

ORIGINAL

In The
SUPREME COURT OF OHIO

Columbus Southern Power Company, :

Appellant, :

v. :

The Public Utilities Commission of
Ohio, :

Appellee. :

Case No. 09-2298

Appeal from the Public Utilities
Commission of Ohio, *In re Columbus
Southern Power Company*, Case No. 08-
917-EL-SSO

FILED

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SUPREME COURT OF OHIO

MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

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**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

Amended Substitute Senate Bill No. 221 (S.B. 221) became effective on July 31, 2008. The same day, Columbus Southern Power Company (CSP or Company) filed an application for a Standard Service Offer. The application sought approval of an Electric Security Plan (ESP or Plan) authorized by S.B. 221.

As part of its Plan, Columbus Southern Power sought approval from the Public Utilities Commission of Ohio (Commission) to sell or transfer two generating plants, even though the Company had no plans to sell or transfer either plant. The Commission found that request to be premature, and directed the Company to file an appropriate application when it intends to actually dispose of the plants.

The Company did not request to recover any costs associated with either plant as part of its Plan. Indeed, up until rebuttal testimony was filed, Company witnesses steadfastly declined to make any recommendation that cost recovery would be appropriate in this case. While the Commission initially modified the Company's Plan to permit cost recovery, it later determined that the Company had not shown that it was not already recovering any costs associated with operating and maintaining the plants.

The Company's requests for rehearing failed to preserve the issues that it now attempts to raise on appeal. Neither has the Company shown that it has suffered any harm warranting relief from this Court. The Commission's decision both declining to pre-approve the sale or transfer of the generating plants and to deny recovery of costs associated with operating and maintaining those plants was both lawful and reasonable, and should be affirmed.

STATEMENT OF THE FACTS

R.C. 4928.141 (A) requires electric distribution utilities to establish a Standard Service Offer (SSO) for all competitive retail electric services based either on a Market-Rate Offer (MRO) under R.C. 4928.142, or on an Electric Security Plan (ESP) under R.C. 4928.143. The SSO is to serve as the electric utility's default generation price. The Company filed its application for an SSO on July 31, 2008, the effective date of S.B. 221. *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale*

or Transfer of Certain Generating Assets, et al., Case Nos. 08-917-EL-SSO, *et al.*

(hereinafter *In re AEP*) (Opinion and Order at 6) (March 18, 2009), CSP App. at 38.¹

With the exception of additional facts noted below, the Commission generally accepts the Company's Statement of Facts. Further detail, however, is helpful in fully understanding the Commission's decision in this case.

Before the Company filed its ESP application, it purchased an interest in two generating facilities, known as the Waterford Energy Center (Waterford) and the Darby Electric Generating Station (Darby). In doing so, it specifically "undertook the attendant risk that market rates for generation service would produce revenue below the level needed to support the investments." CSP Brief at 3.

The Company requested approval for the sale or transfer of those specific assets as part of its ESP. CSP Brief at 1. Specifically, the Company requested:

In a matter related to corporate separation, CSP requests authority to sell or transfer two recently acquired generating facilities that never have been included in rate base for ratemaking purposes. These facilities are the Waterford Energy Center and the Darby Electric Generating Station. * *
* Pursuant to §4928.17(E), Ohio Rev. Code, CSP seeks approval to sell or transfer these generating assets. CSP has no immediate plan to sell or transfer those facilities, and, if authorized to do so, will notify the Commission prior to any such transaction.

¹ References to appellant CSP's appendix are denoted "CSP App. at ____;" references to appellant CSP's supplement are denoted "CSP Supp. at ____;" references to appellee's appendix attached hereto are denoted "App. at ____;" and references to appellee's second supplement are denoted "Sec. Supp. at ____."

Company Ex. 1 at 14, Sec. Supp. at 5-6. But the Company's application did not request authority to recover any costs associated with its ownership of these generating facilities.

Company witness Baker supported the request to sell or transfer in his direct testimony. He repeated the Company's lack of present intention to sell or transfer the plants, and reiterated that "[n]either of these units have [*sic*] ever been in CSP's rate base and customers' generation rates have not reflected CSP's investment in the plants or the expenses of operating and maintaining the plants." Company Ex. 2A at 42, CSP Supp. at 4.

