

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code	: Case No. 2011-0751
	:
	: Appeal from the Public
	: Utilities Commission Of Ohio
	: Case No. 10-1261-EL-UNC
	:
	:

**MERIT BRIEF OF APPELLANTS,
THE OHIO ENERGY GROUP
AND
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

David F. Boehm
(Reg. No. 0021881)
Michael L. Kurtz
(Reg. No. 0033350)
(Counsel of Record)
BOEHM, KURTZ & LOWRY
36 E. Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Telephone: 513.421.2255
Facsimile: 513.421.2764
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com

***COUNSEL FOR APPELLANTS,
THE OHIO ENERGY GROUP***

Janine L. Migden-Ostrander, Consumers Counsel
(Reg. No. 0002310)
Maureen R. Grady,
(Reg. No. 0020847)
(Counsel of Record)
Melissa R. Yost
(Reg. No. 0070914)
Kyle L. Verrett
(Reg. No. 0084199)

Michael DeWine
(Reg. No. 0009181)
Attorney General of Ohio

William L. Wright
(Reg. No. 0018010)
Section Chief, Public Utilities Section
Thomas W. McNamee
(Reg. No. 0017352)
Assistant Attorney General

**PUBLIC UTILITIES COMMISSION
OF OHIO**
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
Telephone: 614-466-4397
Facsimile: 614-644-8767
william.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us

***COUNSEL FOR APPELLEE, PUBLIC
UTILITIES COMMISSION OF OHIO***

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CLERK OF COURT
SUPREME COURT OF OHIO

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (Grady) (614) 466-9567
Telephone: (Yost) (614) 466-1291
Telephone: (Verrett) (614) 466-9585
Facsimile: (614) 466-9475
grady@occ.state.oh.us
yost@occ.state.oh.us
verrett@occ.state.oh.us

***COUNSEL FOR INTERVENING APPELLANTS,
THE OFFICE OF THE OHIO CONSUMERS'
COUNSEL***

Steven T. Nourse
(Reg. No. 0046705)
(Counsel of Record)
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com

Kathleen M. Trafford
(Reg. No. 0021753)
Daniel R. Conway
(Reg. No. 0023058)
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-1915
Facsimile: (614) 227-1000
ktrafford@porterwright.com
dconway@porterwright.com

***COUNSEL FOR CROSS-APPELLANT
COLUMBUS SOUTHERN POWER COMPANY***

Samuel C. Randazzo

(Reg. No. 0016386)

(Counsel of Record)

Frank P. Darr

(Reg. No. 0025469)

Joseph E. Oliker

(Reg. No. 0086088)

McNees Wallace & Nurick LLC

21 East State Street, 18th Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

***COUNSEL FOR APPELLANTS,
INDUSTRIAL ENERGY USERS-OHIO***

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INTRODUCTION

In Senate Bill 221 (“S.B. 221”) (Appx. 106-164), the Legislature determined that the Public Utilities Commission of Ohio (“PUCO” or “Commission”) must protect Ohio customers by regulating the full earnings (generation, transmission, and distribution) of the investor-owned electric utilities. S.B. 221 requires the PUCO, on an annual basis, to compare the earnings of Ohio investor-owned utilities with electric security plans (“ESPs”) to the earnings of companies with comparable risk.¹ If, after conducting such a comparison, the PUCO determines that a utility’s ESP rate “adjustments”² resulted in “significantly excessive” earnings, the utility must refund the excess earnings back to the utility’s customers.³ The protection against ESP rate adjustments that result in significantly excessive utility profits is a fundamental customer protection and is an essential piece of S.B. 221.

This significantly excessive earnings test (“SEET”) is set forth in R.C. 4928.143(F)(Appx. 95). R.C. 4928.143(F) requires the PUCO to determine “***if any such [rate] 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***.*” (Emphasis added). Thus, the

¹ R.C. 4928.143(F)(Appx. 95).

² *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, PUCO Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010) at 15 (defining adjustments as “any change in rates when compared to the rates in the electric utility’s preceding rate plan”). (Supp. 15). ESP “adjustments” can include rate increases due to increased costs of fuel, purchased power, environmental expense, or any other item authorized by statute.

³ R.C. 4928.143(F).

plain language of R.C. 4928.143(F) specifically dictates how the Commission should measure a utility's earnings in order to accomplish the comparable analysis for purposes of SEET.

On January 11, 2011, the PUCO issued an order addressing whether CSP's 2009 earnings constituted "significantly excessive" earnings under R.C. 4928.143(F) ("SEET Order") (Appx. 9-46). Although the Commission found that CSP's earnings were significantly excessive, the PUCO erred by excluding CSP's off-system sales profits from the earnings considered for purposes of the SEET comparison. In doing so, the PUCO compared only *part* of CSP's earnings to *all* of the earnings of companies with comparable risk. Such an asymmetrical comparison is contrary to the language of 4928.143(F). The PUCO is required to compare *all* of CSP's earnings to *all* of the earnings of companies with comparable risk.

The effect of the PUCO's unbalanced SEET comparison is that customers did not receive the full refund they were due under R.C. 4928.143(F). Accordingly, the SEET Order and the Commission's orders implementing and upholding the SEET Order in Case No. 10-1261-EL-UNC (Appx. 48-66), are unlawful and unreasonable and should be reversed. The Court should direct Appellee to correct the error complained of herein by requiring CSP to refund the additional \$22.24 million that CSP's customers would have received if the PUCO had conducted a proper SEET comparison in accordance with R.C. 4928.143(F).

STANDARD OF REVIEW

R.C. 4903.13 (Appx. 87) governs this Court's review of PUCO Orders. It provides in pertinent part: "A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable***." The Court has interpreted this standard as one turning upon whether the issue presents a question of law or a question of fact.

As to questions of fact, the Court has held that it will not reverse the PUCO unless the PUCO's findings "are manifestly against the weight of the evidence and are so clearly unsupported by the record as to show misapprehension or mistake or willful disregard of duty."⁴ Questions of law, such as those raised by Ohio Energy Group's ("OEG")⁵ and the Office of the Ohio Consumers' Counsel's ("OCC")⁶ Proposition of Law 1, are held to a different standard of review. The Court "has complete, independent power of review" on questions of law.⁷ Accordingly, legal issues are subject to a more intensive examination than are factual questions. This is a question of law that is subject to a de novo review. This appeal presents a case of first impression regarding the interpretation of an important consumer protection statute, R.C.

⁴ *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1975), 42 Ohio St.2d 403, 330 N.E.2d 1 paragraph eight of the syllabus, writ of certiorari denied (1975), 423 U.S. 986, 96 S.Ct. 393, 46 L.Ed.302, appeal after remand (1976), 46 Ohio St.2d 105, 346 N.E.2d 778.

⁵ OEG is a non-profit entity organized to represent the interests of large industrial and commercial customers in electric and gas regulatory proceedings before the PUCO. The members of OEG served by CSP are: Amsted Rail Company, ArcelorMittal USA, E.I. DuPont de Nemours & Company, GE Aviation, Praxair Inc., The Timken Company and Worthington Industries.

⁶ OCC, the residential utility consumer advocate, represents the interests of 4.5 million households in proceedings before state and federal regulators and in the courts.

⁷ *Office of Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 108, 110, 388 N.E.2d 1370, 1373.

4928.143(F). With this standard of review in mind, the Court must consider and resolve the error alleged by OEG and OCC.

STATEMENT OF FACTS

R.C. 4928.141(A) (Appx. 88) requires electric distribution utilities to establish a Standard Service Offer (“SSO”) for all competitive retail electric services based on a Market-Rate Offer under R.C. 4928.142 (Appx. 89-91), or on an Electric Security Plan (“ESP”) under R.C. 4928.143 (Appx. 92-95). The SSO serves as the electric utility's default generation price for consumers who do not shop for competitive generation. CSP applied for an ESP which was modified and approved by the PUCO on March 18, 2009.⁸

Utilities with an ESP term of no more than three years, like CSP, are subject to R.C. 4928.143(F)(Appx. 95). That statute requires the PUCO to conduct an annual significantly excessive earnings test (“SEET”) review of the utility’s earnings under the ESP. The statute provides:

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.

⁸ *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*, PUCO Case Nos. 08-917-EL-SSO, Opinion and Order (March 18, 2009).

On September 1, 2010, CSP and Ohio Power (“OP”) jointly filed an application for the Commission’s SEET review of their 2009 earnings (“Application”).⁹ Under Ohio Adm. Code 4901:1-35-03(C)(10), CSP and OP were required to provide certain information with their Application, including their individual Federal Energy Regulatory Commission (“FERC”) Form 1s along with their latest Securities and Exchange Commission (“SEC”) 10-K. (Appx. 104) CSP’s earned return on equity for 2009, as reported to the SEC and FERC, was 20.84%. (Supp. 52 and 62-63, Tr. 60-61). When compared to the 142 other investor-owned regulated electric utilities in the United States, CSP had the highest return on equity in America in 2009. (Supp. 69 and 136-37).

On January 11, 2011, the PUCO issued the SEET Order. (Appx. 9-46). In the SEET Order, the PUCO found that a single earnings item, CSP’s profits from off-system sales, should be excluded from CSP’s 2009 earned return on equity for purposes of the statutory significantly excessive earnings test. (Appx. 37-38). Off-system sales are wholesale sales by a utility to third parties that are not Ohio retail customers. Off-system sales are made from generation that is excess after serving the load of Ohio retail customers. Such sales are made possible because CSP’s Ohio retail customers have paid and are paying a return on CSP’s power plant investment (Supp. 86). The Commission determined that “***[off-system sales] margins and the related equity in generation facilities should be excluded from the SEET calculation.” (Appx. 38). Accordingly, the PUCO adjusted CSP’s earned return on equity from its reported 20.84% to

⁹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code, Application (September 1, 2010).*

19.73% for purposes of the SEET comparison. (Appx. 38)¹⁰ Using the recalculated earned return on equity of 19.73%, the Commission found that CSP had significantly excessive earnings of \$42.683 million in 2009. (Appx. 43). If the Commission had included CSP's 2009 off-system sales earnings in the SEET comparison, then CSP's customers would have received an additional \$22.24 million over and above the significantly excessive earnings found by the PUCO (Supp. 134).¹¹

To this end, 12.1% of CSP's total reported earnings in 2009 were derived from off-system sales (Supp. 87).¹² By excluding CSP's 2009 off-system sales earnings for purposes of SEET, the Commission compared only 87.9% of CSP's earnings to 100% of the earnings of the group of companies with comparable risk (Supp. 87).

On February 11, 2011, applications for rehearing were filed by Customer Parties,¹³ (Appx. 67-86), CSP, Industrial Energy Users-Ohio ("IEU"), and Ohio Partners for Affordable Energy ("OPAE"). Memoranda contra the applications for rehearing were filed by CSP, IEU, Customer Parties, and OPAE. The PUCO issued an Entry on Rehearing denying the applications for rehearing on March 9, 2011. (Appx. 53-66). On May 5, 2011, OEG filed its notice of appeal.

¹⁰ Excluding the profits from off-system sales from the ROE calculation requires a corresponding exclusion of the equity component associated with the generation assets used to support off-system sales from the ROE calculation. However, due to a mathematical error, the PUCO's recalculation of CSP's earned return on equity of 19.73%, excluding off-system sales, is itself incorrect. The correct quantification of CSP's 2009 earned return on equity, excluding off-system sales, was not made by any witness. See (Appx. 73-74).

¹¹ ~~Reported return on equity (20.84) minus adjusted return (19.73) multiplied by 20.039 equals \$22.24 million. Every 1% excessive return on equity equals a refund of \$20.039 million, which quantification was not rebutted by the Company. (Supp. 134)~~

¹² CSP's total earnings in 2009 were \$271.504 million, of which \$32.977 million were from off-system sales. (Supp. 52, 54, and 87).

¹³ OEG, OCC, and the Appalachian Peace and Justice Network.

(Appx. 1-66). On May 13, 2011, OCC moved to intervene as an appellant and thereafter, this Court granted OCC's motion to intervene.¹⁴

ARGUMENT

Proposition of Law No. 1

R.C. 4928.143(F) requires the PUCO to compare *all* of a utility's earnings to *all* of the earnings of companies with comparable risk in its determination of whether ESP rate adjustments have resulted in "significantly excessive" earnings for that year.

The PUCO's decision to carve out and exclude a single element of total earnings from CSP's 2009 earned return on equity for purposes of the SEET comparison was unlawful and unreasonable under R.C. 4928.143(F).

The SEET as set forth in R.C. 4928.143(F) is very similar to the traditional "comparable earnings" standard established in U.S. Supreme Court case law. In *Bluefield Water Works v. West Virginia* (1923), 262 U.S. 679, the U.S. Supreme Court set out the "comparable earnings" standard:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.¹⁵

Building on *Bluefield*, the U.S. Supreme Court later confirmed the comparable earnings test as the proper constitutional standard for setting utility rates: "the return to the equity owner

¹⁴ Supreme Court of Ohio Entry (May 31, 2010).

¹⁵ *Bluefield Water Works v. West Virginia*, 262 U.S. 679, 692-93 (1923).

should be commensurate with the returns on investments in other enterprises having corresponding risks.”¹⁶

The SEET is very similar to the “comparable earnings” standard in that SEET requires a comparison of a utility’s earnings with the earnings of companies with comparable risk to determine an appropriate level of profit for the utility. But unlike the “comparable earnings” standard, the SEET permits a utility to retain “excessive” earnings, provided those earnings are not “significantly excessive.”¹⁷ Accordingly, under SEET, a utility could obtain a greater level of earnings than what would be allowed under the traditional “comparable earnings” standard. Allowing for excessive (but not significantly excessive) profits compensates electric utilities for the utility’s risks under Ohio’s competitive generation market structure, which allows consumers to shop for competitive generation services, but requires utilities to provide back-up generation service to those who do not shop at Commission approved rates.

To determine whether rate increases authorized in the ESP have resulted in “significantly excessive” earnings for that year, R.C. 4928.143(F) requires the PUCO to compare *all* of a utility’s earnings to *all* of the earnings of companies with comparable risk. R.C. 4928.143(F) provides that the PUCO must consider “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.” The statute gives the Commission wide discretion to determine the group of companies with comparable risk and the threshold when earnings transition from being just

¹⁶ *Federal Power Comm. v. Hope Natural Gas* (1944), 320 U.S. 591, 603, 64 S.Ct. 281, 88 L.Ed. 333.

¹⁷ R.C. 4928.143(F).

excessive to “significantly excessive.” But the statutory language does not permit the PUCO to selectively exclude certain utility earnings for purposes of the SEET comparison. The PUCO has no discretion to disregard certain profits actually earned by the utility and reported on its accounting books to the SEC and FERC.¹⁸

CSP’s earned return on equity for 2009, as reported to the SEC and FERC, was 20.84%,¹⁹ giving CSP the highest equity return of 143 investor-owned regulated electric utilities in the United States in 2009.²⁰ 12.1% of CSP’s total reported earnings in 2009 were derived from off-system sales.²¹ Consequently, by excluding CSP’s 2009 off-system sales earnings for purposes of SEET, the Commission compared only 87.9% of CSP’s earnings with 100% of the earnings of the group of companies with comparable risk.²²

The exclusion of CSP’s off-system sales earnings from the CSP 2009 SEET earnings biases CSP’s earnings downward compared to the group of companies with comparable risk used to determine the SEET earnings threshold. The earnings of these companies with comparable risk were not adjusted to exclude segments of their earnings.²³ A comparison of this nature is

¹⁸ *Akron & Barherton Belt Rd. Co. et al. v. Pub. Util. Comm.*(1956), 165 Ohio St. 316, 319, 135 N.E.2d 400, 402 (“the [PUCO] is solely a creature of the General Assembly and may exercise no jurisdiction beyond that conferred by statute.”)

¹⁹ Company. Ex. 4, Pre-filed Direct Testimony of Thomas E. Mitchell at TEM-1; Tr. Vol. I (Oct. 25, 2010) at 60, lines 17-25, and at 61, line 1 (Supp. 52 and 62-63, Tr. 60-61)

²⁰ Joint Intervenor Ex. 2 at 5 and LK-3 (Supp. 69 and 136-37).

²¹ Joint Intervenor Ex. 2 at 23. (Supp. 87). CSP’s total earnings in 2009 were \$271.504 million, of which \$32.977 million were from off-system sales. Company. Ex. 4 at TEM-1 at 1 and 3 (Supp. 52 and 54).

²² Joint Intervenor Ex. 2 at 23. (Supp. 87).

²³ CSP’s witness, Dr. Makhija admitted that “[w]hen calculating the 2009 book [return on equity] for the comparable risk peer group, the earnings***as reported were used with no adjustments.” OCC Ex. 5. (Supp. 177); Joint Intervenor Ex. 2 at 22. (Supp. 86).

asymmetrical and contrary to the language of 4928.143(F). Instead, the statute should be applied “***in a manner consistent with the plain meaning of the statutory language***.”²⁴

The Commission should have compared *all* of CSP's 2009 earnings to *all* of the earnings of the companies with comparable risk in accordance R.C. 4928.143(F). Using all of CSP's 2009 reported earnings for purposes of the SEET comparison is an objective, verifiable approach that does not require adjustments to the utility and/or comparable group earnings and return on equity. CSP's earnings, as reported to the FERC and the SEC, include CSP's allocated share of off-system sales earnings, in accordance with generally accepted accounting principles (“GAAP”).²⁵ The earnings of the companies of comparable risk are also based on GAAP and are reported in accordance with GAAP to the SEC and FERC.²⁶ Accordingly, including CSP's off-system sales earnings in its 2009 SEET earnings allows for the “apples to apples” comparison required by the plain language of R.C. 4928.143(F).

The exclusion of *any* particular category of a utility's reported earnings from the earnings considered for purposes of the SEET comparison is contrary to the plain language of R.C. 4928.143(F). Off-system sales are an inherent component of the Company's earnings, just as the costs of the assets and expenses incurred to provide the capacity and energy for the off-system sales are an inherent component of CSP's earnings.²⁷ In fact, off-system sales are possible only because the costs of the underlying generation assets and purchase power contracts are recovered

²⁴ *State v. Johnson*, 116 Ohio St. 3d 541, 2008-Ohio-69, 880 N.E. 2d 896 at ¶15.

²⁵ Joint Intervenor Ex. 2 at 22 (Supp. 86).

²⁶ *Id.* at 25 (Supp. 89).

²⁷ *Id.* at 5 (Supp. 69).

from Ohio ratepayers.²⁸ It is reasonable that all earnings generated by those assets also be included in the earned return on equity for SEET purposes.

Therefore, the Court should reverse the order of the PUCO with instructions to comply with R.C. 4928.143(F) by comparing *all* of CSP's earnings to *all* of the earnings of the group of companies with comparable risk.

