extent that a transmission entity under division (A) of this section is authorized to build transmission facilities, that transmission entity has the powers provided in and is subject to sections 1723.01 to 1723.08 of the Revised Code.

(D) For the purpose of forming or participating in a regional regulatory oversight body or mechanism developed for any transmission entity under division (A) of this section that is of regional scope and operates within this state:

(1) The commission shall make joint investigations, hold joint hearings, within or outside this state, and issue joint or concurrent orders in conjunction or concurrence with any official or agency of any state or of the United States, whether in the holding of those investigations or hearings, or in the making of those orders, the commission is functioning under agreements or compacts between states, under the concurrent power of states to regulate interstate commerce, as an agency of the United States, or otherwise.

(2) The commission shall negotiate and enter into agreements or compacts with agencies of other states for cooperative regulatory efforts and for the enforcement of the respective state laws regarding the transmission entity.

(E) If a qualifying transmission entity is not operational as contemplated in division (A) of this section,

division (A)(13) of section 4928.34 of the Revised Code, or division (G) of section 4928.35 of the Revised Code, the commission by rule or order shall take such measures or impose such requirements on all for-profit entities that own or control electric transmission facilities located in this state as the commission determines necessary and proper to achieve independent, nondiscriminatory operation of, and separate ownership and control of, such electric transmission facilities on or after the starting date of competitive retail electric service.

**HISTORY:** 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

#### Cross-References to Related Sections

Determinations necessary for approval or prescribing of plan; approval of abandonment, RC § 4928.34.

Utility's transition plan, RC § 4928.31.

Utility to file schedules containing unbundled rate components; equitable reduction to reflect utility's receipt of refund; standard service offer during market development period; amendment of separation plan; plan for independent operation of transmission facilities, RC § 4928.35.

### § 4928.13 Decommissioning of nuclear generation facilities.

Through a periodic filing with the public utilities commission in such form as the commission shall prescribe by rule under division (A) of section 4928.06 of the Revised Code, each electric utility that owns nuclear generation facilities located in this state shall demonstrate compliance with decommissioning requirements of the nuclear regulatory commission and public utilities commission and shall demonstrate adequate financing mechanisms to fund facility decommissioning.

**HISTORY:** 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

### § 4928.14 Market-based standard service offer; competitive bidding process; failure to provide service.

(A) After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.

(B) After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process. Prior to January 1, 2004, the commission shall adopt rules concerning the conduct of the competitive bidding process, including the information requirements necessary for customers to choose this option and the requirements to evalu-

ate qualified bidders. The commission may require that the competitive bidding process be reviewed by an independent third party. No generation supplier shall be prohibited from participating in the bidding process, provided that any winning bidder shall be considered a certified supplier for purposes of obligations to customers. At the election of the electric distribution utility, and approval of the commission, the competitive bidding option under this division may be used as the market-based standard offer required by division (A) of this section. The commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed.

(C) After the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under division (A) of this section until the customer chooses an alternative supplier. A supplier is deemed under this division to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

(1) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

(2) The supplier is no longer capable of providing the service.

(3) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

(4) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

**HISTORY:** 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

#### **Cross-References to Related Sections**

Municipal, township or county aggregation of retail electric loads, RC § 4928.20.

Utility to file schedules containing unbundled rate components; equitable reduction to reflect utility's receipt of refund; standard service offer during market development period; amendment of separation plan; plan for independent operation of transmission facilities, RC § 4928.35.

#### **§ 4928.15 Schedules for providing non-competitive service; access of self-generator to back-up electricity supply.**

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code, no electric utility shall supply noncompetitive retail electric distribution service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service that is consistent with the state policy

specified in section 4928.02 of the Revised Code and filed with the public utilities commission under section 4909.18 of the Revised Code. The schedule shall provide that electric distribution service under the schedule is available to all consumers within the utility's certified territory and to any supplier to those consumers on a nondiscriminatory and comparable basis. Distribution service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code. The schedule shall include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the commission.