The first time that the Company made any reference to recovering any cost associated with these plants as part of its ESP was in rebuttal testimony filed by Company witness Baker. Mr. Baker's testimony was filed on December 8, 2008, more than four months after the application was filed, and after thirteen days of hearing and all parties had concluded their cases in chief. In that testimony, Mr. Baker stated that:

If the Companies through a Commission order are prohibited from transferring these plants or entitlements then any expense not recovered by the FAC [Fuel Adjustment Clause] should be recovered in the non-FAC rate. This would include carrying costs on and expenses of Darby and Waterford of about \$50 million annually.

Company Ex. 2E, at 21, Sec. Supp at 9.

Because the Company had no contemporaneous plan to sell or transfer either Waterford or Darby, the Commission did not rule on the Company's request, but found the request to be premature. *In re AEP* (Opinion and Order at 52) (March 18, 2009), CSP App. at 83. Indeed, the Commission was very specific that "the Commission did not

prohibit the Companies from selling or transferring the facilities.” *In re AEP* (Second Entry on Rehearing at 4) (November 4, 2009), CSP App. at 177. The Commission directed the Company to make a separate application for approval to sell or transfer the facilities consistent with newly adopted rules. The determination finding the request to sell or transfer to be premature was not appealed by the Company, and remained unchanged through the time of the Commission’s final order in the case.

The Commission further directed the Company to modify its ESP to permit the recovery of costs associated with maintaining and operating Waterford and Darby. *In re AEP* (Opinion and Order at 52) (March 18, 2009), CSP App. at 83. Intervening Appellee Industrial Energy Users-Ohio (IEU) requested rehearing of that issue.

The Commission found IEU’s arguments persuasive, and reversed its cost recovery determination on rehearing. *In re AEP* (Entry on Rehearing at 35) (July 23, 2009), CSP App. at 148. It did not modify its decision that the application to sell or transfer was premature. It also did not modify its determination that the Company could recover operating costs. What the Commission decided was that the Company had not demonstrated that it was not already recovering those costs in rates, and, therefore, was not entitled to the increase. The Company failed to meet its burden of proof.

ARGUMENT

Proposition of Law No. I:

CSP failed to preserve its right to appeal the Commission's decision on the issues concerning the authority to sell or transfer CSP's Waterford and Darby facilities and recovery of costs associated with retaining these assets, so the Court lacks jurisdiction to consider CSP's argument and appeal.

- A. CSP waived its right to appeal the Commission's decision on the authority to sell or transfer the Waterford and Darby facilities by not preserving the issue in CSP's April 17, 2009, application for rehearing.**

CSP argues that the Commission unlawfully and unreasonably denied CSP the authority to sell or transfer certain generating assets as part of the Company's proposed Electric Security Plan. Notice of Appeal at 3, CSP App. at 26. But the Commission did not say that it would not grant the requested authority. What the Commission found was "that the request to transfer the Waterford Energy Center and the Darby Electric Generating Station facilities . . . is premature." *In re AEP* (Opinion and Order at 52) (March 18, 2009), CSP App. at 83. It did so because the Company did not have any current plans to sell or transfer either facility. *Id.*

CSP filed an application for rehearing of the Commission's Opinion and Order on April 17, 2009. But the Company did not raise any issue or error addressing the Commission's finding that CSP's request to sell or transfer the Waterford and Darby facilities was premature and that a separate application would have to be filed before that authority could be granted. The Company conceded as much in its second application for

rehearing on July 31, 2009, stating that “[t]he Company viewed the Commission’s ruling as a fair balance regarding that issue (referring to the sell or transfer issue because the Commission, at that time, had granted cost recovery instead) and did not challenge the ruling on rehearing.” CSP Application for Rehearing, July 31, 2009, at 3, CSP App. at 352. The Company admitted that it did not challenge the transfer of assets decision in its April 17, 2009 application for rehearing. As a result, the Court has no jurisdiction to review this issue. *See Senior Citizens Coalition v. Pub. Util. Comm’n*, 40 Ohio St. 3d 329, 333, 533 N.E.2d 353 (1988) (R.C. 4903.10 is jurisdictional, permits an application for rehearing after any order, and requires an application for rehearing to preserve the right to appeal an issue).

CSP waived its right to appeal the Commission’s decision, finding the request to sell or transfer those assets to be premature, as a matter of law by not raising the issue in its April 17, 2009 application for rehearing. *See, e.g., Consumers’ Counsel v. Pub. Util. Comm’n*, 114 Ohio St. 3d 340, 872 N.E.2d 269 (2007) (OCC waived the issue of the test for reviewing settlement stipulations by not including it in the application for rehearing of Commission’s decision approving stipulation). Because CSP waived this argument, the Court has no jurisdiction to review it.