RELIEF REQUESTED

OEG and OCC are seeking to reverse the PUCO's SEET Order as well as the Commission's orders implementing and upholding the SEET Order in Case No. 10-1261-EL-UNC to the extent that they are unlawful and unreasonable because they excluded the profits from off-system sales from the earned return on equity of Columbus Southern Power Company for purposes of the SEET comparison. To ensure that CSP's customers get the full refund to which they are entitled, the Court should direct the PUCO to issue an order requiring CSP to refund the additional \$22.24 million that CSP's customers would have received if the PUCO conducted a proper SEET comparison in accordance with R.C. 4928.143(F).

OEG and OCC's request for an additional refund is permitted under the law. *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.*,²⁹ barring refunds of rates previously approved by the PUCO, does not apply because of the specific statute at issue in this case. The Court recently stated that “[a]ny apparent unfairness [as a result of *Keco*]***remains a policy decision

²⁸ Joint Intervenor Ex. 2 at 22. (Supp. 86).

²⁹ *Keco Indus. Inc. v. Cincinnati & Suburban Bell Tel. Co.*, (1957) 166 Ohio St. 254, 259, 141 N.E.2d 465 (“any rates set by the Public Utilities Commission are the lawful rates until such time as they are set aside as being unreasonable and unlawful by the Supreme Court”).

mandated by the larger legislative scheme.”³⁰ R.C. 4928.143(F) specifically requires the PUCO to conduct an historic review of a utility’s earnings over a given period and to refund any “significantly excessive earnings” back to the utility’s customers. Thus, in S.B. 221, the General Assembly explicitly decided to allow refunds of a utility’s past rates if those rates were “significantly excessive.” Therefore, any refund of rates to customers pursuant to R.C. 4928.143(F) is not barred by the *Keco* decision. Accordingly, the relief that OEG and OEC seek is permitted under the law.

CONCLUSION

WHEREFORE, Appellants respectfully submit that the Commission's January 11, 2011 Opinion and Order, January 27, 2011 Finding and Order, and March 9, 2011 Entry on Rehearing in PUCO Case No. 10-1261-EL-UNC are unlawful to the extent that they excluded the profits from off-system sales from the earned return on equity of Columbus Southern Power Company for purposes of the SEET comparison. Accordingly, the Court should direct Appellee to correct the error complained of herein by requiring CSP to refund the additional \$22.24 million that CSP’s customers would have received if the PUCO had conducted a proper SEET comparison in accordance with R.C. 4928.143(F).

Respectfully submitted,



David F. Boehm, Esq. (0021881)
Michael L. Kurtz, Esq. (0033350)
(Counsel of Record)

~~BOEHM, KURTZ & LOWRY~~
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

³⁰ *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 at ¶17.

Ph: (513) 421-2255 Fax: (513) 421-2764
E-Mail: dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com

***COUNSEL FOR APPELLANTS, THE
OHIO ENERGY GROUP***

JANINE L. MIGDEN-OSTRANDER
(0002310), CONSUMERS' COUNSEL

Maureen R. Grady / mrg
Maureen R. Grady, (Reg. No. 0020847)
(Counsel of Record)
Melissa R. Yost, (Reg. No. 0070914)
Kyle L. Verrett, (Reg. No 0084199)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: (Grady) (614) 466-9567
Telephone: (Yost) (614) 466-1291
Telephone: (Verrett) (614) 466-9585
Facsimile: (614) 466-9475
E-mail: grady@occ.state.oh.us
yost@occ.state.oh.us
verrett@occ.state.oh.us

***COUNSEL FOR INTERVENING
APPELLANTS, THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL***

August 5, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by overnight mail this 5th day of August, 2011.

Steven T. Nourse (Reg. No. 0046705)
(Counsel of Record)
American Electric Power Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
Telephone: (614) 716-1608
Facsimile: (614) 716-2950
stnourse@aep.com

Kathleen M. Trafford (Reg. No. 0021753)
Daniel R. Conway (Reg. No. 0023058)
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-1915
Facsimile: (614) 227-1000
ktrafford@porterwright.com
dconway@porterwright.com

COUNSEL FOR CROSS-APPELLANT COLUMBUS SOUTHERN POWER COMPANY

Samuel C. Randazzo (Reg. No. 0016386)
(Counsel of Record)
Frank P. Darr (Reg. No. 0025469)
Joseph E. Oliker (Reg. No. 0086088)
McNees Wallace & Nurick LLC
21 East State Street, 18th Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Facsimile: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com

COUNSEL FOR APPELLANTS, INDUSTRIAL ENERGY USERS-OHIO

Michael DeWine (Reg. No. 0009181)
Attorney General of Ohio
William L. Wright (Reg. No. 0018010)
Section Chief, Public Utilities Section
Thomas W. McNamee (Reg. No. 0017352)
Assistant Attorney General
Public Utilities Commission Of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
Telephone: 614-466-4397
Facsimile: 614-644-8767
william.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us

COUNSEL FOR APPELLEE, PUBLIC UTILITIES COMMISSION OF OHIO

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Columbus	:	Case No. 2011-0751
Southern Power Company and Ohio Power	:	
Company for administration of the Significantly	:	Appeal from the Public
Excessive Earnings Test under Section	:	Utilities Commission Of Ohio
4928.143(F), Revised Code, and Rule 4901:1-35-	:	Case No. 10-1261-EL-UNC
10, Ohio Administrative Code	:	
	:	

APPENDIX

IN THE SUPREME COURT OF OHIO

11-0751

The Ohio Energy Group	:	Case No. _____
Appellants,	:	
v.	:	
Public Utilities Commission of Ohio	:	Appeal from the Public Utilities Commission Of Ohio
Appellee.	:	Public Utilities Commission of Ohio Case No. 10-1261-EL-UNC

**NOTICE OF APPEAL OF APPELLANTS,
THE OHIO ENERGY GROUP**

David F. Boehm, Esq. (0021881)
 Michael L. Kurtz, Esq. (0033350) (Counsel of Record)
 BOEHM, KURTZ & LOWRY
 36 E. Seventh Street, Suite 1510
 Cincinnati, Ohio 45202
 Ph: 513.421.2255 Fax: 513.421.2255
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com

**COUNSEL FOR APPELLANTS,
THE OHIO ENERGY GROUP**

Michael DeWine (0009181)
 Attorney General of Ohio

William L. Wright (0018010)
 Section Chief, Public Utilities Section
 Thomas W. McNamee (0017352)
 Assistant Attorney General

PUBLIC UTILITIES COMMISSION
 OF OHIO
 180 East Broad Street, 6th Floor
 Columbus, Ohio 43215-3793
 Ph: 614-466-4397 Fax: 614-644-8767
William.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us

**COUNSEL FOR APPELLEE, PUBLIC
UTILITIES COMMISSION OF OHIO**

FILED
 MAY 05 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANTS, THE 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 January 11, 2011 (Exhibit A), Finding and Order entered January 27, 2011 (Exhibit B), and an Entry of Rehearing entered March 9, 2011 (Exhibit C) of Appellee, Public Utilities Commission of Ohio ("PUCO" or "Commission") in PUCO Case No. 10-1261-EL-UNC.

Appellant was and is a party of record in PUCO Case No. 10-1261-EL-UNC, and timely filed its Application for Rehearing of the Appellee's January 11, 2011 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 March 9, 2011.

The Appellant complains and alleges that the Appellee's January 11, 2011 Opinion and Order, January 27, 2011 Finding and Order, and the Commission's March 9, 2011 Entry on Rehearing in PUCO Case No. 10-1261-EL-UNC are unlawful, unjust and unreasonable in the following respects, as set forth in Appellant's Application for Rehearing.

1. The PUCO erred by unlawfully excluding the profits from off-system sales from the earned return of Columbus Southern Power Company. The exclusion of these profits results in a biased comparison between Columbus Southern Power Company and publicly traded companies that face comparable business and financial risk, and thus is contrary to R.C. 4928.143(F), thereby denying customers part of the refund they should have received from Columbus Southern.

WHEREFORE, Appellant respectfully submits that Appellee's January 11, 2011 Opinion and Order, Appellee's January 27, 2011 Finding and Order, and Appellee's March 9, 2011 Entry on Rehearing in Case No. 10-1261-EL-UNC are unlawful, unjust and unreasonable and should be reversed. This case should be remanded to Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,



David F. Boehm, Esq. (0021881)
Michael L. Kurtz, Esq. (0033350) (Counsel
of Record)

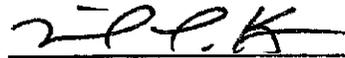
BOEHM, KURTZ & LOWRY
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Ph: (513) 421-2255 Fax: (513) 421-2764
E-Mail: dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com

**COUNSEL FOR APPELLANTS, THE
OHIO ENERGY GROUP**

May 5, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal of the Ohio Energy Group was served upon the Chairman of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus and upon all parties of record by overnight mail (unless otherwise noted) this 5th day of May, 2011.



David F. Boehm, Esq. (0021881)
Michael L. Kurtz, Esq. (0033350)

**COUNSEL FOR APPELLANT
THE OHIO ENERGY GROUP**

Todd A. Snitchler, Chairman
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, Ohio 43215-3793
(Via Hand Delivery)

William L. Wright, Esq.
Section Chief, Public Utilities Section
PUBLIC UTILITIES COMMISSION OF OHIO
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
(Via Hand Delivery)

Thomas W. McNamee, Esq.
Assistant Attorney General
PUBLIC UTILITIES COMMISSION OF OHIO
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
(Via Hand Delivery)

Columbus Southern Power
Selwyn J. Dias
850 Tech Center Drive
Gahanna Oh 43230

Ohio Partners For Affordable Energy
Rinebolt David C
231 West Lima St. Po Box 1793
Findlay Oh 45839-1793

Smalz, Michael Attorney At Law
Ohio State Legal Service Assoc.
555 Buttles Avenue
Columbus Oh 43215-1137

Ohio Power Company
Selwyn J. Dias
850 Tech Center Drive
Gahanna Oh 43230

Darr, Frank P.
21 East State Street 17th Floor
Columbus Oh 43215

Grady, Maureen
Office Of Consumers' Counsel
10 W. Broad Street Suite 1800
Columbus Oh 43215-3485

O'brien , Thomas
Bricker & Eckler Llp
100 South Third Street
Columbus Oh 43215-4291

*Conway, Daniel R. Mr.
Porter Wright Morris & Arthur Llp
41 South High Street
Columbus Oh 43215

*Nourse, Steven T Mr.
American Electric Power
1 Riverside Plaza, 29th Floor
Columbus Oh 43215

*Randazzo, Samuel C. Mr.
Mcnees Wallace & Nurick Llc
21 E. State Street, 17th Floor
Columbus Oh 43215

Mooney, Colleen
231 West Lima Street
Findlay Oh 45840

Samuel C Randazzo
Industrial Energy Users Of Ohio
21 East State Street, 17th Floor
Columbus Oh 43215

Verrett, Kyle L
10 West Broad Street Suite 1800
Columbus Oh 43215-3485

*Rinebolt, David C Mr.
Ohio Partners For Affordable Energy
231 W Lima St Po Box 1793
Findlay Oh 45840-1793

*Schulenberg, Christine
Chester Willcox & Saxbe Llp
65 E. State Street Suite 1000
Columbus Oh 43215

*Duffer, Jennifer Mrs.
Armstrong & Okey, Inc.
222 East Town Street 2nd Floor
Columbus Oh 43215

*Wiley, Mark C Mr.
Kastle Solar & Wind
4501 Kettering Blvd
Dayton Oh 45439

Oliker, Joseph E Attorney
Mcnee Wallace & Nurick Llc
21 East State Street, 17th Floor
Columbus Ohio 43215

Maskovyak, Joseph V
Ohio State Legal Services Association
555 Buttles Avenue

*Satterwhite, Matthew J Mr.
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus Oh 43215

Ohio Consumers' Counsel
10 W. Broad Street Suite 1800
Columbus Oh 43215-3485

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

Ohio Manufactured Housing Assoc.
201 Bradenton Avenue Suite 100
Dublin Oh 43017

Kroger Company, The
Mr. Denis George 1014 Vine Street-Go7
Cincinnati Oh 45202-1100

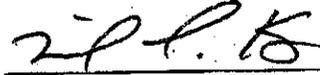
Verrett, Kyle L
10 West Broad Street Suite 1800
Columbus Oh 43215-3485

*O'Brien, Thomas J Mr.
Bricker & Eckler, Llp
100 South Third Street
Columbus Oh 43215

Bentine, John
Chester Willcox & Saxbe Llp
65 E. State Street, Suite 1000
Columbus Oh 43215

CERTIFICATE OF FILING

I certify that this Notice of Appeal has been filed with the docketing division of the Public Utilities Commission of Ohio in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.



David F. Boehm, Esq. (0021881)

Michael L. Kurtz, Esq. (0033350)

**COUNSEL FOR APPELLANT
THE OHIO ENERGY GROUP**

EXHIBIT A

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company)
and Ohio Power Company for)
Administration of the Significantly) Case No. 10-1261-EL-UNC
Excessive Earnings Test under Section)
4928.143(F), Revised Code, and Rule)
4901:1-35-10, Ohio Administrative)
Code.)

OPINION AND ORDER

The Commission, considering the application, the evidence of record, the applicable law, and being otherwise fully advised, hereby issues its Opinion and Order.

APPEARANCES:

Steven T. Nourse, American Electric Power Service Corporation, One Riverside Plaza, Columbus, Ohio 43215, and Porter, Wright, Morris & Arthur, by Daniel R. Conway, 41 South High Street, Columbus, Ohio 43215, on behalf of Columbus Southern Power Company and Ohio Power Company.

Mike DeWine, Attorney General of the State of Ohio, by William Wright, Section Chief, and Thomas W. McNamee, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, the Office of the Ohio Consumers' Counsel, by Maureen R. Grady, Melissa Yost, and Kyle Lynn Verrett, Assistant Consumers' Counsels, 10 West Broad Street, Columbus, Ohio 43215-3485, on behalf of the residential utility consumers of Columbus Southern Power Company and Ohio Power Company.

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

Michael R. Smalz and Joseph M. Maskovyak, Ohio Poverty Law Center, 555 Buttles Avenue, Columbus, Ohio 43215, on behalf of the Appalachian Peace and Justice Network.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo and Joseph Oliker, 21 East State Street, 17th Floor, Columbus, Ohio 43215-4228, on behalf of Industrial Energy Users-Ohio.

000009

David C. Rinebolt and Colleen L. Mooney, Counsel, 231 West Lima Street, P.O. Box 1793, Findlay, Ohio 45839-1793, on behalf of Ohio Partners for Affordable Energy.

Bricker & Eckler, Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215 and Richard L. Sites, 155 East Broad Street, 15th Floor, Columbus, Ohio 43215-3620, on behalf of Ohio Hospital Association.

Bricker & Eckler, Thomas J. O'Brien, 100 South Third Street, Columbus, Ohio 43215, on behalf of Ohio Manufacturers' Association.

BACKGROUND:

I. Significantly Excessive Earnings Test Background

On May 1, 2008, the governor signed into law Amended Substitute Senate Bill No. 221 (SB 221), amending various statutes in Title 49 of the Ohio Revised Code. Among the statutory amendments were changes to Section 4928.14, Revised Code, to establish a standard service offer (SSO). Pursuant to the amended language of Section 4928.14, Revised Code, electric utilities are required to provide consumers with a SSO, consisting of either a market-rate offer (MRO) or an electric security plan (ESP). Sections 4928.142(D)(4), 4928.143(E), and 4928.143(F), Revised Code, direct the Commission to evaluate the earnings of each electric utility's approved ESP or MRO to determine whether the plan or offer produces significantly excessive earnings for the electric utility.

After considering the arguments raised in the ESP and/or MRO proceedings of the electric utilities, the Commission concluded that initially the methodology for determining whether an electric utility has significantly excessive earnings as a result of an approved ESP or MRO should be examined within the framework of a workshop.¹ The Commission directed Staff to conduct a workshop to allow interested stakeholders to present concerns and to discuss and clarify issues raised by Staff. Accordingly, Case No. 09-786-EL-UNC, *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities (09-786)* was opened. The workshop was held on October 5, 2009. Staff filed its recommendations in 09-786 on November 18, 2009.

In 09-786, by Finding and Order issued on June 30, 2010, as amended and clarified in accordance with the entry on rehearing issued August 25, 2010, the Commission

¹ *In re Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company*, Case No. 08-935-EL-SSO, Opinion and Order at 64 (December 19, 2008) (FirstEnergy ESP case); and *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 08-917-EL-SSO, et al., Opinion and Order at 68 (March 18, 2009) (AEP-Ohio ESP cases).

provided guidance on the interpretation and application of Sections 4928.142(D)(4), 4928.143(E), and 4928.143(F), Revised Code.

On April 16, 2010, in 09-786 and in Case No. 10-517-EL-WVR, Columbus Southern Power Company (CSP) and Ohio Power Company(OP) (jointly AEP-Ohio or Companies) filed an application for a limited waiver of Rule 4901:1-35-10, Ohio Administrative Code (O.A.C.), to the extent that the rule requires the electric utility to file their SEET information by May 15, 2010.² By entry issued May 5, 2010, the Commission granted AEP-Ohio's request for an extension and directed AEP-Ohio to make its SEET filing by July 15, 2010. The due date for Companies to file their SEET information was further extended to September 1, 2010, pursuant to entry issued July 14, 2010, in 09-786.

On September 1, 2010, AEP-Ohio filed an application in Case No. 10-1261-EL-UNC, for the administration of the SEET, as required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C. By entry issued September 21, 2010, as amended on October 8, 2010, a procedural schedule was established for this proceeding. Pursuant to the procedural schedule, motions to intervene were due by October 8, 2010.

Motions to intervene were filed by, and intervention granted to, the following entities: the Office of the Ohio Consumers' Counsel (OCC), Industrial Energy Users-Ohio (IEU-Ohio), Ohio Partners for Affordable Energy (OPAE), Ohio Energy Group (OEG), Appalachian Peace and Justice Network (APJN), Ohio Manufacturers Association (OMA) and Ohio Hospital Association (OHA).

The hearing commenced, as scheduled, on October 25, 2010, and concluded on November 1, 2010, including rebuttal testimony offered by AEP-Ohio. At the hearing, AEP-Ohio presented the direct testimony of three witnesses: Thomas E. Mitchell (Cos. Ex. 4), Dr. Anil K. Makhija (Cos. Ex. 5), Joseph Hamrock (Cos. Ex. 6) and on rebuttal presented the testimony of Dr. Makhija (Cos. Ex.7) and Mr. Hamrock (Cos. Ex. 8). OCC, OMA, OHA, APJN and OEG (jointly Customer Parties) presented the testimony of Dr. J. Randall Woolridge (Joint Inv. Exs. 1 and 1-A) and Lane Kollen (Joint Inv. Ex. 2). The Staff offered the testimony of Richard Cahaan (Staff Ex. 1). Initial briefs and reply briefs were filed by AEP-Ohio, Staff, Customer Parties,³ IEU-Ohio, and OPAE.