(B) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code and except as preempted by federal law, no electric utility shall supply the transmission service or ancillary service component of noncompetitive retail electric service in this state on or after the starting date of competitive retail electric service except pursuant to a schedule for that service component that is consistent with the state policy specified in section 4928.02 of the Revised Code and filed with the commission under section 4909.18 of the Revised Code. The schedule shall provide that transmission or ancillary service under the schedule is available to all consumers and to any supplier to those consumers on a nondiscriminatory and comparable basis. Service rates and charges under the schedule shall be established in accordance with Chapters 4905. and 4909. of the Revised Code.

(C) A self-generator shall have access to backup electricity supply from its competitive electric generation service provider at a rate to be determined by contract.

**HISTORY:** 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

#### **Cross-References to Related Sections**

Jurisdiction of commission upon complaint or commission initiative; arbitration of commercial disputes; alternative dispute resolution procedures, RC § 4928.16.

#### **§ 4928.16 Jurisdiction of commission upon complaint or commission initiative; arbitration of commercial disputes; alternative dispute resolution procedures.**

(A)(1) The public utilities commission has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the commission on or after the starting date of competitive retail electric service, regarding the provision by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised Code of any service for which it is subject to certification.

(2) The commission also has jurisdiction under section 4905.26 of the Revised Code, upon complaint of any person or upon complaint or initiative of the com-

nity for hearing as provided in section 4905.26 of the Revised Code, the commission determines that the utility has failed to so comply, the commission, in addition to any other remedies provided by law, may use the remedies specified in divisions (C)(1) to (3) and (D)(1) and (2) of section 4928.18 of the Revised Code to enforce compliance.

**HISTORY:** 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

**§ 4928.37 Mechanisms for receiving transition revenues; transition charge; itemization and disclosure.**

(A)(1) Sections 4928.31 to 4928.40 of the Revised Code provide an electric utility the opportunity to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market. An electric utility for which transition revenues are approved pursuant to sections 4928.31 to 4928.40 of the Revised Code shall receive those revenues through both of the following mechanisms beginning on the starting date of competitive retail electric service and ending on the expiration date of its market development period as determined under section 4928.40 of the Revised Code:

(a) Payment of unbundled rates for retail electric services by each customer that is supplied retail electric generation service during the market development period by the customer's electric distribution utility, which rates shall be specified in schedules filed under section 4928.35 of the Revised Code;

(b) Payment of a nonbypassable and competitively neutral transition charge by each customer that is supplied retail electric generation service during the market development period by an entity other than the customer's electric distribution utility, as such transition charge is determined under section 4928.40 of the Revised Code. The transition charge shall be payable by each such retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved and shall be billed on each kilowatt hour of electricity delivered to the customer by the electric distribution utility as registered on the customer's meter during the utility's market development period as kilowatt hour is defined in section 4909.161 [4909.16.1] of the Revised Code or, if no meter is used, as based on an estimate of kilowatt hours used or consumed by the customer. The transition charge for each customer class shall reflect the cost allocation to that class as provided under bundled rates and charges in effect on the day before the effective date of this section. Additionally, as reflected in section 4928.40 of the Revised Code, the transition charges shall be structured to provide shopping incentives to customers sufficient to encourage the development of effective competition in the supply of retail electric generation service. To the extent possible, the level and structure of the transition charge shall be designed to avoid revenue responsibility shifts among the utility's customer classes and rate schedules.

(2)(a) Notwithstanding division (A)(1)(b) of this section, the transition charge shall not be payable on electricity supplied by a municipal electric utility to a retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved, if the municipal electric utility provides electric transmission or distribution service, or both services, through transmission or distribution facilities singly or jointly owned or operated by the municipal electric utility, and if the municipal electric utility was in existence, operating, and providing service as of January 1, 1999.

(b) The transition charge shall not be payable on electricity supplied or consumed in this state except such electricity as is delivered to a retail customer by an electric distribution utility and is registered on the customer's meter during the utility's market development period or, if no meter is used, is based on an estimate of kilowatt hours used or consumed by the customer. However, no transition charge shall be payable on electricity that is both produced and consumed in this state by a self-generator.

(3) The transition charge shall not be discounted by any party.

(4) Nothing prevents payment of all or part of the transition charge by another party on a customer's behalf if that payment does not contravene sections 4905.33 to 4905.35 of the Revised Code or this chapter.

(B) The electric utility shall separately itemize and disclose, or cause its billing and collection agent to separately itemize and disclose, the transition charge on the customer's bill in accordance with reasonable specifications the commission shall prescribe by rule under division (A) of section 4928.06 of the Revised Code.