CSP did not raise the transfer of assets issue within thirty days of the Commission’s decision as required by R.C. 4903.10. *See Greer v. Pub. Util. Comm’n*, 172 Ohio St. 361, 176 N.E. 2d 416 (1961) (the Commission has no power to entertain an application for rehearing after the expiration of the statutory thirty day period). CSP’s subsequent application for rehearing raising the transfer of assets issue after the

expiration of the statutory thirty day period cannot save and preserve the issue for appeal because the Court no longer has jurisdiction to review it.

CSP did raise the transfer of assets issue after the Commission's July 23, 2009, Entry on Rehearing, but not in a timely fashion under R.C. 4903.10. Over 120 days had passed since the Commission's Opinion and Order was issued. The Company's first assignment of error is not properly before this Court, and should be dismissed.

B. CSP waived its right to appeal the Commission's decision on the recovery of costs associated with its ownership of the Waterford and Darby facilities by not preserving the issue in CSP's July 31, 2009, application for rehearing.

CSP argues that the Commission unlawfully and unreasonably denied recovery of costs associated with operating and maintaining the Waterford and Darby facilities as part of its ESP. Notice of Appeal at 3, CSP. App. at 26. But when CSP finally raised the transfer of assets issue in its second application for rehearing on July 31, 2009, it failed to preserve this cost recovery issue. Only the cost recovery issue, not the transfer of assets issue, was decided by the Commission in its July 23rd decision. CSP had thirty days from July 23, 2009, to raise and argue the cost recovery issue in an application for rehearing to the Commission, but it failed to do so. As a result, CSP waived this issue and argument as well.

The Company's application did not request authority to recover any costs associated with its ownership of the Waterford or Darby generating facilities. The first time that the Company made *any* reference to seeking recovery of any cost associated

with these plants as part of its ESP was in rebuttal testimony filed by Company witness Baker on December 8, 2008, more than four months after the application was filed, and after thirteen days of hearing and all parties had concluded their cases in chief. Indeed, prior to Mr. Baker's rebuttal testimony, the Company took no position on whether it should be permitted to recover any cost associated with the Waterford and Darby facilities:

Q (by IEU Attorney Randazzo): If the Commission rejects Columbus Southern's proposal in this regard for the reasons you provide and would not allow the sale or transfer of Darby or Waterford, would it be your recommendation that the company should be able to achieve some level of rate recovery associated with those two units?

A (by Company witness Baker): I'm not really testifying to that. I'm just testifying to the fact that I think Commission authority is needed to do this.

Q I understand that. But now I'm asking you to think about it, and if you don't have an opinion, you can say that. But whether or not, if the Commission precludes the sale or transfer of those units, whether you think it would be appropriate for Columbus Southern to get some rate recovery associated with either/or both of those units.

A I'm not really testifying to that. I'm just testifying to the fact that I think Commission authority is needed to do this. I don't have an opinion on that right now.

Tr. XI. at 287-288, Sec. Supp. at 14-15.

In its initial Opinion and Order, the Commission allowed recovery of costs associated with the Waterford and Darby facilities. *In re AEP* (Opinion and Order at 52)

(March 18, 2009), CSP App. at 83. The Company did not raise any issue concerning the recovery of costs as an issue in its first request for rehearing.

Intervening appellee IEU, however, requested rehearing, arguing that the Commission erred in permitting CSP to recover costs associated with the Waterford and Darby facilities. In its first Entry on Rehearing issued July 23, 2009, the Commission found IEU's arguments persuasive, and granted rehearing on the issue of the recovery of costs associated with maintaining and operating the Waterford and Darby facilities through the non-FAC portion of the generation rate. *In re AEP* (Entry on Rehearing at 35) (July 23, 2009), CSP App. at 148. The Commission found that:

The Companies have not demonstrated that their current revenue is inadequate to cover the costs associated with the generating facilities, and that those costs should be recoverable through the non-FAC portion of the generation rate from Ohio customers. We, therefore, direct AEP-Ohio to modify its ESP and remove the annual recovery of \$51 million of expenses including associated carrying charges related to these generation facilities.