² By May 15 of each year, the electric utility shall make a separate filing with the commission demonstrating whether or not any rate adjustments authorized by the commission as part of the electric utility's electric security plan resulted in significantly excessive earnings during the review period as measured by division (F) of Section 4928.143, Revised Code. The process and timeframes for that proceeding shall be set by order of the commission, the legal director, or attorney examiner. The electric utility's filing shall include the information set forth in paragraph (C) of Rule 4901:1-35-03, O.A.C., as it relates to excessive earnings.

³ The reply brief filed by Customer Parties did not include OMA or OHA as a party to the brief. Only OCC, APJN, and OEG are listed as parties to the reply brief.

On November 30, 2010, AEP-Ohio, Staff, OHA, OMA, The Kroger Company (Kroger), and Ormet Primary Aluminum Corporation (Ormet) filed a Joint Stipulation and Recommendation (Stipulation) in this case and in Case Nos. 09-872-EL-FAC and 09-873-EL-FAC, *In the Matter of the Review of the Fuel Adjustment Clauses of Columbus Southern Power Company and Ohio Power Company*, (Fuel Adjustment Clause (FAC) or FAC cases).⁴ The Stipulation included a proposed procedural schedule for the consideration of the Stipulation. Further, as part of the Stipulation, AEP-Ohio agreed to withdraw its opposition to Kroger's request to intervene and, pursuant to the entry issued December 1, 2010, Kroger was granted limited intervention to participate in the SEET case. On December 16, 2010, AEP-Ohio filed a notice of withdrawal of the Stipulation. The Companies' withdrawal, as any party to a Stipulation may, dissolves, terminates and voids the Stipulation. Nonetheless, in its notice of withdrawal, AEP-Ohio unilaterally and voluntarily agreed to fulfill its obligations in the Stipulation to: (1) contribute \$1 million of shareholder funds for OMA to be used to assist its members with programs and initiatives designed to bring energy-related benefits to Ohio manufacturers; (2) contribute \$1 million of shareholder funds for OHA to be used to assist its members with programs and initiatives designed to bring energy-related benefits to hospitals as those institutions continue to serve their communities; and (3) promote the accelerated deployment and use of new energy efficiency technologies by contributing \$100,000 of shareholder funds towards Kroger's energy efficiency projects that may not otherwise be eligible for recovery under a reasonable arrangement or pass the total resource cost test as defined in Rule 4901:1-39-01, O.A.C. AEP-Ohio stated that there would be no deadline or time limitation to deploy Kroger's projects and that the contribution would not expire, but may be used by Kroger on acceptable energy efficiency projects until the contribution amount is exhausted. Kroger is required to commit its energy usage reductions resulting from energy efficiency projects funded by AEP-Ohio's \$100,000 contribution to AEP-Ohio so that AEP-Ohio may meet its energy efficiency requirements under Section 4928.66, Revised Code. Further, in the notice of withdrawal, CSP agreed, as part of its upcoming ESP filing to propose and work with the Staff to develop a Phase II pilot program for AEP-Ohio's gridSMART program beyond the current footprint of Phase I, which will include dynamic pricing options.

APPLICABLE LAW:

Section 4928.143(F), Revised Code, provides, in relevant part:

⁴ On May 14, 2010, in Case Nos. 09-872-EL-FAC and 09-873-EL-FAC, AEP-Ohio filed its 2009 report of the management/performance and financial audits of its FAC (FAC cases). Motions to intervene in the FAC cases were timely filed by, and intervention granted to the following entities: OCC, IEU-Ohio, and Ormet. The hearing in the FAC cases commenced, as scheduled, on August 23, 2010, and concluded on August 24, 2010. Briefs and reply briefs were filed on September 23, 2010, and October 15, 2010, respectively.

- (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 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.

Further, Rule 4901:1-35-03(C)(10)(a), O.A.C., as effective May 7, 2009, provides:

For the annual review pursuant to division (F) of section 4928.143 of the Revised Code, the electric utility shall provide testimony and analysis demonstrating the return on equity that was earned during the year and the returns on equity earned during the same period by publicly traded companies that face comparable business and financial risks as the electric utility. In addition, the electric utility shall provide the following information:

- (i) The federal energy regulatory commission form 1 (FERC form 1) in its entirety for the annual period under review. The electric utility may seek protection of any confidential or proprietary data if necessary. If the FERC form 1 is not

available, the electric utility shall provide balance sheet and income statement information of at least the level of detail as required by FERC form 1.

- (ii) The latest securities and exchange commission form 10-K in its entirety. The electric utility may seek protection of any confidential or proprietary data if necessary.
- (iii) Capital budget requirements for future committed investments in Ohio for each annual period remaining in the ESP.

I. PROCEDURAL ISSUES:

A. AEP-Ohio's void-for-vagueness constitutionality argument

Section 4928.143(F), Revised Code, is void and unenforceable, AEP-Ohio claims, because it is impermissibly vague and fails to provide CSP and OP with fair notice, or the Commission with meaningful standards, as to what is meant by "significantly excessive earnings." According to AEP-Ohio, the void-for-vagueness doctrine has two primary goals. The first is to ensure "fair notice" to those subject to the law and the second is to provide standards to guide those charged with enforcing the law. Citing to *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995), AEP-Ohio asserts that the Supreme Court has provided greater specificity related to the two primary goals. The Companies acknowledge that the vagueness doctrine arises most often in the context of criminal laws that implicate First Amendment values. However, the Companies argue that laws that impose criminal penalties or sanctions or that reach a substantial level of constitutionally protected conduct must satisfy a "higher level of definiteness." *Belle Maer Harbor v. Charter Township of Harrison*, 170 F.3d 553, 557 (6th Cir. 1999). The Ohio Supreme Court applied this heightened standard of scrutiny, claims AEP-Ohio, in *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-379; a case involving a municipal ordinance that allowed a taking of property by eminent domain even though the statute carried no penalties or sanctions.

Similar to the *Norwood* case cited above, AEP-Ohio claims that Section 4928.143(F), Revised Code, results in a taking of private property rights as the Companies are being required to forfeit earnings lawfully gained through the efficient use of their own property so that those earnings can be redistributed to its customers, even though the customers indisputably paid a just and reasonable rate for the service they received. According to the Companies, Section 4928.143(F), Revised Code, fails to give any definitive notice or guidance as to what is meant by "significantly excessive earnings." For example, AEP-Ohio states that there are no definitions, standards or guidance in the statute providing the electric utility fair notice of the risk of forfeiture or giving the Commission adequate

standards to appropriately judge the result as is evident by the parties' starkly conflicting positions in this case. Further, AEP-Ohio asserts, the parties have no common understanding of what level of earnings should be deemed "significantly excessive," whether off-system sales should be included in the net earnings used to calculate the return on equity, how write-offs and deferrals should be treated, how to identify companies that face "comparable business and financial risk" or what is meant by the reference to "adjustments in the aggregate."

According to AEP-Ohio, the vagueness of Section 4928.143(F), Revised Code, is further compounded because the statute applies in a retrospective manner, requiring an electric utility to forfeit earnings from a prior year; because it is the electric utility's burden to prove its earnings in the prior year were not significantly excessive; and because the statute penalizes an electric utility for excess earnings in the prior year but does not insulate the electric utility from prior year earnings that fall significantly below what was earned in the same period by companies with comparable business and financial risk. Given the asymmetric consequences leveled by a determination of significantly excessive earnings, and the burden on the electric utility to prove that its earnings were not significantly excessive, the General Assembly, AEP-Ohio argues, failed to meet its heightened constitutional duty in this instance to assure that an electric utility had fair notice in advance of how its earnings would be measured and to assure that the Commission had clear direction on how the test was to be administered.

AEP-Ohio also argues that the Commission had the opportunity to cure, or at least ameliorate, the effects of the statute's vagueness but that the Commission failed to do so. The Companies claim that it pointed out the uncertainty associated with the SEET in its ESP case, and the Commission initially recognized the importance of giving AEP-Ohio the requested clarification at least with respect to OSS and deferrals. However, the Companies aver, the Commission inexplicably reversed itself even as to those two issues on rehearing.⁵ Additionally, the workshop proceeding in 09-786, which was intended to bring clarity to the statute, did not conclude until August 25, 2010, and even then several critical uncertainties remained. AEP-Ohio concludes that, because the SEET offers virtually no guidance as to its proper application and because the Commission failed to cure the uncertainties involved, Section 4928.143(F), Revised Code, is unconstitutionally vague and the Commission's only recourse now to ameliorate the consequences of the statute's constitutional infirmity is to adopt the position advanced by the Companies' witnesses which assures that AEP-Ohio will not be wrongfully deprived of its property.

On reply, Customer Parties (members include OCC, APJN, and OEG) and OPAE argue that constitutional issues are not within the jurisdiction of the Commission and the void-for-vagueness doctrine is inapplicable to Section 4928.143(F), Revised Code.

⁵ AEP-Ohio ESP, Entry on Rehearing at 45-49 (July 23, 2009).

Referring to *East Ohio Gas Co. v. Pub. Util. Comm.* (1940), 137 Ohio St. 225, 238-239, 28 N.E.2d 599, Customer Parties claim that the Ohio Supreme Court has long held that it is the duty of the Commission to assume the constitutionality of a statute and further that the "constitutionality of statutes is a question for the courts and not for a board or commission." Similarly, in *Consumers' Counsel v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 244, 247, 638 N.E.2d 550, the Ohio Supreme Court stated that "an administrative agency such as the commission may not pass upon the constitutionality of a statute." Citing to *Monongahela Power Co. v. Schriber* (S.D. Ohio 2004), 322 F. Supp.2d 902, 911, Customer Parties assert that the Commission has also acknowledged its lack of authority to determine constitutional issues. In short, therefore, Customer Parties and OPAE submit that the Commission must presume the constitutionality of Section 4928.143(F), Revised Code, and any challenges to the constitutionality of that statute must be decided by the Ohio Supreme Court on appeal.

In arguing that the Companies void-for-vagueness argument is misplaced, improperly applied, and inapplicable to Section 4928.143(F), Revised Code, Customer Parties assert that, as acknowledged by AEP-Ohio, the vagueness doctrine is rarely ever applicable to statutes other than criminal laws. Moreover, Customer Parties argue, the case law that the Companies rely on and discuss in great length on brief is simply not relevant to the Commission's consideration of the SEET as established by Section 4928.143(F), Revised Code. In fact, it is significant, Customer Parties note, that AEP-Ohio failed to cite any public utility cases where a statute had been challenged on vagueness grounds. This is easily explained, according to Customer Parties, because the vagueness doctrine is a constitutional law concept that was created to protect individuals from statutes that are too vague for the average citizen to understand in the criminal realm. *Connally v. General Construction Co.* (1926), 269 U.S. 385. Customer Parties submit that there is little question that the vagueness doctrine was not intended to apply to a statute like Section 4928.143(F), Revised Code and that it was never intended to protect utilities from returning significantly excessive earnings to ratepayers.

Customer Parties also disagree with AEP-Ohio's position that the statute is so vague that it provides no standard at all. To support this contention, Customer Parties point out that AEP-Ohio's witnesses garnered sufficient guidance from the statute to draft prefiled testimony and discussed, at great length in detail over 60-plus pages of its initial brief, the meaning and application of the SEET. Moreover, Customer Parties note, the SEET standard is arguably more detailed than the "just and reasonable" standard used in most jurisdictions, including Ohio, for distribution rate cases.

Citing to *Alliance v. Carbone* (2009), 181 Ohio App.3d 500, 2009-Ohio1197, Customer Parties assert that the courts have held that a statute is not void merely because it could have been worded more precisely. Rather, the critical question is whether the statute affords a reasonable person of ordinary intelligence fair notice and sufficient definition

and guidance to enable the individual to conform his or her conduct to the law. In this case, Customer Parties aver, the meaning of Section 4928.143(F), Revised Code, is not under debate but rather which expert witness' methodology the Commission will adopt to determine whether CSP's earnings were significantly excessive in 2009.

Customer Parties also reject AEP-Ohio's complaint that the Commission failed to cure the vagueness of the SEET when it had the opportunity to do so. Customer Parties point out that the Commission did provide further guidance and clarity regarding the application of Section 4928.143(F), Revised Code, through the SEET order and entry on rehearing in 09-786 and the SEET workshop.⁶ To support this position, Customer Parties assert that Ohio's other electric utilities had no difficulty understanding the SEET or the proper application of Section 4928.143(F), Revised Code. In summary, Customer Parties submit that the Companies' vagueness doctrine argument should be rejected as the Commission cannot decide constitutional issues and must presume the constitutionality of Section 4928.143(F), Revised Code, and that, in any event, the doctrine of vagueness is inapplicable to the SEET provision set forth in Section 4928.143(F), Revised Code.

After reviewing the arguments and case law of record, the Commission determines that it is the province of the courts, and not the Commission, to judge the constitutionality of Section 4928.143(F), Revised Code. Thus, the appropriate venue for AEP-Ohio to raise its constitutional challenges to the SEET is at the Ohio Supreme Court. Without addressing the constitutional threshold issue propounded by AEP-Ohio, the Commission determines, for the reasons that follow, that there is ample legislative direction to reasonably apply the statute in this case.

Initially, we note that, pursuant to *Connally*, supra, the typical due process claim of vagueness seeks to bar enforcement of "a statute which either forbids or requires the doing of an act." Section 4928.143(F), Revised Code, is not such a statute. This statute does not forbid or require the doing of an act but merely directs that prospective adjustments to rates be made in a future period if there is a finding that past rate adjustments resulted in significantly excessive earnings. Nor is AEP-Ohio penalized for its earnings under this statute. The fact that there would be a SEET review was known to the Companies when the rate plans were proposed.

The Commission also determines that Section 4928.143(F), Revised Code, is part of a comprehensive regulatory framework for setting rates under the provisions of S.B. 221. S.B. 221 created an approach to establishing ESP rates with significant regulatory flexibility including flexibility in what the utility may propose, a scope that may include distribution as well as generation charges and the option for the utility to withdraw any rate plan

⁶ 09-786, Finding and Order (June 30, 2010); Entry on Rehearing (August 25, 2010).

modified by the Commission. The SEET examination included in S.B. 221 provides a check to this flexible approach.

Contrary to AEP-Ohio's argument, Section 4928.143(F), Revised Code, provides a clear benchmark for identifying "excessive earnings." For example, the statute defines earnings as excessive "as measured by whether the earned return on common equity of the electric 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." Additionally, the statute directs the Commission to make "such adjustments for capital structure as may be appropriate." Further, the Commission is to consider "the capital requirements of future committed investments in this state." Finally, the Commission is directed to "not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company." These concepts are not new or novel and have been traditionally applied in the regulatory ratemaking process. *Federal Power Commission v. Hope Natural Gas Co.* (1944), 320 U.S. 591.

Moreover, the fact that there may be disagreement about how to define and apply this benchmark is not new. Parties frequently present the Commission with different views about a utility's return on common equity. The Commission has extensive experience adjudicating this issue. Utility regulation is not so mechanical that it can be performed without any expert judgment. The General Assembly has directed the Commission to utilize its experience and technical expertise in deciding a broad range of ratemaking issues. We do not find this issue to be fundamentally different from those which the Commission regularly decides under Ohio's statutory provisions for utility regulation. For these reasons, we find that Section 4928.143(F), Revised Code, provides sufficiently definitive guidance to the Commission to conduct the SEET.

B. IEU-Ohio's motion to dismiss

On the opening day of hearing before AEP-Ohio called its first witness, IEU-Ohio made an oral motion to dismiss the Companies' application in this matter. In support of its motion, IEU-Ohio claims that CSP and OP failed to come forward with evidence that satisfies the Companies' burden of proving that the Companies did not have significantly excessive earnings for calendar year 2009. IEU-Ohio renewed its motion to dismiss AEP-Ohio's application at the close of the evidentiary record. Both motions to dismiss were denied by the bench. (Tr. at 18-26, 746-747.)

Pursuant to Rule 4901-1-15(F), O.A.C., IEU-Ohio challenged, on brief, the hearing examiner's rulings on the motions to dismiss. In support, IEU-Ohio submits that the Commission does not have subject matter jurisdiction to adopt an earnings test other than the earnings test outlined in Section 4928.143, Revised Code, or apply the required earnings test other than as mandated by Section 4928.143, Revised Code. IEU-Ohio argues

that AEP-Ohio's application includes more than retail services in its earned return on equity (ROE), includes revenues for a period less than one year, includes nonretail transactions such as those subject to Federal Energy Regulatory Commission (FERC) jurisdiction and considers revenue, expenses and earnings of any affiliate or parent company.

Citing to the testimony of record, IEU-Ohio submits that AEP-Ohio witness Mitchell utilized earned ROE numbers for 2009 that were driven by total company numbers from all lines of business and not just the equity earned as a result of the ESP.⁷ AEP-Ohio witness Hamrock confirmed that CSP and OP engage in multiple lines of business including nonutility business and that the calculations in AEP-Ohio's testimony includes income from FERC-jurisdictional activities.⁸ Further, IEU-Ohio claims that all other witnesses in this proceeding relied upon AEP-Ohio's non-jurisdictionalized total company numbers as the starting point for developing their recommendations. Thus, IEU-Ohio argues, under the provisions of Section 4928.143, Revised Code, the Commission can proceed no further in its analysis of AEP-Ohio's SEET.

IEU-Ohio next submits that, even if the evidence presented by AEP-Ohio and the other parties conformed to the requirements of Section 4928.143, Revised Code, the Commission would not be able to rely on such evidence without correcting the math to eliminate other problems with the numbers used by the parties to present their recommendations. For example, pointing to the AEP-Ohio ESP order, IEU-Ohio submits that AEP-Ohio was instructed to remove the annual recovery of \$51 million of expenses, including associated carrying charges, related to the Waterford Energy Center and the Darby Electric Generating Station.⁹ However, pointing to the testimony of AEP-Ohio witness Hamrock, the expenses associated with the Waterford Energy Center and the Darby Electric Generating Station are included in the per book net income for CSP for 2009. IEU-Ohio claims that, in order to properly measure CSP's electric utility earned return from the ESP, the income statement (expenses, revenue and net income) and balance sheet (common equity) effects attributable to the Waterford Energy Center and the Darby Electric Generating Station must be removed in order to apply the SEET to the ESP currently in effect. (Tr. at 139-141.)

Even if the Commission ignores the fact that SEET requires reliance upon the electric utility and retail jurisdictional numbers, IEU-Ohio argues, the total company analysis provided by AEP-Ohio is based on one-sided, selective and misleading adjustments to the total company numbers. For example, AEP-Ohio removed off-system sales (OSS) net margins from CSP's total company dollar return on equity for 2009 because

⁷ Cos. Ex. 4 at 4-5; Tr. I at 37-39.

⁸ Cos. Ex. 6 at 6; Tr. I at 134, 136-137, 141-152.

⁹ AEP-Ohio ESP cases, Order at 51-52 (March 18, 2009); Entry on Rehearing at 35-36 (July 23, 2009); and Second Entry on Rehearing at 2-4 (November 4, 2009).