**HISTORY:** 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

**Cross-References to Related Sections**

Commission to establish transition charge for each customer class; expiration of utility's market development period; periodic reviews; residential rate reduction; resale provisions; status as retail customer, RC § 4928.40.

**§ 4928.38 Commencement and termination of transition revenues; utility's responsibility for competitive viability.**

Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termina-

tion of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

**HISTORY:** 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

**§ 4928.39 Determination of total allowable transition costs; commission may impose commitments upon collection of revenues to ensure proper use.**

Upon the filing of an application by an electric utility under section 4928.31 of the Revised Code for the opportunity to receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues under those sections. Such amount shall be the just and reasonable transition costs of the utility, which costs the commission finds meet all of the following criteria:

(A) The costs were prudently incurred.

(B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.

(C) The costs are unrecoverable in a competitive market.

(D) The utility would otherwise be entitled an opportunity to recover the costs.

Transition costs under this section shall include the costs of employee assistance under the employee assistance plan included in the utility's approved transition plan under section 4928.33 of the Revised Code, which costs exceed those costs contemplated in labor contracts in effect on the effective date of this section.

Further, the commission's order under this section shall separately identify regulatory assets of the utility that are a part of the total allowable amount of transition costs determined under this section and separately identify that portion of a transition charge determined under section 4928.40 of the Revised Code that is allocable to those assets, which portion of a transition charge shall be subject to adjustment only prospectively and after December 31, 2004, unless the commission authorizes an adjustment prospectively with an earlier date for any customer class based upon an earlier termination of the utility's market development period pursuant to division (B)(2) of section 4928.40 of the Revised Code.

The electric utility shall have the burden of demonstrating allowable transition costs as authorized under this section. The commission may impose reasonable commitments upon the utility's collection of the transition revenues to ensure that those revenues are used to eliminate the allowable transition costs of the utility during the market development period and are not available for use by the utility to achieve an undue competitive advantage, or to impose an undue disadvantage,

in the provision by the utility of regulated or unregulated products or services.

**HISTORY:** 148 v S 3. Eff 7-6-99; 10-5-99.†

† The effective date of SB 3, as it applies to this section, is unclear. See Ohio Constitution Art. II, §§ 1c and 1d.

**Cross-References to Related Sections**

Commission to establish transition charge for each customer class; expiration of utility's market development period; periodic reviews; residential rate reduction; resale provisions; status as retail customer, RC § 4928.40.

**§ 4928.40 Commission to establish transition charge for each customer class; expiration of utility's market development period; periodic reviews; residential rate reduction; resale provisions; status as retail customer.**

(A) Upon determining under section 4928.39 of the Revised Code the allowable transition costs of an electric utility authorized for collection as transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall establish the transition charge for each customer class of the electric utility and, to the extent possible, each rate schedule within each such customer class, with all such transition charges being collected as provided in division (A)(1)(b) of section 4928.37 of the Revised Code during a market development period for the utility, ending on such date as the commission shall reasonably prescribe. The market development period shall end on December 31, 2005, unless otherwise authorized under division (B)(2) of this section. However, the commission may set the utility's recovery of the revenue requirements associated with regulatory assets, as established pursuant to section 4928.39 of the Revised Code, to end not later than December 31, 2010. The commission shall not permit the creation or amortization of additional regulatory assets without notice and an opportunity to be heard through an evidentiary hearing and shall not increase the charge recovering such revenue requirements associated with regulatory assets.

Factors the commission shall consider in prescribing the expiration date of the utility's market development period and the transition charge for each customer class and rate schedule of the utility include, but are not limited to, the total allowable amount of transition costs of the electric utility as determined under section 4928.39 of the Revised Code; the relevant market price for the delivered supply of electricity to customers in that customer class and, to the extent possible, in each rate schedule as determined by the commission; and such shopping incentives by customer class as are considered necessary to induce, at the minimum, a twenty per cent load switching rate by customer class halfway through the utility's market development period but not later than December 31, 2003. In no case shall the commission establish a shopping incentive in an amount exceeding the unbundled component for retail electric generation service set in the utility's approved transition plan under section 4928.33 of the Revised Code, and