In re AEP (Entry on Rehearing at 35-36) (July 23, 2009), CSP App. at 148-149.

CSP filed an application for rehearing, its second, on July 31, 2009. In it, CSP claimed that:

The Commission's Entry on Rehearing reversing its March 18, 2009, Opinion and Order in this proceeding regarding CSP's proposal to sell or transfer its Waterford Energy Center (Waterford) and Darby Electric Generating Station (Darby) is unlawful and unreasonable.

CSP Application for Rehearing, July 31, 2009, at 1, CSP App. at 350. But the Company's proposition was inaccurate. Its argument was based on an incorrect

implication that the Commission *granted* CSP the authority to sell or transfer these facilities in the March Opinion and Order, and then reversed itself in the July decision. That is not what happened.

CSP is trying to suggest that the Commission addressed both its ESP application request for authority to transfer these facilities and CSP's subsequent request to recover costs associated with those facilities in the same Commission decision. But that is not the case. Only the Commission's initial March Opinion and Order addressed the transfer request, not its July Entry on Rehearing. The Commission's initial decision finding the transfer authority request to be premature was not raised in an application for rehearing by *any* party until *after* the Commission's July Entry on Rehearing.

The July Entry on Rehearing only reversed the previously authorized cost recovery, based on IEU's application for rehearing. What CSP sought to have reviewed was limited to the issue concerning the authority to sell or transfer the generating facilities, not the recovery of costs associated with them. This is evident by CSP's argument:

If the Commission were going to revoke the rate authorization it provided in the Opinion and Order it also should have reconsidered its ruling as it related to authority to sell or transfer the Waterford and Darby facilities and granted CSP the authority it sought under §4928.17 (E), Ohio Rev. Code, regarding Waterford and Darby. Having failed to do so, the Commission's orders are unreasonable and unlawful and should be modified on rehearing to authorize the sale or transfer of Waterford and Darby. * * * Therefore, with the cost recovery provision of the Opinion and Order being revoked on rehearing, the fair and reasonable course of action now is to authorize CSP to sell or transfer those units. * * * On rehearing the Commission should rectify this unlawful situation by granting CSP

the authority it sought in the proceeding to sell or transfer Waterford and Darby.

CSP Application for Rehearing, July 31, 2009, at 3-4, CSP App. at 352-353.

The only references CSP made to the recovery of costs issue in its July 31, 2009 application for rehearing were in the context of what the Commission revoked. All of CSP's arguments for relief on rehearing to the Commission's July 23, 2009 Entry on Rehearing focused on CSP obtaining authority to sell or transfer those facilities. But CSP never raised this argument in its April 17, 2009 application for rehearing.

The Commission's Second Entry on Rehearing squarely addressed the limited issue raised by CSP's application for rehearing, stating that:

AEP-Ohio argues that the July Entry is unlawful and unreasonable to the extent that the Commission revoked the Companies' ability to recover the costs associated with the Waterford and Darby plants without reconsidering the Companies' authority to sell or transfer the plants pursuant to Section 4928.17(E), Revised Code. * * * The Companies argue that in light of the Commission's revocation of CSP's authority to recover Ohio customers' jurisdictional share of the costs associated with the Darby and Waterford facilities, the Commission should authorize CSP to sell or transfer the facilities in accordance with Section 4928.17(E), Revised Code. * * * AEP-Ohio has not presented any reason in its request for rehearing that convinces the Commission to reverse its March Order or the July entry to the extent that the Commission concluded that the Companies' request for authority to transfer or sell the facilities is premature. When the Companies have established a plan to exercise their authority to sell or transfer the facilities, they should file such plan with the Commission for our consideration as required by Section 4928.17(E), Revised Code. Accordingly, AEP-Ohio's application for rehearing is denied.

In re AEP (Second Entry on Rehearing at 2-4) (November 4, 2009), CSP App. at 175-177.

CSP's second application for rehearing raised only one issue, and that concerned the transfer of assets that was decided back in the Commission's March 18, 2009 Opinion and Order. No other issue was raised. Aside from making a passing reference to the recovery of costs being revoked, CSP did not raise this issue in its July 31, 2009 application for rehearing. Without CSP specifically raising the recovery of costs argument, the Commission was left to guess what CSP meant.