OSS margins result from wholesale transactions subject to FERC jurisdiction and not retail transactions. AEP-Ohio admits, however, that there are other nonjurisdictional activities that the Companies did not attempt to fully jurisdictionalize for 2009 earnings purposes although the Companies claim the right to do so, if necessary. The importance of AEP-Ohio's selective application between SEET and jurisdictional rate plan transactions was discussed by Staff witness Cahaan. Mr. Cahaan testified that if the OSS were excluded from the net income (numerator) then there should have been an adjustment made to the common stock equity (denominator). Failure to make such an adjustment tends to lower the overall return on equity. (Cos. Ex. 4 at 5; Cos. Ex. 6 at 6-7; Tr. at 36; Staff Ex. 1 at 19-20.)

AEP-Ohio submits that IEU-Ohio's motion to dismiss based upon IEU-Ohio's reading of Section 4928.143, Revised Code, as well as IEU-Ohio's criticisms of the Companies exclusions and deferrals for purposes of performing ROE calculations is without merit. Regarding IEU-Ohio's contention that the first annual period for the calculation of SEET began on April 1, 2009, and ended on March 31, 2010, AEP-Ohio claims that this position is contrary to determinations made by the Commission in the Companies' ESP proceedings. The Companies state that the Commission specifically found that AEP-Ohio's ESP was authorized effective January 1, 2009.¹⁰ The Commission later confirmed the January 1, 2009, start date of the Companies' ESP in a March 30, 2009, entry *nunc pro tunc* and in an entry on rehearing issued on July 23, 2010. Therefore, AEP-Ohio argues, the first annual period of the Companies' ESP is calendar year 2009, and IEU-Ohio's contention otherwise is incorrect.

IEU-Ohio's argument that Section 4928.143(F), Revised Code, requires a jurisdictionalized earnings allocation study, based on ESP rate plan-approved services, is also incorrect, AEP-Ohio argues. The statute does not specifically require, claims AEP-Ohio, that the Commission perform a comprehensive jurisdictional allocation study in order to determine an earned ROE appropriate for use in the SEET. Rather, the Companies submit, FERC Form 1 data provides a reasonable starting point from which appropriate adjustments can be made in order to develop an earned ROE.

Next, AEP-Ohio disputes IEU-Ohio's contention that the Companies' filing contains faulty data insofar as the net income reflects inclusion of the expenses associated with CSP's Waterford and Darby generating stations. Adopting IEU-Ohio's logic, AEP-Ohio claims, would mean that every item of expense not related to an ESP rate adjustment would be adjusted out of expenses resulting in an artificial inflation of earnings for purposes of applying the SEET. Such a position is inappropriate, the Companies claim, because such an approach reflects a traditional ratemaking analysis pursuant to Section 4909.15, Revised Code, rather than favorably comparing the ESP to the expected results of

¹⁰ AEP-Ohio ESP cases, Order at 64 (March 18, 2009).

a MRO as intended by the General Assembly. AEP-Ohio urges the Commission to reject IEU-Ohio's position for purposes of developing the SEET analysis in this proceeding.

Lastly, AEP-Ohio's arguments responding to intervenors concerns regarding the exclusion of OSS, deferrals, and the failure to fully account for other nonjurisdictional activities are addressed under specific topic areas and not further addressed in this section of the Commission's decision.

IEU-Ohio's motion to dismiss is denied. The Commission has already fully addressed the start date of AEP-Ohio's ESP.¹¹ Likewise, we reject IEU-Ohio's contention that the Companies' application cannot proceed as AEP-Ohio did not perform a comprehensive jurisdictional allocation study. Nowhere in Section 4928.143(F), Revised Code, is a comprehensive jurisdictional allocation study required in order to determine an earned ROE appropriate for use in the SEET. Nor do we find that a comprehensive jurisdictional allocation study is the only manner in which to determine an earned ROE for SEET. Rather, we find that it is acceptable to make appropriate adjustments to FERC Form 1 data in order to develop an earned ROE for SEET. In making this determination, we note that, under applicable provisions of Section 4928.01, Revised Code, and under Section 4905.03, Revised Code, an electric utility is not limited to a subset of a firm's activities that may be regulated under an ESP. Additionally, the definition of an electric light company explicitly covers firms engaged in both activities subject to rate regulation by this Commission and activities such as transmission that are, in large part, subject to federal jurisdiction. Thus, while adjustments to FERC Form 1 data may be appropriate to isolate the effects on ROE of the adjustments in the ESP under review, the SEET, in the first instance, may be measured based upon the return of common equity of the electric utility viewed as a company without a complete jurisdictional cost and revenue allocation study.

Regarding IEU-Ohio's argument that the Companies' filing contains faulty data insofar as the net income reflects inclusion of expenses associated with CSP's Waterford and Darby generating stations, this argument is also rejected. In the Companies' ESP proceedings, the Commission had authorized CSP to increase revenues by \$51 million to recover jurisdictional expenses associated with the Waterford and Darby facilities.¹² The Waterford and Darby facilities had never before been included in rate base. In response to IEU-Ohio's application for rehearing, the Commission agreed with IEU-Ohio that the Companies had not demonstrated that their current revenue was inadequate to cover the costs associated with the generating facilities. Therefore, the Commission directed AEP-Ohio to modify its ESP and remove the annual recovery of \$51 million of expenses,

¹¹ AEP-Ohio ESP, Order at 64 (March 18, 2009); Entry *Nunc Pro Tunc* (March 30, 2009); Entry on Rehearing at 41-45 (July 23, 2009).

¹² AEP-Ohio ESP, Order at 51-52 (March 18, 2009).

including associated carrying charges related to these generation facilities.¹³ Today, AEP-Ohio is in the same position regarding the Waterford and Darby facilities as it was before issuance of the ESP Order and, therefore, excluding an additional \$51 million would be unreasonable.

II. APPLICATION OF SEET ANALYSIS:

A. Comparable Group of Companies, ROE of Comparable Companies and SEET Threshold

1. AEP-Ohio

One of the steps in the process to determine whether an electric utility has significantly excessive earnings is to compare the earned return on common equity of the electric utility to the earned return on common equity of a group of publicly traded companies, including utilities that face comparable business and financial risk. AEP-Ohio, Customer Parties and Staff advocate different methods to select the comparable group of publicly traded companies to develop the ROE to which AEP-Ohio's ROEs will ultimately be compared.

AEP-Ohio presented the testimony of Dr. Anil Makhija, professor of finance at The Ohio State University (Cos. Ex. 5). The process advocated by Dr. Makhija may be summarized as stated below. AEP-Ohio's proposed process evaluates all publicly traded U.S. firms to develop its comparable group of companies. To evaluate business risk, AEP-Ohio used unlevered betas and to evaluate financial risk, it used the book equity ratio. By using data from Value Line,¹⁴ AEP-Ohio applies the standard decile portfolio technique to divide the companies into five different business risk groups and five different financial risk groups (listing each unlevered beta or book equity ratio lowest to highest). AEP-Ohio defines business risk as evolving from the day-to-day operations of CSP and OP, including the uncertainty associated with revenue stream, operating and maintenance expenses, regulatory risks, and fluctuations in weather and demand. AEP-Ohio equates financial risk with the debt obligation of CSP and OP. AEP-Ohio then selects the companies in the cell which includes AEP Corporation (AEP) as the comparable group companies. To account for the fact that the business and financial risks of CSP and OP may differ from AEP, this aspect of the process is repeated for CSP and OP and taken into consideration in determining whether CSP's or OP's ROEs are excessive. (Cos. Ex. 5 at 5-6, 13-18, 24-27.)

AEP-Ohio accounts for the risk faced by common equity holders by using the Capital Asset Pricing Model (CAPM), and then attempts to verify its findings by repeating

¹³ AEP-Ohio ESP cases, Order at 51-52 (March 18, 2009); Entry on Rehearing at 35-36 (July 23, 2009); and Second Entry on Rehearing at 2-4 (November 4, 2009).

¹⁴ Value Line Standard Edition as of June 1, 2010.

the analysis using capital intensity and the ratio of revenues to total assets as screens. AEP-Ohio argues that CAPM, which is used to measure total market-related risks, is "by far the most widely used model for taking risk into account." AEP-Ohio uses Value Line betas for AEP, as compared to the betas of CSP and OP, to confirm the conservative nature of AEP-Ohio's proposed method. To account for any difference in the capital structure of CSP or OP, as compared to the capital structure of the companies in the comparable group companies, the electric utility examines the unlevered beta and the debt/equity ratio of the publicly traded comparable companies as a part of determining their ROE. (Cos. Ex. 5 at 18-25.)

AEP-Ohio again advocates, as it proposed in its ESP proceeding and in 09-786, that an electric utility's earnings not be considered significantly excessive if the annual earnings are less than two standard deviations above the mean ROE of the comparable group of companies. The Companies explain that approximately two standard deviations (which is equivalent to a 1.96 standard deviation adder for SEET purposes) is equivalent to the traditional 95 percent confidence level, and the 95 percent confidence level provides for a reasonably acceptable risk of false positives. Further, this process for selection of the comparable group of companies is preferable, according to AEP-Ohio, because it is objective, as it relies on market-based measures of risk, best targets comparable companies, delivers a reliably large sample of comparable companies and can be replicated in future proceedings. Further, AEP-Ohio confirms its proposed method by repeating the analysis using other business and financial risk measures and a larger population of companies to form the comparable group of companies. (Cos. Ex. 5 at 5-6, 13.)

AEP-Ohio concludes that the mean ROE for the comparable group of companies for 2009 is 11.04 percent with a standard deviation of 5.85 percent. Multiplying the standard deviation of the comparable group of companies by 1.96 (corresponding to a 95 percent confidence level) yields an adder of 11.47 percent. Thus, AEP-Ohio's SEET analysis yields a threshold ROE, the point at which earnings should be considered significantly excessive for 2009, of 22.51 percent (11.04 + 11.47) for CSP and OP. (Cos. Ex. 5 at 39, 45.)

Opposition to AEP-Ohio's proposed SEET analysis

Customer Parties and Staff argue that there are a number of errors with the method advocated by AEP-Ohio. First, Customer Parties claim that AEP-Ohio's approach for determining the comparable group companies identifies comparable utility and publicly traded companies based on the business and financial risk profile of AEP and not CSP (or OP) in contradiction of the language in Section 4928.143(F), Revised Code, which directs the Commission not to consider the revenues, expenses, or earnings of the electric utility's affiliates or its parent company. Second, Customer Parties contend that AEP-Ohio's process establishes an ROE threshold for SEET based on a 95 percent confidence interval and, as such, only 2.5 percent of companies would ever be determined to have

significantly excessive earnings. Customer Parties argue that using such a high confidence interval results in an excessively high ROE SEET threshold. Third, Customer Parties argue that AEP-Ohio's method does not directly adjust the ROE for the capital structure and cost of debt of CSP to appropriately account for the differences in financial risk between CSP and the comparable companies. Ultimately, Customer Parties contend that AEP-Ohio's proposed SEET analysis does not provide a direct ROE SEET for CSP. (Joint Inv. Ex. 1 at 24-26.)

Staff notes a number of advantages and some disadvantages with AEP-Ohio's SEET process. Staff supports AEP-Ohio's proposed SEET process to the extent that it yields a reliably large sample and is objective as a result of its reliance on market-based measures. However, Staff asserts that AEP-Ohio's process very significantly reduces any aspect of judgment as to the appropriateness of any company included in the comparable group of companies. Staff also argues that AEP-Ohio's implementation of the CAPM does not allow for the consideration of the type of business risk and, thus, creates a group of comparable companies with diverse business risk which produces a large variance. Staff argues that AEP-Ohio's use of CAPM to evaluate business risk is misplaced. Staff interprets Section 4928.143(F), Revised Code, to focus on the company's business risk as opposed to the investor's diversifiable business risk. Staff also dislikes AEP-Ohio's reliance on unlevered betas as a part of the SEET process. Staff reasons that unlevered beta measures are not stable. Finally, Staff rejects a statistical definition of "significantly" for three reasons. In this case, it is Staff's opinion that the Companies' proposal for statistical significance is egregiously excessive and counter-intuitive to the requirements of SB 221. According to Staff, a statistical definition of "significant" does not provide a useful or satisfactory interpretation of the legislative language, common sense or the ordinary meaning of the words as used in the English language. Staff believes that there is no reason to implement a scientific process for statistical inference when direct observation to reach a conclusion is feasible. Although Staff recognizes that direct observation to surmise a result could put the electric utility in the position of trying to prove a negative, Staff believes it is in essence a method to avoid false negatives like the Companies' proposed method is designed to avoid false positives. (Staff Ex. 1 at 3-9, 12-16.)

2. Customer Parties

Customer Parties advocate a seven-step process by which to determine the SEET threshold ROE which may be summarized as follows: (1) identify a proxy group of electric utility companies (electric proxy group); (2) identify a list of business and financial risk measures for the electric proxy group; (3) establish the ranges for the business and financial risk indicators for the companies in the electric proxy group; (4) screen the *Value Line* database to identify a group of comparable public companies, including electric utilities, whose business and financial risk indicators fall within the ranges of the electric proxy group; (5) compute the benchmark ROE for the group of comparable public

companies, including electric utilities; (6) adjust the benchmark ROE for the capital structures of CSP; and (7) add a ROE premium to establish the SEET threshold ROE. (Joint Inv. Ex. 1 at 8.)

Customer Parties first created an electric proxy group by reviewing utilities in the *AUS Utility Reports* based on four criteria. The electric proxy group includes 15 electric utilities with: (1) at least 75 percent of revenue from regulated electric; (2) an investment grade bond rating; (3) total revenue of less than \$10 billion; and (4) a three-year history of paying cash dividends (2007-2010) with no dividend reductions.¹⁵ Customer Parties reason that this aspect of its proposed SEET analysis is appropriate, as it is common to use this screening process in estimating the cost of capital in public utility rate cases and because the process results in a group of businesses with similar business and financial characteristics to the utility at issue, in this case CSP. After excluding foreign companies, Customer Parties use three business and financial risk indicators, beta, asset turnover and common equity ratios, from the electric proxy group to establish ranges for beta, asset turnover and common equity to develop the comparable group of companies as required in Section 4928.143(F), Revised Code. (Joint Inv. Ex. 1 at 9-15.)

Step 4 of the process advocated by Customer Parties is to screen the *Value Line Investment Analyzer 2010* to develop the comparable group companies with business and financial risk indicators within the range of the electric utility proxy group. Forty-five companies compose Customer Parties' comparable group of companies with 15 electric utilities, 28 gas and electric utilities and only two nonutility companies. Under Customer Parties' proposed SEET, the next step is to determine the median ROE for the comparable group companies, in this case, 9.55 percent for 2009. Customer Parties argue that it is appropriate to use the median ROE, as opposed to the mean ROE, to avoid the impact of outliers in the distribution of the ROEs, as the presence of outliers can greatly inflate the standard deviation of the comparable group companies and ultimately inflate the SEET threshold ROE. (Joint Inv. Ex. 1 at 15-21; JRW-2; JRW-3; Cos. Br. at 32.)

Next, Customer Parties adjust the benchmark ROE of the comparable group companies for the capital structure of CSP to account for the differences in financial risk between the comparable group of companies and CSP. Under Customer Parties' proposed SEET analysis, the benchmark ROE for CSP is 9.58 percent and the benchmark ROE for the comparable group of companies is 9.55 percent. Customer Parties recommend a 200 to 400 basis point premium adder to the benchmark ROE of the comparable group of companies ROE to establish the threshold ROE for significantly excessive earnings for the year 2009. Customer Parties emphasize that the 200-400 basis points premium should not be considered an unchanging precedent but is based on the ROE adder used by the FERC for transmission investments that are not routine and riskier than the usual investments made

¹⁵ Joint Inv. Ex. 1 at 10, Table 1.

by transmission companies. The rationale is that the basis points premium is an administrative standard based on informed judgment for additional risk. In comparison, Customer Parties offer that setting the SEET threshold 200 basis points over the returns of the comparable group of companies is an appropriate proxy for the significantly excessive earnings threshold for AEP-Ohio and, in its opinion, is consistent with the Commission's adoption of the 200 basis points "safe harbor" provision as set forth in 09-786. Under this analysis, Customer Parties argue that the threshold ROE for CSP is 11.58 percent to 13.58 percent. OP&E supports the SEET analysis advocated by Customer Parties (Joint Inv. Ex. 1 at 7-8, 17-23; OP&E Br. at 6-7.)

Opposition to Customer Parties' proposed SEET analysis

AEP-Ohio argues that Customer Parties' proposed SEET analysis does not meet the objective required by the statute that the comparable group of companies match the business and financial risk of CSP and OP. AEP-Ohio also asserts that Customer Parties' method presupposes what kind of companies ought to be a match for CSP or OP by use of the electric proxy group, limits the sample of companies available and rules out publicly traded companies that may have been a better match to the electric utility. AEP-Ohio also reasons that Customer Parties' process does not produce a reliably large sample of comparable companies. AEP-Ohio suggests that Customer Parties implicitly recognize the relatively small sample size by modifying the results to eliminate outliers and by using the median rather than the mean based on a misinterpretation of Section 4928.143(F), Revised Code. AEP-Ohio reasons that the median is inadequate for purposes of the SEET analysis because it does not respond to the variation in the ROEs among the comparable group of companies. AEP-Ohio advocates that the mean and standard deviation better capture the information regarding the ROEs of the comparable group of companies and the distribution of their ROEs. AEP-Ohio notes that the mean ROE of the electric proxy group is 9.74 percent. The Companies contend that Customer Parties' proposed SEET analysis process includes the FERC adder based on an arbitrary calculation that has no connection to the comparable group of companies to whose mean or median the ROE is applied. AEP-Ohio asserts that the Customer Parties' approach lacks objectivity. Further, AEP-Ohio argues that Customer Parties' method produces the same result for all electric utilities in Ohio as well as others across the country and includes only two non-utility companies out of the 45 that form the Customer Parties' group of comparable companies. (Cos. Ex. 7 at 1-5, 7-9.)

AEP-Ohio contends that Customer Parties' use of the beta range produced by the electric proxy group is inappropriate to compare to the year-end value for CSP. Because CSP's beta is higher, since it is a smaller company, Customer Parties' analysis necessarily puts CSP's beta outside of the range of the electric proxy group beta, causing a misguided comparable group of companies to be composed. According to AEP-Ohio, Customer Parties' method implements a screen for business risk too late in the process and utilizes

inappropriate screens. AEP-Ohio contends that Customer Parties' proposal mixes business and financial risks where SB 221 requires the consideration of both business and financial risks in the formation of the comparable group of companies. (Cos. Ex. 7 at 5-6.)

Further, AEP-Ohio asserts that Customer Parties failed to correctly adjust the data for the comparable group of companies for the capital structure of CSP. The Companies contend that Customer Parties should have considered short-term debt as well as long-term debt, preferred and common equity. (Cos. Ex. 7 at 6-7.)