R.C. 4903.10 provides:

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Ohio Rev. Code Ann. § 4903.10 (West 2010), App. at 1. The Court has strictly applied the specificity requirement and has held that setting forth specific grounds for rehearing is a jurisdictional prerequisite to the Court's review. *See, e.g., Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St. 3d 244, 247, 638 N.E.2d 550, 553 (1994) (substantial compliance argument rejected); *Agin v. Pub. Util. Comm'n*, 12 Ohio St. 3d 97, 98, 232 N.E.2d 828, 829 (1967) (some similarity between grounds in the rehearing application and arguments in the brief insufficient to comply with the statute). As the Court has explained:

It may fairly be said that, by the language which it used, the General Assembly indicated clearly its intention to deny the right to raise a question on appeal where the appellant's

application for rehearing used a shotgun instead of a rifle to hit that question.

Cincinnati v. Pub. Util. Comm'n, 151 Ohio St. 353, 378, 86 N.E.2d 10, 23 (1949). In preserving an issue for appeal, R.C. 4903.10 does not give a party the right, in this case or any case, to skip the first application for rehearing in the process. And a party, under R.C. 4903.10, cannot later bootstrap an issue it failed to raise in a prior application for rehearing by incorporating it into a second application for rehearing.

But that is exactly the unauthorized process CSP followed to appeal its transfer of assets issue. CSP failed to raise the cost recovery issue as the basis of its argument and relief sought in CSP's second application for rehearing. Having failed to raise the issue of recovery of costs associated with the Waterford and Darby facilities in its application for rehearing, CSP is precluded from doing so on appeal.

The Court has no jurisdiction to consider CSP's arguments and appeal on the issues of authority to sell or transfer the Waterford and Darby facilities and their associated costs, because it failed to preserve these issues for appeal in its applications for rehearing. The Court should therefore decline to consider these issues.

Proposition of Law No. II:

The Commission's determination that the Company should not recover operating and maintenance expenses related to its Waterford and Darby generation facilities was lawful, reasonable, and adequately supported by the record.

A. The Commission's decision finding CSP's request to sell or transfer its generating facilities to be premature was lawful and reasonable.

The Company had no plans to sell or transfer either the Waterford or Darby facilities. Consequently, the Commission, in its initial order, found the Company's request for "pre-approval" to sell or transfer those assets to be premature. *In re AEP* (Opinion and Order at 52) (March 18, 2009), CSP App. at 83. The Commission did not modify this finding in any of its subsequent orders.

As noted above, the Company failed to timely argue that the Commission's decision finding its request to sell or transfer the Waterford and Darby plants to be premature was unlawful. Despite the fact that S.B. 221 permits companies to make expansive requests in ESP applications, the Commission retains its discretion in managing its dockets. This Court has long recognized the Commission's broad discretion to regulate its proceedings and manage its docket. *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 19, 734 N.E.2d 775, 780 (2000). *See also Toledo Coalition for Safe Energy v. Pub. Util. Comm'n*, 69 Ohio St. 2d 559, 560, 433 N.E.2d 212, 214 (1982) (Commission has discretion whether to allow intervention); *Consumers' Counsel v. Pub. Util. Comm'n*, 56 Ohio St. 2d 220, 223-224, 383 N.E.2d 593, 596 (1978) (Commission may limit scope of cross-examination). The Commission must be able to control the scope of its

proceedings in order to effectively carry out its duties. It was well within its discretion to require the Company to file an appropriate application when it actually intends to sell or transfer the plants.

B. The Commission's decision that CSP should not recover costs related to operating and maintaining its generating facilities was lawful and reasonable.

The Company did not request recovery of any costs associated with operating or maintaining its Waterford and Darby plants in its ESP application. It did propose implementing an adjustment mechanism that would apply to the cost of fuel and fuel-related components, termed the Fuel Adjustment Clause (FAC). *In re AEP* (Opinion and Order at 14) (March 18, 2009), CSP App. at 45. No party contested the Commission's decision that fuel and fuel-related costs related to these generating facilities, recoverable through the FAC, could be recovered.

The Company also proposed to increase the non-fuel related (non-FAC) portion of its generation rate to recover various costs associated with capitalized investments made to comply with environmental requirements. *Id.* at 24, CSP App. at 55. In rebuttal testimony, the Company also proposed any expense associated with Waterford and Darby not recovered through the FAC should be recovered in the non-FAC rate. Company Ex. 2E at. 21, Sec. Supp. at 9.