Finally, AEP-Ohio argues that Customer Parties' adder is arbitrary and produces an unreasonably high number of companies that would fail the SEET. With the 200 basis points adder, and using Customer Parties' benchmark ROE of 9.58 percent, and a threshold ROE minimum of 11.58 percent, AEP-Ohio concludes that almost one in every four companies in Customer Parties' comparable group of companies would have significantly excessive earnings. Further, AEP-Ohio reasons that, pursuant to Customer Parties' SEET analysis, if applied symmetrically, to a mean below 7.58 percent and above 11.58 percent, nearly half the comparable group companies would have earnings that were significantly excessive or deficient under Customer Parties' proposed 200 points adder. AEP-Ohio argues that such results demonstrate excessive failure rates in the application of the SEET with dire consequences for attracting capital to Ohio's utilities. (Cos. Ex. 7 at 10-11; Joint Int. Ex. 1 at Ex. JRW-4.)

3. Staff

Staff presented the testimony of Richard Cahaan, consultant to the Capital Recovery and Financial Analysis Division of the Utilities Department. Staff's SEET analysis proposal is based on a three-step process: (1) determine the ROE for the group of companies with comparable business and financial risks; (2) establish a threshold ROE that is significantly in excess of the ROE for the comparable group of companies; and (3) calculate AEP-Ohio's ROE for use in the SEET. (Staff Ex. 1 at 1-2.)

After evaluating the SEET analyses offered by AEP-Ohio and by Customer Parties in this proceeding, as well as the model advocated by Dr. Vilbert in the FirstEnergy Companies SEET case,¹⁶ Staff posits that, while each approach is considerably different, the results are not so different. Staff characterizes AEP-Ohio's model as theoretical, abstract and academic and Customer Parties' model as more traditional. Staff claims that the Customer Parties' comparable group of companies includes an anomaly company or isolated outlier with one portion of its business that is characteristically quite different

¹⁶ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Administration of the Significantly Excessive Earnings Test Under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code, Case No. 10-1265-EL-UNC.*

from utility generation and distribution assets. Staff reasons that it is not unusual to eliminate the highest and lowest observations in a sample to calculate the mean and, if the high and low outliers were omitted from the Customer Parties' process, the mean would be 10.06 percent. In light of such a comparison, Staff reasons that Customer Parties' 9.58 percent ROE for the comparable group of companies is low. However, the witness acknowledges that, if the median ROE is used, Staff's proposed adjustment to eliminate the outliers would have no effect on the ROE of the comparable group of companies. (Staff Ex. 1 at 3-9, 12; Tr. III at 518).

In the application of SEET, the Staff declares that it is appropriate to recognize a range of reasonableness as opposed to the accounting accuracy usually associated with public utility regulation. Consistent with that reasoning, Staff notes that the ROE as presented in two exchange funds, namely *iShares Dow Jones U.S. Utilities Sector Index Fund* and *Utilities Select Sector SPDR Fund*, have a weighted average ROE of 11.15 percent and 11.39 percent, respectively. Staff offers that these independently determined ROEs confirm the reasonableness of the ROE offered by the parties to this case. Considering the SEET analyses offered and Staff's expressed advantages and disadvantages of each parties' proposal, Staff witness Cahaan believes that the mean ROE for the group of comparable companies is reasonably within the 10 percent to 11 percent range with a bit more evidence on the higher side of the range. (Staff Ex. 1 at 3, 11-13.)

Operating under the theory that "significantly excessive" is a concept of fairness, Staff advocates that, rather than a 200-400 basis points adder to the mean of the comparable group companies' ROE, the threshold ROE be expressed as a percentage of the comparable group companies' benchmark ROE. The benefits of using a percentage of the comparable group companies' benchmark ROE incorporates an adjustment that works and is reasonable in deflationary and inflationary economic conditions. Staff advocates a 50 percent adder to the comparable group of companies' ROE to establish the SEET threshold. Staff explains that, in this case for 2009, the 50 percent adder is in the reasonable range by comparing it to CSP's current embedded cost of debt. Staff argues that if the result of subtracting the adder from the comparable ROE yields a result that is near CSP's cost of debt, the adder is reasonable. Staff, therefore, recommends a SEET threshold for CSP of 16.05 percent before the company's earnings may be considered significantly excessive. (Staff Ex. 1 at 13-17).

Finally, for efficiency of the annual SEET analysis, Staff proposes that, in future SEET cases, the Commission direct Staff to offer a benchmark ROE based on an index or combination of indices announced in advance and that parties to the case put forward analysis for adjustments or modifications to the indexed benchmarks (Staff Ex. 1 at 12).

Opposition to Staff's analysis

AEP-Ohio argues that Staff's proposed 50 percent adder is roughly equivalent to less than one standard deviation and is too low when the frequency with which a company will be considered to have significantly excessive earnings is considered. According to AEP-Ohio, the 50 percent adder would cause more than one out of every three companies to be found to have significantly excessive earnings. Further, AEP-Ohio notes that under Staff's proposal, where the comparable group of companies are right-skewed and fat-tailed, an even greater portion of companies would be beyond the threshold ROE. (Cos. Ex. 5 at 39-40; Cos. Br. at 40-41.)

4. Commission decision on comparable companies and comparable companies' ROE

Contrary to Customer Parties' claims, AEP-Ohio took into account the business and financial risks of the electric utility in determining its comparable group of companies and adjusted for the capital structure of the electric utility. AEP-Ohio's determination of the comparable group of companies was initially determined by publicly traded companies that share similar business and financial risks, and the use of the beta of AEP-Ohio, as opposed to the beta of CSP or OP, does not negate the validity of the comparable group of companies selected under AEP-Ohio's analysis. The Commission is concerned that Customer Parties' determination of the comparable group of companies was developed from an electric only proxy group which predetermines, to some extent, the characteristics of the comparable group without any direct relationship to the electric utility, and, most significantly, produces the same comparable group of companies for all Ohio's electric utilities.

Given the divergent methods with which each party computed the comparable companies' ROE, including Staff's use of two independent indices to confirm the reasonableness of the resulting ROEs, the evidence indicates the comparable benchmark ROE is in the general range of between 10 percent and 11 percent. Thus, this is the range within which the mean of the comparable companies should be established. However, we believe that the reasons cited by Staff and AEP-Ohio warrant establishing the benchmark at the top of the range, 11 percent, rather than the 10.7 percent recommended by the Staff.

B. AEP-Ohio 2009 Earned ROEs

AEP-Ohio witness Thomas E. Mitchell presented testimony that supported the Companies' calculation of CSP's and OP's earned ROE for the 2009 SEET, proposed deductions to the Companies' ROEs and quantified the revenue producing provisions of the Companies' ESP. AEP-Ohio calculates each electric utility's ROE by using the net earnings available to common equity shareholders compared to the beginning and ending

average equity for the year ended December 31, 2009, as dictated by the Commission in 09-786. AEP-Ohio witness Mitchell testified that there were no minority interest, non-recurring, special or extraordinary items for CSP or OP for the year 2009. Thus, without any further adjustments, AEP-Ohio determined an ROE for OP of 10.81 percent and for CSP of 20.84 percent for 2009. AEP-Ohio acknowledges that included in the earnings of CSP and OP are nonjurisdictional earnings (excluding as it proposes off-system sales) that it did not attempt to fully jurisdictionalize for purposes of the 2009 SEET analysis; however, AEP-Ohio asserts to reserve the right to further jurisdictionalize its earnings if necessary. (Cos. Ex. 4 at 3-5, Ex. TEM-1 at 1; Cos. Ex. 6 at 7.)

Based on the Companies' determination of the mean ROE of the comparable group of companies of 11.04 percent, the Companies concluded that OP was within the safe harbor provision of 200 basis points above the mean of the comparable group of companies and, thus, did not have significantly excessive earnings for 2009 (Cos. Ex. 4 at 3-5; Cos. Ex. 6 at 7-9).

Customer Parties and Staff accepted the Companies' calculation of CSP's ROE of 20.84 percent for 2009 and OP's ROE of 10.81 percent for 2009, excluding any adjustments (Joint Inv. Ex. 2 at 18; Staff Ex 1 at 18).¹⁷

1. Commission decision on SEET Threshold

First, to the extent that AEP-Ohio failed to further jurisdictionalize its 2009 earnings for the SEET proceeding, AEP-Ohio has waived its right to do so subsequent to the issuance of this Order. The parties to this proceeding should not be required to revise their position or the Commission reconsider its Order because AEP-Ohio elected not to further jurisdictionalize its earnings before the application was filed.

In 09-786, the Commission concluded that, for purposes of the SEET analysis, any electric utility earnings found to be less than 200 basis points above the mean of the comparable group of companies would not be significantly excessive earnings.¹⁸ In this case, depending on the comparable group of companies selected and the range of the comparable companies' ROEs, the ROE spans from 9.58 percent, as proposed by Customer Parties, to 11.04 percent, as proposed by AEP-Ohio. The Commission observes that under any parties' proposed SEET analysis presented in this proceeding, OP's earned ROE is less than 200 basis points above the mean of the comparable group of companies. Thus, we find that OP did not have significantly excessive earnings for 2009 pursuant to Section

¹⁷ Customer Parties nonetheless note that it computes CSP's ROE for 2009 as slightly more, 20.86 percent, and that SNL Financial database computes CSP's ROE at 20.82 percent. Customer Parties concede that the difference is immaterial. (Joint Inv. Ex. 2 at 18.)

¹⁸ 09-786, Order at 29 (June 30, 2010).

4928.143(F), Revised Code, or pursuant to the Commission's directives in 09-786 and we will not further analyze the earnings of OP as a part of this 2009 SEET proceeding.

Further, we find the Companies' straight-forward calculation of CSP's and OP's earned ROE for 2009 to be reasonable, consistent with the requirements of Section 4928.143(F), Revised Code, and the directives of the Commission as set forth in 09-786.¹⁹ We address the related arguments of IEU-Ohio regarding the jurisdictionalization of CSP's and OP's revenues above in the procedural section of this order and, therefore, see no reason to restate our findings on the issue again here.

To recap the position of the parties, AEP-Ohio advances a 2009 SEET threshold for CSP of 22.51 percent. At the other end of the spectrum is Customer Parties, who argue that, under its proposed SEET analysis, the threshold ROE for CSP is in the range of 11.58 percent to 13.58 percent. Staff advocates a 50 percent adder to the ROE of the comparable group of companies which when added to its recommended benchmark ROE of 10.70 yields, in this case, a SEET threshold of 16.05 percent for CSP.

In regards to the determination of the SEET threshold, in 09-786, a number of commenters requested a "bright line statistical analysis test for the evaluation of earnings." While the Commission agreed that "statistical analysis can be one of many useful tools," we declined to adopt such a test. We concluded, instead, that "significantly excess earnings should be determined based on the reasonable judgment of the Commission on a case-by-case basis." Our Order noted the significant variation among Ohio electric utilities and went on to identify specific factors which the Commission would consider in its case-by-case analysis.

[T]he Commission will give due consideration to certain factors, including, but not limited to, the electric utility's most recently authorized return on equity, the electric utility's risk, including the following: whether the electric utility owns generation; whether the ESP includes a fuel and purchased power adjustment or other similar adjustments; the rate design and the extent to which the electric utility remains subject to weather and economic risk; capital commitments and future capital requirements; indicators of management performance and benchmarks to other utilities; and innovation and industry leadership with respect to meeting industry challenges to maintain and improve the competitiveness of Ohio's economy, including research and development expenditures, investments in advanced technology, and innovative

¹⁹ 09-786, Entry on Rehearing at 6 (August 25, 2010).

practices; and the extent to which the electric utility has advanced state policy.

In the current case, AEP-Ohio again proposes a bright line SEET threshold based exclusively on a statistical analysis of comparable companies, with some regard for the Commission's directives. The Companies' recommendation is unreasonable and inconsistent with the statute. As we clearly stated in 09-786:

[U]tilizing only a statistical method for establishing the SEET threshold is insufficient by itself to meet the electric utility's burden of proof pursuant to Section 4928.143(F), Revised Code. Section 4928.143(F), Revised Code, places on the utility "the burden of proof for demonstrating that significantly excessive earnings did not occur." Passing a statistical test does not, in and of itself, demonstrate that excessive earnings did not occur.

The statute requires us to measure excessive earnings by whether "the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity" earned by comparable companies. Section 4928.143(F), Revised Code. Whether any differential between the ROE of the electric utility and that of the comparable companies is significant necessarily depends on factors related to the individual electric utility under review. While a statistical analysis of the variation in returns among companies facing comparable business and financial risks can provide useful information, as indicated in our decision in 09-786, we will not rely exclusively on a statistical approach or set a generic bright line threshold based only on variations in the returns of the comparable companies.

We find that not only does AEP-Ohio's proposed SEET analysis rely exclusively on a bright line statistical test for its SEET threshold, it relies on the statistical analysis to the point of producing an unrealistic and indefensible result. If the Commission were to accept AEP-Ohio's SEET analysis to determine the threshold ROE for CSP at 22.51 percent, the Commission would be forced to accept an electric utility ROE of less than 22.51 percent as not significantly excessive. Without additional comparisons to justify its SEET threshold for CSP as reasonable, we conclude that AEP-Ohio improperly relied on a statistical test for its SEET threshold. In light of the Commission's rejection of Customer Parties' development of the comparable group of companies, we also reject their SEET threshold range of 11.58 to 13.58 percent. Not only do we reject Customer Parties' SEET threshold range in this case, we do not believe that their use of a 200-400 basis points adder to the benchmark ROE of the comparable group of companies is optimally related to the purpose of the SEET. We find the conceptual construct of Staff's proposal to use a percentage of the average of the comparable companies to be more appropriately related to the purpose of the SEET.

Although the purpose of the SEET is to be a statutory check on rates that result in excessive earnings, we find that one of the impacts of the SEET creates symmetry with our obligation to ensure that a company may operate successfully, maintain financial integrity, attract capital and compensate its investors for the risk assumed. Among the parties' positions we find that Staff's basic methodology best gives effect to the statutory design to create such symmetry. Specifically, the Commission is persuaded by the fact that Staff's proposed adder's impact, if subtracted from the comparable ROE benchmark yields a result that is similar to the company's cost of debt. Given the Commission's adoption of an 11 percent ROE, the impact of a 50 percent downward adjustment to the comparable ROE results in an earnings of 5.5 percent, which is similar to CSP's embedded cost of debt. Therefore, 50 percent is a reasonable guide for establishing an adder.

Additionally, when there is a differential by which the return for a specific electric utility exceeds the safe harbor threshold established in 09-786, the Commission must attribute any such amount to and allocate it between earnings that are significantly excessive as a result of adjustments in the utility's ESP, or to earnings that are not significantly excessive because they reflect utility specific factors, are reasonable given the utility's actual performance or are attributable to factors unrelated to the ESP.

Turning first to utility specific factors related to investment requirements, risk, and investor expectations, the Commission must recognize that a comparison to other firms will not fully capture company specific factors which influence whether a return is significantly excessive. On a going forward basis, the Commission expects to refine the quantitative analysis associated with these factors through future SEET proceedings.

In its SEET application, as set forth in the Order in 09-786, Mr. Hamrock discusses at length in his testimony the various factors which the Commission indicated it would take into consideration in the establishment of the level of significantly excessive earnings. Mr. Hamrock discussed the capital commitments made by CSP for both 2010 and 2011, as well as the various business and financial risks faced by CSP. The witness also explained several ways in which CSP has demonstrated positive management performance in several areas. He discussed the improved service reliability experienced by CSP customers from 2003 to 2009 and the various technological innovations CSP has initiated, such as gridSMART, to its leadership in energy efficiency and peak demand response programs. CSP continues to make extensive capital investments in the state of Ohio. Customer Parties raised a concern that CSP was not making a firm commitment to its 2010 budget. The Commission notes that, on cross-examination, it was demonstrated that CSP is indeed committed to spending the projected capital budget for 2010.

In terms of the various business and financial risks discussed by Mr. Hamrock in his testimony, the Commission concurs that CSP is facing various business and financial risks. Despite the use of riders, some bypassable and other nonbypassable riders, the fact

remains that initial capital outlays must be made to fund many of the activities enumerated by CSP. In addition to initial capital outlays that CSP must make in order to fund its obligations under its ESP and its provision of service in general, there are other risks, not clearly associated with a rider, of which the Commission must remain mindful. For example, the Commission concurs with CSP that electric utilities are not assured recovery of their generation assets due to the change in the regulatory environment; the prospect of future industry restructuring and carbon regulation is unknown; and market prices for generation-related services are volatile. Lastly, the Commission gives consideration to the challenge of fulfilling the various mandates of SB 221, within the context of a rapidly changing electric market.

The Commission also takes into consideration the fact that CSP's service reliability, both in terms of the number of outages experienced by its customers and the length of those outages, has improved. CSP's actual frequency of outages (SAIFI) went from 1.91 in 2003 to 1.31 in 2009. During the same period, CSP's number and duration of outages (CAIDI) went from 148.6 to 122.6.

Additionally, the Commission notes that CSP's most recently authorized ROE was 12.46 and, while dated, it may still be influencing earned returns and should be acknowledged and considered. We also believe, in light of the current economic situation across the state, it is unreasonable to overlook economic volatility in the SEET analysis.

The Commission also believes consideration should be given to CSP's commitment to innovation. In particular, the Commission believes that consideration should be given to CSP's gridSMART program. CSP's gridSMART program is a holistic approach to the deployment of gridSMART and, as such, as noted by Mr. Hamrock, received the highest rating among all demonstration grant applications to the U. S. Department of Energy. Further CSP has agreed to initiate a Phase 2 gridSMART program.²⁰

Lastly, the Commission must also include in its consideration CSP's efforts to advance Ohio's energy policy and future committed capital investments. CSP far exceeded the established benchmark requirements both in the area of energy efficiency and peak demand response. CSP continues its innovation efforts and dedication to Ohio's energy policy by its commitment to provide \$20 million in funding to a solar project in Cumberland, Ohio. Not only will this project advance the state's energy policy, but it will also bring much needed economic development activity to Ohio. Various parties noted that this commitment was contingent on several other factors and questioned the appropriateness of giving any consideration to this investment. The Commission remains confident that this project will move forward and the funds will be expended for this project in the near future. Nevertheless, should this project not move forward in 2012,

²⁰ See AEP-Ohio Notice of Withdrawal of the Stipulation filed December 16, 2010.

such that the funds are expended in 2012, the Commission requires the \$20 million to be spent in 2012 on a similar project.

Giving due consideration to the aforementioned factors, and keeping in mind the nature of the SEET, the Commission believes that Staff's 50 percent baseline adder should be adjusted upward. Thus, the appropriate percentage to be added to the mean of the comparable group companies is 60 percent which in this case yields a SEET threshold of 17.6 percent.