The Commission acknowledges that the Company was authorized by S.B. 221 to request recovery of these costs. R.C. 4928.143(B)(2) permits electric distribution utilities to request a wide range of services, charges, and increases as part of their ESP proposals.

Although the statute specifically permits nine categories of provisions that could be included in an ESP, it does so “without limitation.” Ohio Rev. Code Ann. § 4928.143(B)(2) (West 2010), App. at 7.

The Commission, in its initial order, found that the Company could recover operating and maintenance (O&M) costs related to the Waterford and Darby facilities through the non-FAC portion of the generation rate, to the extent not recovered through the FAC portion, because pre-approval to sell or transfer the plants was not being granted. *In re AEP* (Opinion and Order at 52) (March 18, 2009), CSP App. at 83. The Commission found that, “while the Companies still own the generating facilities, they should be allowed to obtain recovery for the Ohio customers’ share of any costs associated therewith.” *Id.* The Commission did not reject or reverse this decision on rehearing. Indeed, the Commission did not modify this finding in any of its subsequent orders, and it is not at issue before this Court.

The Company’s argument appears to be concisely contained in its proposition that “the Commission’s reliance on traditional rate making concepts to reverse its earlier position was unlawful.” CSP Brief at 13. The Commission never reversed its decision finding the request for authority to sell or transfer to be premature. The Commission never reversed its finding that the Company could recover O&M costs related to the Waterford and Darby facilities through the non-FAC portion of the generation rate, to the extent not recovered through the FAC portion.

What the Commission did do was to reverse its position on the recovery of O&M costs based on the evidence of record. The Company claims that the “Commission faulted

CSP for not demonstrating that which CSP was not required to demonstrate.” CSP Brief at 12. The Commission faulted the Company because it did not meet its burden. It failed to demonstrate that it was incurring costs that it was not already recovering.

The Commission did not apply traditional rate-making concepts to the Company’s ESP. It did not demand the valuation of property not included in rate base, the consideration of a test year, or the application of a fair return on investment. Nor did the Commission demand that the Company demonstrate its overall cost of rendering service or that its gross annual revenues were insufficient to recover those costs.

What the Commission found was that its original determination “was without record evidence and a demonstration of need.” *In re AEP* (Entry on Rehearing at 35) (July 23, 2009), CSP. App. at 148. Specifically, the Commission found, as a matter of fact, that:

The Companies have not demonstrated that their current revenue is inadequate to cover the costs associated with the generating facilities, and that those costs should be recoverable through the non-FAC portion of the generation rate from Ohio customers.

Id.

The Court will not reverse factual determinations of the Commission unless they are against the manifest weight of the evidence or so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm’n*, 88 Ohio St. 3d 549, 555, 728 N.E.2d 371, 376 (2000), quoting *MCI Telecommunications Corp. v. Pub. Util. Comm’n*, 38 Ohio St. 3d 266, 268, 527 N.E.2d 777, 780 (1980). The Court has consistently refused to substitute its judgment

for that of the Commission on evidentiary matters. *See, e.g., Payphone Ass'n v. Pub. Util. Comm'n*, 109 Ohio St. 3d 453, 849 N.E.2d 4 (2006). The appellant bears the burden of showing that the Commission's decision is against the manifest weight of the evidence or clearly unsupported by the evidence. *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St. 3d 81, 765 N.E.2d 862 (2002).

Deference should be shown to Commission determinations in matters, like here, where the Commission applies its specialized expertise and discretion. *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St. 3d 177, 180, 749 N.E.2d 262 (2001); *Weiss v. Pub. Util. Comm'n*, 90 Ohio St. 3d 15, 17-18, 734 N.E.2d 775 (2000).

The Commission's decision denying recovery of maintenance and operating costs associated with the Waterford and Darby generating plants in this case was reasonable, justified, and supported by evidence of record, and should be upheld.

Proposition of Law No. III:

The Court will not reverse a Commission decision absent a showing of real and definite harm. *See, e.g., Myers v. Pub. Util. Comm'n*, 64 Ohio St. 3d 299, 302, 595 N.E.2d 873, 876 (1992).

The Company has demonstrated no harm or prejudice from the Commission's order. The Court has repeatedly declared that it "will not reverse an order of the commission absent a showing of prejudice by the challenging party." *Myers v. Pub. Util. Comm'n*, 64 Ohio St. 3d 299, 595 N.E.2d 873 (1992); *see also Holladay Corp. v. Pub. Util. Comm'n*, 61 Ohio St. 2d 335, 402 N.E.2d 1175 (1980) (syllabus). The Company has not established injury to a substantial right or present, immediate and pecuniary interest

as required to warrant reversal. *Senior Citizens Coalition v. Pub. Util. Comm'n*, 40 Ohio St. 3d 329, 533 N.E.2d 353 (1988). The harm must be real and concomitant and not future in nature. *Cincinnati v. Pub. Util. Comm'n*, 63 Ohio St. 3d 366, 588 N.E.2d 1175 (1992). An appeal lies only on behalf of a party aggrieved by the final order appealed from, and not simply to settle abstract questions. *Ohio Domestic Violence Network v. Pub. Util. Comm'n*, 65 Ohio St. 3d 438, 439, 605 N.E.2d 13, 14 (1992).

The Company purchased these plants with no intention of including them in rate base, fully accepting the risk that they might not recover their investment because of market conditions. CSP Brief at 3. While the law did change, ratepayers should not now be expected to pay for the consequences of a business decision within the Company's control without a demonstration that those costs are not already being adequately recovered.

The Company made no apparent effort to mitigate any harm that it might claim from ongoing expenses by attempting to sell or transfer these plants prior to filing its ESP case. S.B. 221's amendment to R.C. 4928.17(E) requiring Commission approval before any sale or transfer could, and should, have been anticipated by the Company. It was contained in the very first version of the bill as introduced on September 25, 2007, just five months after Darby was purchased, and ten full months before the Company filed its ESP application. The Company was well aware of this provision and its implications, yet did nothing to mitigate these costs.

Nor did the Company request recovery of these expenses as part of its application. As noted above, the Company made no effort of any sort to support recovery until very near the end of the evidentiary hearing.

The Company offered testimony to justify a level of requested cost recovery on an unrelated issue. The Company proposed establishing a baseline FAC rate, above which increases were requested, by identifying components of the current SSO. *In re AEP* (Opinion and Order at 18) (March 18, 2009), CSP App. at 49. The Commission staff argued that a proxy for actual costs should be used for the baseline instead, given that the resulting amounts should be costs that the Company was already recovering. *Id.* at 19, CSP App. at 50. The Commission adopted its staff's value for the baseline, and authorized that additionally incurred unrecovered costs could be recovered through the FAC. *Id.* This finding is consistent with the Commission's finding denying recovery of O&M generating costs through the non-FAC portion of the generation charge. The Company did not demonstrate that it was incurring costs that were not already being recovered through its then-existing SSO rates.

The Commission did not apply traditional ratemaking concepts to reach this result. And, contrary to the Company's assertion, the Commission did apply the proper legal standard to its approval of the application as modified. CSP Brief at 13.

First, the Commission affirmed that it had the authority to modify the Company's ESP, including permitting the Company to recover generation-related O&M costs. Specifically, the Commission explained that its "statutory authority is not limited to an after-the-fact determination, but rather, includes the authority to make modifications to a

proposed ESP that are supported by the record.” *In re AEP* (Entry on Rehearing at 49) (July 23, 2009), CSP App. at 162. Company witness Baker testified that it was the Company’s position that the Commission, under S.B. 221, has the right to modify an ESP plan. Tr. XIV at 138, Sec. Supp. at 11.

Then, the Commission determined, once again, that the Company’s ESP, as modified by the Commission, including the exclusion of the Waterford and Darby O&M costs, satisfied the statutory standard. Specifically, the Commission found that:

With respect to the MRO versus ESP comparison, our analysis did not end with the rehearing requests. Upon review of the record in this case and all arguments raised on rehearing, the Commission does in fact find that the ESP, including deferrals and future recovery of deferrals, as modified by the Order and as further modified by this entry, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.

The Commission notes that, with this entry, it is further modifying AEP-Ohio’s ESP to reduce the rate impacts on customers. The Commission believes that the modifications made in this entry increase the value of the Companies’ ESP.

In re AEP (Entry on Rehearing at 51) (July 23, 2009), CSP App. at 164.

The record in this matter is clear. The Company failed to demonstrate any harm from the Commission’s refusal to permit cost recovery associated with these generating plants. Because the Company failed to demonstrate harm or prejudice from the Commission’s order, this appeal should be dismissed or, in the alternative, the Commission’s order should be affirmed.