C. Adjustments to CSP's 2009 Earnings

1. Off-system sales

(a) AEP-Ohio's SEET application excludes OSS

AEP-Ohio submits that its ROEs should be reduced for OSS margins (after federal and state income taxes). Based on AEP-Ohio's interpretation of Section 4928.143(F), Revised Code, only those earnings resulting from adjustments included in AEP-Ohio's ESP are part of the SEET analysis process. AEP-Ohio reasons that OSS margins are based on wholesale transactions, approved by FERC, and excluding OSS margins from SEET complies with well-settled federal constitutional law. AEP-Ohio argues that under federal constitutional law, the State is preempted from interfering with the Companies' ability to realize revenue rightfully received from wholesale power sales pursuant to contracts or rates approved by FERC. *Pacific Gas & Electric v. Energy Resources Comm.*, 461 U.S. 190 (1983) (*Energy Resources Comm.*); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (*Nantahala*); *Mississippi Power & Light v. Mississippi*, 487 U.S. 354 (1988) (*MP&L*); *Pacific Gas & Electric Co. v. Lynch*, 216 F. Supp. 2d 1016 (N.D. Cal. 2002) (*Lynch*). AEP-Ohio extends that reasoning to conclude that, just as the state may not trap FERC-approved wholesale power costs, it may not, in effect capture or siphon off the revenue the Companies receive from FERC-approved wholesale sales for the purpose of reducing the retail rates paid by Ohio customers. Any such order by the Commission, according to AEP-Ohio, would conflict with the Federal Power Act and Congress' power under the Supremacy Clause. AEP-Ohio further alleges that this type of economic protectionism would also violate the federal Commerce Clause. *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (*NEPC*). Thus, AEP-Ohio declares that it would be unlawful for the Companies' OSS earnings to be included in the computation of any significantly excessive earnings. To that end, AEP-Ohio proposes that, to avoid any jurisdictional conflict, OSS margins be excluded from AEP-Ohio's earnings to comply with Section 4928.143(F), Revised Code. Consistent with this reasoning, AEP-Ohio reduces its earnings attributable to common stock after taxes and adjusts its ROE for CSP from 20.84 percent to 18.31 percent. (Cos. Ex. 4 at 5-6, Ex. TEM-1; Cos. Ex. 6 at 6-7.)

(b) Staff's positions as to OSS

Staff takes no position on the inclusion or exclusion of OSS from the SEET analysis. However, Staff argues that the Companies' calculation to exclude OSS from CSP's earned ROE is incorrect. According to Staff, to appropriately exclude OSS margins from CSP's earned ROE there must be an adjustment to the equity base of the ROE. Staff adjusts the denominator, common stock equity, to account for that part of the equity which finances the generation plant which facilitates OSS. To make the adjustment, Staff first calculates the amount of equity that supports production plant, which is 51.5 percent of CSP's total equity. The next step is to allocate that portion of equity to OSS by using the ratio of sales for resale revenues to total sales revenues, which equals 13.9 percent. Staff's calculation results in \$93.4 million of the total average equity of \$1,302.6 million being allocated to OSS, leaving the remaining average equity balance at \$1,209.2 million. As adjusted by Staff, CSP's ROE after excluding OSS, acknowledging the corresponding equity effect, produces an earned ROE of 19.73 percent as opposed to the 18.31 percent offered by CSP. (Staff Ex. 1 at 19-21, Ex. 3.)

Customer Parties oppose any adjustment to CSP's earned ROE of 20.84 percent. Nonetheless, if the Commission elects to exclude OSS margins from CSP's earned ROE, Customer Parties admit that the Staff's proposed revision to the calculation is an appropriate starting point although it understates the company's earned return. (Joint Inv. Br. at 29-31.)

AEP-Ohio explains that, despite Staff's claims that the Companies' calculation to exclude OSS from CSP's earned ROE needs to be refined, according to AEP-Ohio, the calculation is consistent with the Commission's directive as to the calculation of equity in 09-786 (Cos. Ex. 4 at 4-5; Tr. at 78).²¹

(c) Customer Parties' position on OSS

Customer Parties, as supported by OP&E, vehemently oppose any adjustment to CSP's earned ROE of 20.84 percent including OSS. Customer Parties reason that OSS are sales by the utility to individuals or entities that are not Ohio retail customers. OSS are possible, Customer Parties explain, by generation plant that otherwise produces power for Ohio retail electric customers; generation facilities built for the benefit of and funded by Ohio customers. Customer Parties are adamant that CSP's jurisdictional customers have funded a return on as well as a return of the generation assets used for OSS transactions. Thus, Customer Parties and OP&E reason that it is only equitable to include OSS earnings in CSP's SEET calculation. (Joint Inv. Ex. 2 at 22-24; OP&E Br. at 4-7.)

²¹ 09-786, Order at 18 (June 30, 2010); Entry on Rehearing at 6 (August 25, 2010).

Customer Parties offer that in 2009, CSP's earnings from OSS were \$32,977 million, in comparison to CSP's total earnings of \$271,504 million, 12.1 percent of CSP's total earnings. If, as AEP-Ohio requests, earnings from OSS are excluded from the SEET analysis, Customer Parties argue that the Commission would be comparing 87.9 percent of CSP's earnings to 100 percent of the earnings of the comparable group of companies, biasing the SEET analysis in favor of AEP-Ohio. Customer Parties plead that such a comparison is in conflict with the language of Section 4928.143(F), Revised Code, and will render the SEET analysis meaningless and asymmetrical. Further, Customer Parties contend that OSS are an inherent component of the company's earnings, as prescribed by generally accepted accounting principles, as such earnings are reported to the Securities and Exchange Commission (SEC) and FERC. Customer Parties declare that modifying such reported earnings would be inconsistent with federal law as well as FERC and SEC accounting standards. (Joint Inv. Ex. 2 at 21-24; Cos. Ex. 4 at Ex. TEM-1.)

Moreover, Customer Parties note that Ohio customers are paying CSP for its energy efficiency programs instituted pursuant to Section 4928.64, Revised Code, which facilitate OSS. On that basis, Customer Parties believe it is unreasonable to exclude OSS margins from the SEET analysis. Incorporating OSS margins in the SEET analysis serves as a form of off-set to the energy efficiency costs incurred by CSP's customers and promotes the policy of the state, under Section 4928.02(A), Revised Code, to ensure the availability of reasonably priced retail electric service to Ohio's consumers. (Joint Int. Ex. 2 at 23-24; Tr. 253-254.)

In regard to the FERC jurisdictional claims made by AEP-Ohio, Customer Parties retort that there is no valid federal preemption prohibiting consideration of OSS earnings in retail ratemaking. Customer Parties assert that several other state commissions have done so. (Joint Inv. Ex. 2 at 24.)

(d) Commission decision on OSS margins

Initially, the issue of OSS margins in the SEET analysis was considered by the Commission in AEP-Ohio's ESP proceedings. Numerous interested stakeholders also participated in 09-786 and offered their position on the issue of OSS in that proceeding. While the Commission offered guidance on numerous aspects of the issues raised as to the application of the SEET, in regards to OSS, the Commission determined that the issue was more appropriately addressed in the individual SEET proceedings. As the Commission had hoped, in this case the Companies and Customer Parties have expanded and clarified their positions and have provided context to the effects of each position presented as part of this SEET analysis.

We are required to consider not only whether the electric utility had significantly excessive earnings but also whether its earnings are the result of adjustments in its ESP. Where it can be shown that the electric utility received a return on its OSS, which if

included in the calculation could unduly increase its ROE for purposes of SEET comparisons, OSS margins and the related equity in generation facilities should be excluded from the SEET calculation. Thus, without reaching the federal and constitutional law arguments, we will exclude OSS and the portion of generation that supports OSS from the SEET analysis.

With the exclusion of OSS margins from the SEET analysis, we find it necessary to correct, as Staff recommends and Customer Parties at least accept as conceptually correct, to account for the equity effect of the exclusion. Therefore, we reduce CSP's earnings to exclude OSS and similarly adjust the calculation to account for that portion of the generation facilities that supports OSS. Accordingly, the Commission recalculates CSP's ROE, excluding OSS and incorporating the equity effect of excluding OSS, to be 19.73 percent.

2. Deferrals

(a) AEP-Ohio

In AEP-Ohio's SEET application, the Companies exclude what it refers to as "significant" deferrals- deferred fuel adjustment clause revenues (including the interest on carrying costs and the equity carrying costs component on the deferred fuel) and deferred economic development rider (EDR) revenues from CSP's ROE for SEET purposes, thereby reducing CSP's ROE from 18.31 percent (with OSS excluded) to 15.99 percent (excluding both OSS and deferrals) for 2009. AEP-Ohio calculates CSP's deferrals to total \$47.2 million. AEP-Ohio argues that this exclusion is critical for the Companies to preserve the probability of recovery of the deferred fuel cost as it is a necessary basis for the utility to record and maintain the regulatory asset on its balance sheet and for the Commission to direct the phase-in of rate increases as permitted pursuant to Section 4928.144, Revised Code. The Companies also argue it is inappropriate for the Commission to consider refunding earnings through the SEET analysis that the Companies have not actually collected from customers. (Cos. Ex. 6 at 13-15; Cos. Ex. 4 at 12-16, Ex. TEM-6.)

(b) Other parties' position regarding deferrals

(1) Customer Parties

Customer Parties view FAC and EDR deferred revenues as deferred rate increases pursuant to the ESP which contribute to the earnings approved by the Commission and subject to refund to customers. Customer Parties argue that deferred expenses only affect earnings in the year of the deferral and there is no effect on earnings in future years. In future years, revenues and expenses are matched with no effect on earnings. Customer Parties recommend that any excess earnings first be used to eliminate or reduce the

regulatory asset created by the deferral on the electric utility's books as of the date the refund is effective. (Joint Inv. Ex. 2 at 6-7, 15-16, 25-26.)

(2) Staff

Like OSS, Staff takes no position on the inclusion or exclusion of deferrals from the SEET analysis. However, like the adjustment for OSS, Staff argues that the Companies' calculation to exclude deferrals from CSP's earned ROE is incorrect and requires an adjustment to the denominator to account for the equity effect of the exclusion from revenue. As adjusted by Staff, CSP's ROE to exclude deferrals, acknowledging the corresponding equity effect, produces an earned ROE of 18.74 percent as opposed to the 18.52 percent (deferrals only excluded) offered by CSP. (Staff Ex. 1 at 19-21, Ex. 3.)

(c) Commission decision on deferrals

Unlike OSS or extraordinary or non-recurring items, deferrals should not be excluded from the electric utility's ROE as requested by AEP-Ohio. Consistent with generally accepted accounting principles, deferred expenses and the associated regulatory liability are reflected on the electric utility's books when the expense is incurred. Subsequently, with the receipt of deferred revenues, there is an equal amortization of the deferred expenses on the electric utility's books, such that there is no effect on earnings in future years. Accordingly, we are not persuaded by the arguments of AEP-Ohio to adjust CSP's 2009 earnings to account for certain significant deferred revenue.

D. Capital requirements for future committed Ohio investments

In support of its future committed investments, AEP-Ohio offered its actual construction expenditures for 2007 through 2009 and capital budget forecast for 2010 and 2011 categorized by new generation, environmental, other generation, transmission, distribution, gridSMART and corporate/other. For the ESP period, AEP-Ohio offers a plan to invest \$1.67 billion in Ohio. More specifically, AEP-Ohio had total construction expenditures for the year 2009 for CSP of \$280,108 million, and for 2010 and 2011 projected construction expenditures of \$256,100 million, and \$186,969 million, respectively. Over and above the future committed investments set forth in the Companies' construction expenditures and budget projections, AEP-Ohio notes a commitment to make a capital investment associated with the company's compliance with its alternative energy portfolio requirements pursuant to Section 4928.64, Revised Code. CSP has made a commitment to invest \$20 million to support the development of a large solar farm near Cumberland, Ohio, and entered into a 20-year purchase agreement for all of the facility's power. CSP also plans to expand its gridSMART project to its entire service territory. (Cos. Ex. 6 at 16-18, Ex. JH-1; Cos. Ex. 8 at 7; Cos. Br. at 67-72; Tr. 289-290, 687-690.)

1. Opposition to the committed future investment claims

Customer Parties opine that consideration of future committed investments is a factor to be considered in association with the development of comparable companies, the establishment of the threshold ROE and any adjustment to the threshold. To that end, Customer Parties note that its development of the comparable group of companies includes consideration of the fixed asset turnover ratio as part of the business and financial risk measures. IEU-Ohio and Customer Parties also note that, using CSP's 2009 construction expenditures as a baseline of \$280.108 million, CSP's budgeted projections are declining through 2011. The intervenors argue that the Commission should only consider future committed investments during the ESP period that are funded by the electric utility itself and which are beyond the utility's normal rate of funding. Further, Customer Parties challenge AEP-Ohio's commitment to construct the projects on which the budget projections are developed. In light of the tenuous nature of the committed future investments, and the fact that CSP's future capital commitments are declining during the ESP period, Customer Parties implore the Commission that, although it is required to give consideration to the electric utility's future committed capital investments in Ohio, in this instance, it is not appropriate to take future investments into consideration. OPAE joins Customer Parties in its conclusion that there should not be an upward adjustment in the SEET or a reduction in any refund due customers for future committed investments. (Joint Inv. Ex. 1 at 13; Joint Inv. Ex. 2 at 29-30; Joint Inv. Br. at 47-56; OPAE Reply Br. at 9; IEU-Ohio Br. at 22-24.)

In its response, AEP-Ohio notices that Staff did not acknowledge the evidence offered concerning the Companies' committed capital investments and states that the other parties to the proceeding mischaracterize the approximately \$1.7 billion investments as merely "business as usual." AEP-Ohio argues that Section 4928.143(F), Revised Code, clearly allows the consideration of the utility's future committed investments without limitations as to ESP period and no language in the statute requires that the investment be unreimbursed shareholder-funded contributions. AEP-Ohio is of the opinion that the statute does not require the future investment to be extraordinary in comparison to an historical baseline of investments. The Companies rely on the language in Rule 4901:1-35-03(C)(10)(a)(iii), O.A.C., in support of the notion that the capital budget forecasts are indicative of the electric utility's "capital requirements for future committed investments." AEP-Ohio contends it would be arbitrary and capricious to only consider the electric utility's incremental future capital investments that increase annually year-after-year. AEP-Ohio reiterates that while all of the projects in the forecasted budget have not completed the management review process, approximately 90 percent of the projects listed for 2010 and 70-80 percent of the projects listed for 2011 have received the necessary management approvals. (Cos. Reply Br. at 28-35.)

Commission Decision

As required by the statute and as discussed above, the Commission considered the electric utility's future committed capital investments when rendering its decision on the SEET.

2. Other adjustments to CSP's 2009 Earnings

(a) AEP-Ohio

As part of its SEET application, AEP-Ohio presented a narrative of information regarding the Companies' risk and performance. AEP-Ohio notes that as an Ohio electric utility that owns generation, it faces numerous risks including risks associated with: the lack of guaranteed recovery for generation assets; customer shopping; the term of the Companies' approved ESP and the unanticipated shutdown of generation stations; environmental regulation; and market-price impact for generation-related services. Further, the Companies contend that they face risks associated with the variability and uncertainty of its retail revenue stream and weather.

As for the Companies management performance and industry benchmarks, AEP-Ohio notes that since 2005, CSP and OP have consistently performed very well on customer satisfaction surveys. Further, AEP-Ohio notes that its SAIFI and CAIDI have improved since 2003 through 2009. The Companies state that they are leaders in the industry regarding advances in electric generation and transmission technologies. CSP and OP invest in Ohio and maintain a significant tax base throughout the state with a total economic impact that exceeds \$2 billion per year. CSP states that its gridSMART project received the highest rating among all such applications presented to the U.S. Department of Energy (US DOE). AEP-Ohio asserts the Companies regularly participate in various industry efforts to strengthen interoperability standards and cyber security. AEP-Ohio is working in collaboration with US DOE to advance carbon capture and sequestration technologies. AEP-Ohio also claims that its energy efficiency and demand reduction programs have the potential to save Ohio consumers \$630 million and reduce power plant emissions. Finally, AEP-Ohio emphasizes that CSP achieved 202 percent and OP achieved 171 percent of their respective energy efficiency benchmarks for 2009. (Cos. Ex. 6 at 19-24, Ex. JH-2.)

(b) Other parties' position

Customer Parties reason that any consideration of the additional factors offered as directed in 09-786 do not negate any significantly excessive earnings by CSP in 2009 and any consideration of such factors as to CSP and OP, jointly, or AEP-Ohio, are prohibited pursuant to the language of the statute. Indeed, Customer Parties assert that the return on equity in CSP's last general rate case was 12.46 percent,²² the most recent ROE in CSP's rider cases of 10.50 percent,²³ and the company's 2009 actual ROE of 20.84 percent is a strong indicator of significantly excessive earnings. Further, Customer Parties argue that evidence presented by AEP-Ohio on the business and financial risks faced by CSP does not justify any additional further consideration than what the Companies have reflected in their comparable group of companies. Customer Parties and OPAE offer that only a small portion of CSP's customers are actually shopping and, according to their calculations, CSP has been sufficiently compensated for the shopping risk by the provider of last resort (POLR) charge. (Joint Inv. Ex. 2 at 30; Joint Inv. Reply Br. at 40-43; OPAE Br. at 6.)

In addition, Customer Parties argue there are other factors that reduce or neutralize the risks alleged by AEP-Ohio. Customer Parties note that CSP's ESP includes a FAC that protects CSP and OP against rising fuel costs. Customer Parties also note that CSP's ROE of 20.84 percent was the highest reported by Ohio's electric utilities; the highest among the company's affiliates in the AEP East power pool; and the highest ROE among all investor-owned regulated electric utilities in the United States. Customer Parties submit that these factors likewise must be considered by the Commission in making its decision as to CSP's 2009 earnings. (Joint Inv. Ex. 2 at 18-20; Joint Inv. Reply Br. at 44-48.)

Commission decision on additional factors

As discussed previously in our discussion of the SEET threshold, the Commission has considered these arguments in its establishment of the threshold.

Commission's Conclusions Regarding AEP-Ohio's 2009 SEET

In consideration of the Commission's conclusion as discussed above regarding the application of the SEET to OP for 2009, the Commission finds that under any parties' proposed SEET analysis presented in this proceeding, OP's earned ROE is less than 200 basis points above the mean of the comparable group of companies. Thus, the

²² Tr. at 214-216.

²³ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Establish Environmental Investment Carrying Cost Riders*, Case No. 10-155-EL-RDR, Finding & Order (August 25, 2010); and *In the Matter of the Application of Columbus Southern Power Company to Update its gridSMART Rider*, Case No. 10-164-EL-RDR, Finding & Order (August 11, 2010).

Commission concludes that OP did not have significantly excessive earnings for 2009 pursuant to Section 4928.143(F), Revised Code, and the Commission's directives in 09-786. Next, in regard to CSP, consistent with the findings discussed above, the Commission finds:

	Percent	\$ in millions
CSP's earned ROE for 2009	20.84	271.504
Exclusion of OSS with equity effect	19.73	
Threshold ROE for 2009 SEET	17.6	
Difference (19.73 - 17.6) x \$ 20.039 ²⁴	2.13	42.683
CSP's 2009 Significantly Excessive Earnings Subject to Return		42.683

The Commission directs CSP to apply the significantly excessive earnings, as determined in this Opinion and Order, first to any deferrals in the FAC account on CSP's books as of the date of this order, with any remaining balance to be credited to CSP's customers on a per kilowatt hour basis beginning with the first billing cycle in February 2011 and coinciding with the end of the current ESP period. Additionally, the Commission finds that any balance credited to CSP's customers will not be deducted from the Company's earnings for purposes of the 2011 SEET review.

In the Companies' ESP case, the Commission approved an increase in rates for 2011 of six percent of total bill. With the Commission's determination of significantly excessive earnings for CSP in 2009, the Commission directs CSP, consistent with this Opinion and Order, to adjust its tariff rates, accordingly.

Finally, in regards to Staff' recommendation to offer a benchmark ROE based on an index or combination of indices as the starting point for the annual SEET, the Commission will continue to consider the proposal and address any amendment to the SEET process by entry to be issued in the near future.

²⁴ Joint Int. Ex. 2 at 17.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) CSP and OP are public utilities as defined in Section 4905.02, Revised Code, and, as such, the companies are subject to the jurisdiction of this Commission.
- (2) On September 1, 2010, CSP and OP filed an application for administration of the SEET in accordance with Section 4928.143(F), Revised Code.
- (3) Intervention in this case was granted to OCC, IEU-Ohio, OP&E, OEG, APJN, OMA, OHA and The Kroger Company.
- (4) The hearing in this case commenced on October 25, 2010, and concluded on November 1, 2010. Three witnesses testified on behalf of AEP-Ohio, two witnesses testified on behalf of Customer Parties, and one witnesses testified on behalf of the Commission Staff.
- (5) Initial briefs were filed on November 19, 2010 and/or reply briefs were on filed on November 30, 2010, by AEP-Ohio, Staff, Customer Parties,²⁵ IEU-Ohio and OP&E.
- (6) AEP-Ohio waived its right to further jurisdictionalize its earnings in this SEET proceeding.
- (7) OP did not have significantly excessive earnings for 2009 pursuant to Section 4928.143(F), Revised Code, and the Commission's safe harbor provision.
- (8) CSP had significantly excessive earnings for 2009 pursuant to Section 4928.143(F), Revised Code.

ORDER:

It is, therefore,

ORDERED, That IEU-Ohio's motion to dismiss AEP-Ohio's SEET application is denied. It is, further,

ORDERED, That CSP apply the significantly excessive earnings, as determined in this Opinion and Order, first to any deferrals in the FAC account on CSP's books as of the date

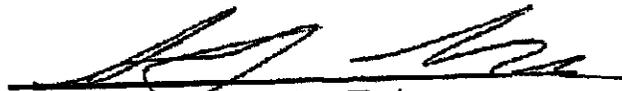
²⁵ The reply brief filed by Customer Parties did not include OMA or OHA as a party to the brief. Only OCC, APJN and OEG are listed as parties to the reply brief.

of this Order, with any remaining balance to be credited to CSP's customer bills beginning with the first billing cycle in February 2011. The bill credit shall be on a kilowatt hour basis and coincide with the end of the current ESP period. It is, further,

ORDERED, That AEP-Ohio comply with its commitments as set forth in its notice of withdrawal of the Stipulation. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties and other interested person of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Steven D. Lesser, Chairman



Paul A. Centolella



Valerie A. Lemmie

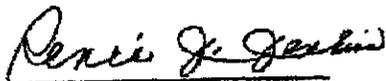


Cheryl L. Roberto

GNS/JRJ/vrm

Entered in the Journal

JAN 11 2011



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)
Administration of the Significantly)
Excessive Earnings Test under Section)
4928.143(F), Revised Code, and Rule)
4901:1-35-10, Ohio Administrative)
Code.)

Case No. 10-1261-EL-UNC

CONCURRING OPINION OF COMMISSIONER CHERYL L. ROBERTO

I generally concur with my colleagues as to the matters discussed within the majority opinion and with the conclusion that CSP enjoyed significantly excessive earnings which must be returned to consumers.

However, I would have preferred that my colleagues and I could have considered another alternative to the timing and methodology for the consideration of Off Systems Sales (OSS). Recognizing that we may only consider excessive earnings resulting from "adjustments" granted in an electric security plan, we account for this by excluding the OSS from the return on equity (ROE) reported by CSP on its FERC Form No. 1, thereby reducing the reported ROE of 20.84 percent to 19.73 percent for purposes of the SEET analysis. I am concerned that this method may skew the SEET analysis by an improper weighting of OSS while also failing to account for any other earnings that were not the result of "adjustments." A better practice may have been first to determine what earnings are significantly excessive by calculating all earnings over the SEET threshold (i.e., earnings that increased the ROE from 17.6 percent to 20.84 percent). Recognizing that some of these earnings were due to "adjustments" but the remaining were due to any number of factors, including but not limited to OSS, one could allocate the earnings between adjustment-related and nonadjustment-related earnings. The most straight-forward method to accomplish this would be to calculate a simple ratio of total revenue resulting from adjustments (collected and deferred) to total earnings. It is that ratio applied to the calculated significantly excessive earnings that would reasonably identify what proportion of those earnings resulted from adjustments. However, because the record does not contain total earnings resulting from adjustments both collected and deferred, this calculation is not possible.

Therefore, I concur with the majority.

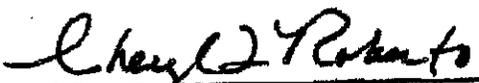

Cheryl L. Roberto

EXHIBIT B

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company)
and Ohio Power Company for)
Administration of the Significantly) Case No. 10-1261-EL-UNC
Excessive Earnings Test under Section)
4928.143(F), Revised Code, and Rule)
4901:1-35-10, Ohio Administrative)
Code.)

FINDING AND ORDER

The Commission finds:

- (1) By Opinion and Order issued January 11, 2011 (SEET Order), the Commission concluded that pursuant to Section 4928.143(F), Revised Code, Columbus Southern Power Company (CSP) had significantly excessive earnings of \$42.683 million for 2009. The Commission directed CSP to apply the significantly excessive earnings first to any deferred fuel adjustment clause (FAC) costs on CSP's books as of the date of the SEET Order, with any remaining balance to be credited to CSP's customers on a per kilowatt (kWh) hour basis beginning with the first billing cycle in February 2011 and coinciding with the end of the current ESP period.
- (2) On January 21, 2011, CSP filed tariffs to implement the directives in the SEET Order. The proposed tariffs are to be effective with the first billing cycle of February 2011 and expire with the last billing cycle of December 2011. CSP proposes that any over or under reconciliation be addressed in the subsequent FAC audit. Based on CSP's calculations, all CSP customers, including special contract customers, will receive a credit of \$.001256 per kWh.
- (3) Upon further consideration of the application of the credit to all customer bills, the Commission clarifies that reasonable arrangement customers who receive service under a discount rate supported by delta revenue recovery are not entitled to both the discount rate and a SEET credit. Accordingly, CSP is directed to revise the SEET credit calculation to omit such reasonable arrangement customers and file revised tariffs.

- (4) CSP is directed to immediately file revised tariffs consistent with this Order to be effective with the first billing cycle of February 2011 and expire with the last billing cycle of December 2011. In light of the short timeframe remaining before these tariffs must go into effect, the Commission finds that the revised tariffs shall be approved to be effective as of the date of filing, contingent upon final review by Staff.

It is, therefore,

ORDERED, That CSP's January 21, 2011, tariff filing, as modified by this finding and order, should be approved as set forth in findings (3) and (4). It is, further,

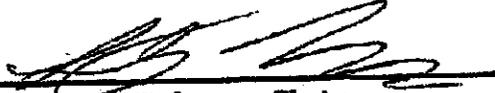
ORDERED, That CSP be authorized to immediately file, in final form four complete copies of tariffs consistent with this finding and order. CSP shall file one copy in this case docket and one copy in the company's TRF docket (or may make such filing electronically, as directed in Case No. 06-900-AU-WVR). The remaining two copies shall be designated for distribution to Staff. It is, further,

ORDERED, That the effective date of the new tariffs shall not be a date earlier than the date on which the revised tariffs are filed and the date this finding and order is issued for bills rendered with the first billing cycle of February 2011. It is, further,

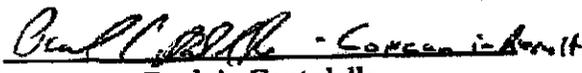
ORDERED, That nothing in this finding and order shall be binding upon this Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

ORDERED, That a copy of this Finding and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Steven D. Lesser, Chairman



Paul A. Centolella



Valerie A. Lemmie

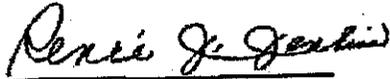


Cheryl L. Roberto

GNS/ vrm

Entered in the Journal

JAN 27 2011 JAN 27 2011



Renee J. Jenkins
Secretary

BEFORE

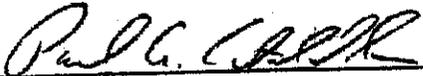
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company)
and Ohio Power Company for)
Administration of the Significantly)
Excessive Earnings Test under Section)
4928.143(F), Revised Code, and Rule)
4901:1-35-10, Ohio Administrative)
Code.)

Case No. 10-1261-EL-UNC

CONCURRING OPINION OF COMMISSIONER PAUL A. CENTOLELLA

I concur in the result of the Commission's Finding and Order in that it produces an impact for consumers that largely approximates that which I believe to be appropriate. While I find the Order's impact to be reasonable, for customers who are served under the Commission-approved special arrangements addressed in the Finding and Order, I would have preferred to make the prospective adjustments required under Section 4928.143(F), Ohio Revised Code, by reducing the costs, incentives, and foregone revenues recoverable through the Company's unavoidable Economic Development Rider.


Paul A. Centolella, Commissioner

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EXHIBIT C

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus)
Southern Power Company and Ohio Power)
Company for Administration of the) Case No. 10-1261-EL-UNC
Significantly Excessive Earnings Test under)
Section 4928.143(F), Revised Code, and Rule)
4901:1-35-10, Ohio Administrative Code.)

ENTRY ON REHEARING

The Commission finds:

- (1) On July 31, 2008, Columbus Southern Power Company (CSP) and Ohio Power Company (OP) (jointly, AEP-Ohio or the Companies) filed an application for a standard service offer (SSO) pursuant to Section 4928.141, Revised Code. The application was for an electric security plan (ESP) in accordance with Section 4928.143, Revised Code.
- (2) On March 18, 2009, the Commission issued its opinion and order (ESP Order) modifying and approving AEP-Ohio's ESP.¹ By entries on rehearing issued July 23, 2009 (First ESP EOR), and November 4, 2009 (Second ESP EOR), the Commission affirmed and clarified certain issues raised in AEP-Ohio's ESP Order.
- (3) On September 1, 2010, AEP-Ohio filed the instant application for the administration of the significantly excessive earnings test (SEET), as required by Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code (O.A.C.). By entry issued September 21, 2010, as amended on October 8, 2010, a procedural schedule was established for this proceeding.
- (4) Motions to intervene were timely filed by, and intervention granted to, the following entities: the Office of the Ohio Consumers' Counsel (OCC), Ohio Energy Group (OEG), Appalachian Peace and Justice Network (APJN), Ohio Manufacturers' Association (OMA), Ohio Hospital Association (OHA), Ohio Partners for Affordable Energy (OPAE), and

¹ *In re AEP-Ohio*, Case Nos. 09-917-EL-SSO and 09-918-EL-SSO.

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Industrial Energy Users-Ohio (IEU-Ohio). Pursuant to the entry issued December 1, 2010, The Kroger Company (Kroger) was granted limited intervention to participate in the SEET case.

- (5) On January 11, 2011, the Commission issued its Opinion and Order (SEET Order), pursuant to the requirements of Section 4928.143(F), Revised Code, and the Commission's directives in *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC (09-786). In the SEET Order, the Commission found that under any party's proposed SEET analysis presented in this proceeding, OP's earned return on equity (ROE) is less than 200 basis points above the mean of the comparable group of companies. Thus, the Commission concluded that OP did not have significantly excessive earnings for 2009 pursuant to Section 4928.143(F), Revised Code, and the Commission's directives in 09-786.

As to CSP, the Commission ultimately concluded that, based on an earned ROE of 20.84 percent for 2009, CSP had significantly excessive earnings of \$42.683 million. Accordingly, the Commission directed CSP to apply the significantly excessive earnings, first to any deferrals in the fuel adjustment clause (FAC) account on CSP's books as of the date of the SEET Order, with any remaining balance to be credited to CSP's customers on a per kilowatt hour (kWh) basis beginning with the first billing cycle in February 2011 and coinciding with the end of the current ESP period. The Commission also concluded that any balance credited to CSP's customers would not be deducted from CSP's earnings for purposes of the 2011 SEET review.

- (6) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matter determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.
- (7) On February 10, 2011, applications for rehearing were filed by Customer Parties,² CSP, IEU-Ohio and OP&E. Memoranda

² Originally, Customer Parties included OMA and OHA. However, neither the reply brief nor the application for rehearing filed by Customer Parties included OMA or OHA as parties to the pleadings. Only OCC, APJN, and OEG are listed as parties to the reply brief and application for rehearing.

contra the various applications for rehearing were filed by CSP, IEU-Ohio, Customer Parties, and OPAAE. In their applications for rehearing, the parties raise a number of assignments of error, alleging that the SEET Order is unjust, unreasonable, and/or unlawful.

- (8) On January 21, 2011, CSP filed tariffs to implement the directives in the SEET Order. CSP proposed that any over or under reconciliation be addressed in the subsequent FAC audit and determined that based on its calculations, all CSP customers, including reasonable arrangement customers, will receive a credit of \$.001256 per kWh. By entry issued January 27, 2011, the Commission approved the proposed SEET tariff, with clarification that reasonable arrangement customers who receive service under a discount rate supported by delta revenue recovery are not entitled to both the discount rate and a SEET credit. Therefore, the Commission directed CSP to revise the SEET credit calculation to omit such reasonable arrangement customers and file revised tariffs.
- (9) The Commission has reviewed and considered all of the arguments on rehearing. Any arguments on rehearing not specifically discussed herein have been thoroughly and adequately considered by the Commission and are being denied.

Constitutionality and Application of Section 4928.143(F), Revised Code

- (10) CSP argues that the Commission erred by concluding that Section 4928.143(F), Revised Code, provides ample direction to reasonably apply the statute in this case. CSP presents three arguments in support of this assignment of error. First, CSP notes that the Commission erred by concluding that Section 4928.143(F), Revised Code, is not void for vagueness. Next, CSP claims that the Commission erred by determining that there is ample legislative direction to reasonably apply Section 4928.143(F), Revised Code, in this case. Last, CSP asserts that the Commission erred in finding that the SEET issue is not fundamentally different from concepts the Commission regularly decides under Ohio's statutory provisions for utility regulation. (CSP App. at 4-6.)

- (11) The Commission fully addressed the arguments CSP raises in its first assignment of error at pages 9-10 of the SEET Order. As CSP has raised no new argument not already considered and addressed by the Commission, we find that CSP's first assignment of error should be denied.
- (12) IEU-Ohio raised eight arguments in support of its position that the SEET Order was unjust and unreasonable.³ IEU-Ohio argues that it was unreasonable for the Commission to have failed to order CSP and OP to refile their testimony and supporting materials to properly address the requirements of Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C. IEU-Ohio next submits that the Commission erred by failing to properly apply the SEET as outlined in Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, O.A.C. Next, IEU-Ohio argues that the Commission erred by determining that the SEET may be measured by the total company return on common equity rather than the electric distribution utility's (EDU) earned return on common equity from the ESP. Even if reliance on total company data was lawful, IEU-Ohio asserts that the Commission failed to adjust appropriately net income and common equity to account fully for the removal of off-system sales (OSS) and other non-jurisdictional effects from the calculation of excessive earnings. (IEU-Ohio App. at 5-14.)
- (13) The Commission fully addressed at pages 13-14 of the SEET Order the first four arguments raised by IEU-Ohio in its application for rehearing. As IEU-Ohio has raised no new argument not already considered and addressed by the Commission, we find that IEU-Ohio's first four arguments of error should be denied.
- (14) IEU-Ohio next argues that the Commission erred by failing to use the appropriate annual period to conduct the SEET as required by Section 4928.143(F), Revised Code. IEU-Ohio submits that the start date of the ESP was April 1, 2009, and thus, the annual period should have ended on March 31, 2010, but that the Commission once again relied on the noncompliant position that the ESP was retroactive to January 1, 2009. (IEU-Ohio App. at 14-15.)

³ IEU-Ohio's first four assignments of error were grouped together for discussion in its application for rehearing and will be treated similarly in this entry on rehearing.

- (15) As noted in the SEET Order at page 13, the Commission has on several prior occasions addressed the start date of AEP-Ohio's ESP. See AEP-Ohio ESP Order at 64; Entry Nunc Pro Tunc (March 30, 2009); and First ESP EOR at 41-45. As the Commission has already fully addressed this issue and because IEU-Ohio has raised no new argument not already fully considered and addressed by the Commission, we deny IEU-Ohio's assignment of error on this matter.
- (16) IEU-Ohio further argues that the SEET Order was unlawful and unreasonable because the Commission failed to comply with the policy of the state as outlined in Section 4928.02, Revised Code, to ensure the availability to consumers of reasonably priced electric service and encourage the competitiveness of Ohio's economy (IEU-Ohio App. at 17-19).
- (17) IEU-Ohio's concern with the Commission's order on this issue appears to be one of degree as the Commission sided with IEU-Ohio and with the intervenors on the argument that CSP benefitted from significantly excessive earning during 2009. In other words, IEU-Ohio's argument appears to be predicated on the position that the Commission's order did not go far enough in ordering customer refunds. IEU-Ohio's assignment of error is predicated on the position that there may be an understatement of the amounts by which CSP exceeded the significantly excessive threshold and that Ohio's competitiveness is being harmed because AEP-Ohio retail customers may be carrying more than their fair share of the profitability achieved by the parent, American Electric Power Company, Inc. The Commission fully explained, in the SEET Order, the rationale for rendering the determination that CSP benefitted from significantly excessive earnings during 2009 and the appropriate level of refunds to be returned to customers pursuant to Section 4928.143(F), Revised Code. Aside from the issues addressed in the SEET Order, IEU-Ohio has not demonstrated the presence of any other significant factors that has caused Ohio customers to carry more than their fair share of the parent company's profitability. IEU-Ohio's assignment of error on this matter is, therefore, denied.