CONCLUSION

S.B. 221 represents a fundamental change in the way that rates are determined in Ohio. This appeal is about how the Commission exercised its responsibility and authority in response to that change. As the Commission's orders reflect, the Commission understood and fully discussed those changes, their effect, and the options for responding to them. The Commission exercised its jurisdiction, applied its expertise, and exercised its discretion in making its decisions in a reasonable and lawful manner.

Based on the foregoing, the Commission respectfully requests its decision be affirmed.

Respectfully submitted,

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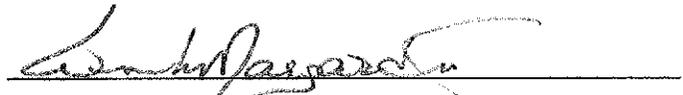
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief**, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 16th day of April, 2010.



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APPENDIX

4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

Effective Date: 09-29-1997

4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a 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. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

Effective Date: 2008 SB221 07-31-2008

4928.142 Standard generation service offer price - competitive bidding.

(A) For the purpose of complying with section 4928.141 of the Revised Code and subject to division (D) of this section and, as applicable, subject to the rate plan requirement of division (A) of section 4928.141 of the Revised Code, an electric distribution utility may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer.

(1) The market-rate offer shall be determined through a competitive bidding process that provides for all of the following:

(a) Open, fair, and transparent competitive solicitation;

(b) Clear product definition;

(c) Standardized bid evaluation criteria;

(d) Oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that the criteria specified in division (A)(1)(a) to (c) of this section are met;

(e) Evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners. No generation supplier shall be prohibited from participating in the bidding process.

(2) The public utilities commission shall modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of bidders, which rules shall foster supplier participation in the bidding process and shall be consistent with the requirements of division (A)(1) of this section.

(B) Prior to initiating a competitive bidding process for a market-rate offer under division (A) of this section, the electric distribution utility shall file an application with the commission. An electric distribution utility may file its application with the commission prior to the effective date of the commission rules required under division (A)(2) of this section, and, as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect. An application under this division shall detail the electric distribution utility's proposed compliance with the requirements of division (A)(1) of this section and with commission rules under division (A)(2) of this section and demonstrate that all of the following requirements are met:

(1) The electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization that has been approved by the federal energy regulatory commission; or there otherwise is comparable and nondiscriminatory access to the electric transmission grid.

(2) Any such regional transmission organization has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric distribution utility's market conduct; or a similar market monitoring function exists with commensurate ability to identify and monitor market conditions and mitigate conduct associated with the exercise of market power.

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis. The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric distribution utility shall withdraw the application. However, if such remedy is made and the subsequent finding is positive and also if the electric distribution utility made a simultaneous filing under this section and section 4928.143 of the Revised Code, the utility shall not initiate its competitive bid until at least one hundred fifty days after the filing date of those applications.

(C) Upon the completion of the competitive bidding process authorized by divisions (A) and (B) of this section, including for the purpose of division (D) of this section, the commission shall select the least-cost bid winner or winners of that process, and such selected bid or bids, as prescribed as retail rates by the commission, shall be the electric distribution utility's standard service offer unless the commission, by order issued before the third calendar day following the conclusion of the competitive bidding process for the market rate offer, determines that one or more of the following criteria were not met:

(1) Each portion of the bidding process was oversubscribed, such that the amount of supply bid upon was greater than the amount of the load bid out.

(2) There were four or more bidders.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility. All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall

approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

(D) The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five. The standard service offer price for retail electric generation service under this first application shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price, adjusted upward or downward as the commission determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of any one or more of the following costs as reflected in that most recent standard service offer price:

- (1) The electric distribution utility's prudently incurred cost of fuel used to produce electricity;
- (2) Its prudently incurred purchased power costs;
- (3) Its prudently incurred costs of satisfying the supply and demand portfolio requirements of this state, including, but not limited to, renewable energy resource and energy efficiency requirements;
- (4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be

appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

(E) Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the commission shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the market rate offer, cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division.

(F) An electric distribution utility that has received commission approval of its first application under division (C) of this section shall not, nor ever shall be authorized or required by the commission to, file an application under section 4928.143 of the Revised Code.

Effective Date: 2008 SB221 07-31-2008; 2008 HB562 09-22-2008

4928.143 Application for approval of electric security plan - testing.

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code; and provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric

distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date

scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that

face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

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