Comparable Group of Companies, Return on Equity of Comparable Companies and SEET Threshold

- (18) OP&E argues the SEET Order is unreasonable and unlawful under the requirements of Section 4928.143(F), Revised Code, in its rejection of Customer Parties' methodology and composition of the comparable group of companies, the comparable companies' benchmark ROE of 9.58 percent, and the establishment of the SEET threshold range of 11.58 percent to 13.58 percent based on a 200-400 basis points adder over the comparable companies' ROE. OP&E also argues that the SEET Order is unreasonable and unlawful for failing to make, in OP&E's opinion, the statutory refund required based on the arguments of Customer Parties. (OP&E App. at 3-8, 14-16.)
- (19) Similarly, CSP also argues that the SEET Order is unlawful and unreasonable in its failure to adopt AEP-Ohio's method for establishing the benchmark ROE, determination of significantly excessive earnings at approximately two standard deviations above the benchmark ROE, and adoption of the 2009 SEET threshold of 22.51 percent (CSP App. at 7-9). Customer Parties and OP&E support the Commission's rejection of CSP's proposed method for establishing and adopting the SEET threshold (Customer Parties Memo at 2-4; OP&E Memo at 4-5). IEU-Ohio, however, maintains that CSP and OP failed to file a SEET application which complied with the statutory requirement to demonstrate that the electric utilities did not have significantly excessive earnings. (IEU-Ohio Memo at 5-6.)
- (20) The Commission thoroughly considered and discussed in the SEET Order each party's process to determine the comparable group of companies, the comparable companies' benchmark ROE, and the SEET threshold to determine the significantly excessive earnings subject to refund. The SEET Order also presented the Commission's rationale and justification for its decision on each component of the SEET analysis. Neither OP&E nor CSP presents any new arguments that the Commission did not already consider. Accordingly, OP&E's and CSP's requests for rehearing, on the basis that the Commission did not adopt their respective positions, are denied.
- (21) OP&E contends that the SEET Order is unreasonable and unlawful to the extent that it adopts Staff's proposed 50 percent

adder to the benchmark ROE and considered "utility specific factors related to investment requirements, risk and investor expectations" to adjust the adder applied to the mean ROE of the comparable group of companies. OPAE insists that the Commission should have only considered CSP's capital requirements for future committed investments in Ohio to occur during the current ESP period, through December 2011, which are not funded by riders paid by ratepayers. OPAE argues that CSP's capital investment budget for 2009 was below its actual construction expenditures in 2007 and 2008. For these reasons, OPAE concludes that the Commission should not have accorded any consideration to the solar project, the gridSMART project, future environmental investments, or for any shopping risk. (OPAE App. at 8-12.)

- (22) As the Commission indicated in the order and entry on rehearing in 09-786 and as thoroughly discussed in the SEET Order at pages 23-27, the Commission must recognize, in applying the SEET, the variation among Ohio's electric utilities and our obligation to ensure that the electric utility is allowed to operate successfully, to maintain its financial integrity, attract capital, and to compensate its investors. OPAE has not raised any new arguments for the Commission's consideration. As such, the Commission affirms its decision in the SEET Order and denies OPAE's request for rehearing on this matter.

Adjustments to CSP's 2009 Earnings

- (23) OPAE and Customer Parties request that the Commission reconsider the exclusion of OSS margins from CSP's earnings for the SEET. OPAE and Customer Parties assert that OSS are an inherent component of CSP's earnings and further argue that excluding OSS from CSP's earnings skews the comparison to the earnings of the comparable group of companies in violation of the language in Section 4928.143(F), Revised Code. (OPAE App. at 13; Customer Parties App. at 6-7.)
- (24) These are the same arguments presented to the Commission on brief by Customer Parties and OPAE regarding OSS in the SEET calculation and considered in the Commission's decision. OPAE and Customer Parties have not presented any new arguments for the Commission's consideration. As such, the requests for rehearing regarding the exclusion of OSS from the SEET calculation are denied.

- (25) Further, Customer Parties and OPAE argue that the Commission's adoption of the Staff's adjustment to account for the impact of excluding OSS from the SEET calculation is incomplete as no evidence was presented to correctly quantify the necessary adjustment. Customer Parties and OPAE claim that the adjustment in the SEET Order understates the significantly excessive earnings subject to refund and argue that, because there is a lack of record evidence to correctly quantify the exclusion of OSS, CSP failed to meet its burden of proof in accordance with Section 4928.143(C)(1), Revised Code. Therefore, Customer Parties and OPAE contend that the Commission must include OSS in CSP's earnings for purposes of the SEET. (OPAE App. at 13-14; Customer Parties App. at 3-5.)
- (26) The arguments presented by Customer Parties and OPAE on rehearing do not persuade the Commission that OSS should be included in the electric utility's earnings for purposes of the SEET. We also note that, in their brief, Customer Parties acknowledged, at least conceptually, Staff's adjustment as a starting point for excluding OSS. The Commission affirms its decision to exclude CSP's OSS from the SEET analysis for the reasons stated in the SEET Order. Further, while it is always our intent to correctly calculate any adjustment, in this instance we used the best information available in the record to account for the equity effect in the numerator and the denominator. Thus, we affirm the SEET Order and deny Customer Parties' and OPAE's requests for rehearing on this matter.
- (27) IEU-Ohio also finds error in the Commission failing to remove the operating expenses of the Waterford and Darby generating stations from the calculation of the SEET when the Commission previously ordered that the expenses be removed from the ESP (IEU-Ohio App. at 15-17).
- (28) The Commission fully addressed this issue at pages 13 and 14 of the SEET Order. Having raised no new argument for the Commission's consideration, IEU-Ohio's assignment of error on this issue is denied.
- (29) CSP contends that the SEET Order is unlawful and unreasonable to the extent the Commission included non-cash earnings, deferrals of FAC revenues, and economic development rider revenues in the calculation of the company's

earnings. CSP reiterates its position that including deferrals in the company's earnings jeopardizes the electric utility's ability to create deferrals and the Commission's ability to phase-in rate increases in contrast to the policy expressed in Section 4928.144, Revised Code. CSP argues that if an electric utility is determined to have significantly excessive earnings and has deferrals, the electric utility should not have to refund amounts not yet received nor refund amounts that are merely a recovery of costs which do not contribute to earnings. CSP advocates that, in the year the deferral is collected, when cash is received from customers, if the electric utility has significantly excessive earnings in that year, an adjustment be made to exclude the amortized deferral expenses to recognize recovered revenues in the earnings subject to refund. (CSP App. at 10-11.)

- (30) Consistent with the Commission's conclusion in the SEET Order, Customer Parties, OP&E, and IEU-Ohio ask the Commission to deny CSP's request for rehearing on this issue. IEU-Ohio explains that CSP's process would shift earnings to later periods and, by definition, understates income. Customer Parties offer that deferrals fall within the definition of "rate adjustments" as adopted in 09-786 and, because deferrals are included in the ROE reported for financial accounting purposes, it is appropriate to include deferrals in CSP's earnings for the SEET analysis. (OP&E Memo at 5; IEU-Ohio Memo at 6; Customer Parties Memo at 4-7.)
- (31) The Commission thoroughly considered AEP-Ohio's position and presented the Commission's justification for including deferrals in the SEET analysis at pages 30-31 of the SEET Order. CSP has not presented any new arguments for the Commission's consideration on rehearing. Accordingly, CSP's request for rehearing on this issue is denied.
- (32) CSP also argues that the SEET Order is unreasonable and unsupported by the record to the extent that the Commission required CSP to expend \$20 million by the end of 2012 on the Turning Point solar project in Cumberland, Ohio, or other similar project. CSP states that, although it is fully committed to the solar project, there are outstanding details, including federal loan guarantees and state and local tax incentives, which must be finalized for the project to go forward. The company argues that the regulatory requirement to spend \$20 million by the end of 2012 is detrimental to CSP's ability to

negotiate the best terms for its investment and, therefore, is not in the public interest, which is not ameliorated by the option to invest in another similar project. CSP requests the flexibility necessary to make the best decision as to how the Turning Point project or similar project is structured and implemented. CSP expects that sufficient progress will be made in the upcoming months to allow the company to propose a firm schedule for the solar project or similar project, during the course of its next ESP proceeding.⁴ In the alternative, CSP asks that the Commission require the company to submit a status report on the Turning Point project or other similar project in 2012 so that the Commission can consider and determine whether sufficient progress is being made. (CSP App. at 11-13.)

- (33) As part of the Commission's application of the SEET, the Commission gave consideration to CSP's future committed capital expenditure in the Turning Point solar project. Given the Commission's consideration of CSP's expenditure in a solar project in the development of the 2009 SEET threshold, it is reasonable for the Commission to require that the expenditure occur by a date certain. However, we agree that CSP should propose, during the course of its next ESP proceeding, a firm schedule setting forth its expenditure in the Turning Point solar project or other similar project. Accordingly, we deny CSP's request for rehearing.

Application of the SEET Credit

- (34) IEU-Ohio offers that the SEET Order, as implemented by the January 27, 2011 entry, addressing the applicable tariffs, is unreasonable and unlawful to the extent that reasonable arrangement customers paying rates under the SSO do not receive the SEET credit in violation of Sections 4928.143(F) and 4903.09, Revised Code (IEU-Ohio App. at 19-21).
- (35) Special arrangement customers receive a discount off of the otherwise applicable tariff rate and the difference between the tariff rate and the discounted rate is recoverable from the electric utility's remaining customers. As such, special

⁴ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case Nos. 11-346-EL-SSO and 11-348-EL-SSO; and In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority, Case Nos. 11-349-EL-AAM and 11-350-EL-AAM.*

arrangement customers did not fully contribute to CSP's 2009 significantly excessive earnings as determined in the SEET Order and should not be entitled to the SEET credit. Accordingly, the Commission denies IEU-Ohio's request for rehearing on this issue.

Other Issues

- (36) Customer Parties argue that the SEET Order is unreasonable and inconsistent with paragraphs (A) and (L) of Section 4928.02, Revised Code, as the Order failed to require CSP to honor the \$1 million commitment to the Partnership with Ohio, as set forth in the Stipulation filed November 30, 2010. Given the slow economic recovery in the state, Customer Parties admonish the Commission for not requiring CSP to honor the \$1 million commitment to the Partnership with Ohio. (Customer Parties App. at 7-10.)
- (37) Customer Parties note, but then ignore the fact, that CSP withdrew from the Stipulation but "unilaterally and voluntarily agreed" to fulfill certain obligations under the Stipulation which did not include the negotiated commitment to the Partnership with Ohio. The SEET Order merely recognized CSP's voluntary agreement to fulfill certain obligations with shareholder funds pursuant to its notice of withdrawal of the Stipulation. Since the Stipulation was withdrawn, the Commission finds it inappropriate to hold any party to a select provision of the Stipulation unless the party elects to do so voluntarily. Accordingly, Customer Parties' request for rehearing to enforce the Partnership with Ohio provision of the withdrawn Stipulation is denied.

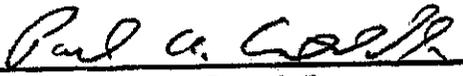
It is, therefore,

ORDERED, That the applications for rehearing be denied. It is, further,

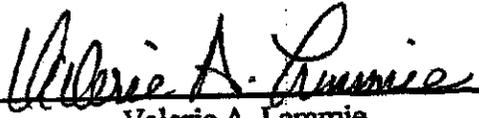
ORDERED, That a copy of this entry on rehearing be served upon all parties and other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

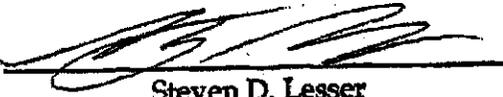
Todd A. Snitchler, Chairman



Paul A. Centolella



Valerie A. Lemmie



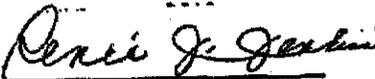
Steven D. Lesser

Cheryl L. Roberto

GNS/JRJ/vrm

Entered in the Journal

MAR 09 2011



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 Administration of the) Case No. 10-1261-EL-UNC
Significantly Excessive Earnings Test under)
Section 4928.143(F), Revised Code, and Rule)
4901:1-35-10, Ohio Administrative Code.)

CONCURRING AND DISSENTING OPINION
OF COMMISSIONER CHERYL L. ROBERTO

I concur with my colleagues in each aspect of the majority opinion, excepting the demarcation as to which "consumers" are due SEET credit.

We previously found, and affirm here on rehearing, that CSP, as a result of provisions (or "adjustments")¹ included in its most recent electric security plan, enjoyed significantly excessive earnings of \$42.683 million. Pursuant to Section 4928.143(F), Revised Code, having made such a finding, the Commission "shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustment...." It falls to the Commission to identify which consumers are due SEET credit.

CSP's electric security plan included provisions (adjustments) relating to the supply and pricing of generation service, as well as provisions relating to CSP's distribution service. Any or all of these provisions could have been the source of the significantly excessive earnings. In the absence of a record otherwise, we must assume that all such provisions did contribute to the significantly excessive earnings and, as such, any consumer class² that contributed revenue pursuant to one of these provisions is due SEET credit. Thus, on the facts before us, a SEET credit would be due to any consumer on CSP's distribution system.

On a more complete record, I believe it would have been possible and appropriate for the Commission to determine that the significantly excessive earnings were principally due to provisions relating to supply and pricing of generation service. On these

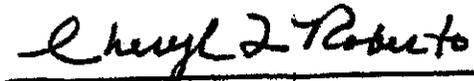
¹ Section 4928.143, Revised Code, uses "provisions" and "adjustments" interchangeably.

² Because Section 4928.143, Revised Code, directs that significantly excessive earnings must be returned to consumers "by prospective adjustment," I believe we must reject any of the arguments on rehearing that suggest an individual consumer's status or magnitude of usage during the previous year is relevant to whether the consumer receives a SEET credit. The "return" of significantly excessive earnings is prospective not retrospective. Thus, the "return" is to a consumer class prospectively. Those current members of the recipient class will be the consumers receiving the SEET credit.

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hypothetical facts, the consumers due a SEET credit would be those consumers purchasing power pursuant to the standard service offer only. On these circumstances, it would have been appropriate to exclude from receipt of the SEET credit any consumer who does not purchase power from CSP via the standard service offer, e.g. consumers on reasonable arrangements or consumers who shop competitive suppliers for their energy.

In the case before us, however, we have made no finding that the significantly excessive earnings were due principally to provisions relating to supply and pricing of generation. Yet the majority excludes CSP distribution service consumers who purchase power via a reasonable arrangement from receipt of the SEET credit. The majority, however, does not exclude CSP distribution consumers who shop for their energy. In ruling thus, the majority has stated that "reasonable arrangement customers who receive service under a discount rate supported by delta revenue recovery are not entitled to both the discount rate and a SEET credit." I can find no statutory support for this distinction, therefore I dissent from this portion of the Entry on Rehearing.



Cheryl L. Roberto

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the 2009 Annual Filing of)
Columbus Southern Power Company and) Case No. 10-1261-EL-UNC
Ohio Power Company Required by Rule)
4901:1-35-10, Ohio Administrative Code.)

APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
OHIO ENERGY GROUP AND
THE APPALACHIAN PEACE AND JUSTICE NETWORK

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Maureen R. Grady, Counsel of Record
Melissa R. Yost
Kyle L. Verrett
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, 18th Floor
Columbus, OH 43215
(614) 466-8574 Telephone
grady@occ.state.oh.us
yost@occ.state.oh.us
verrett@occ.state.oh.edu

Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, OH 43215
(614) 221-7201 Telephone
m-smalz@ohiopoveritylaw.org
j-maskovyak@ohiopoveritylaw.org

Attorneys for Appalachian Peace and
Justice Network

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David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
(513) 421-2255 Telephone
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com

Attorneys for the Ohio Energy Group

February 10, 2011

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2009 Annual Filing of)
Columbus Southern Power Company and) Case No. 10-1261-EL-UNC
Ohio Power Company Required by Rule)
4901:1-35-10, Ohio Administrative Code.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
OHIO ENERGY GROUP AND
THE APPALACHIAN PEACE AND JUSTICE NETWORK**

The Office of the Ohio Consumers' Counsel ("OCC") (representing 1.2 million residential customers), the Ohio Energy Group ("OEG") (representing 22 of Ohio's most energy-intensive industries) and the Appalachian Peace and Justice Network ("APJN") (a not for profit organization whose members include low-income customers in southeast Ohio) (collectively "Customer Parties") each respectively apply for rehearing of the January 11, 2011 Opinion and Order ("Order") issued by the Public Utilities Commission of Ohio ("Commission" or "PUCO"). Through this Application for Rehearing, the Customer Parties seek to protect the customers of Columbus Southern Power Company ("CSP" or "Company").

Under R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Customer Parties assert that the Opinion and Order was unjust, unreasonable, and unlawful in the following particulars:

1. The PUCO erred in adopting the PUCO Staff methodology to exclude profits from off-system sales in the calculation of

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significantly excess earnings, despite such methodology containing mechanical errors, thereby denying customers part of the refund they should have received from CSP.

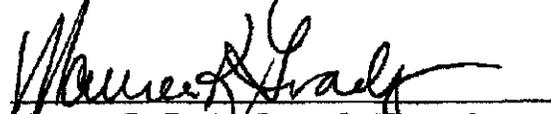
2. The PUCO erred by unlawfully excluding the profits from off-system sales from the earned return of Columbus Southern Power Company. The exclusion of these profits results in a biased comparison between Columbus Southern Power Company and publicly traded companies that face comparable business and financial risk, and thus is contrary to R.C. 4928.143(F), thereby denying customers part of the refund they should have received from CSP.
3. The PUCO erred by failing to require the Company to comply with its \$1 million commitment to Partnership with Ohio initiative for the benefit of its low-income customers. The Commission's decision was unreasonable and inconsistent with R.C. 4928.02(A) and (L).

An explanation of the basis for each of these grounds for rehearing is set forth in the attached Memorandum in Support. Consistent with R.C. 4903.10 and the Customer Parties' claims of error, the PUCO should modify its Order.

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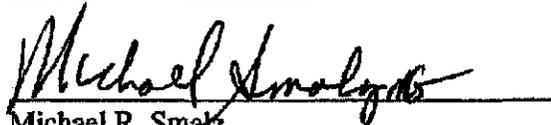
Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



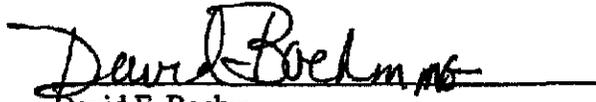
Maureen R. Grady, Counsel of Record
Melissa R. Yost
Kyle L. Verrett
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, 18th Floor
Columbus, OH 43215
(614) 466-8574 Telephone
grady@occ.state.oh.us
yost@occ.state.oh.us
verrett@occ.state.oh.edu



Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, OH 43215
(614) 221-7201 Telephone
msmalz@ohiopoveritylaw.org
jmaskovyak@ohiopoveritylaw.org

**Attorneys for Appalachian Peace and
Justice Network**



David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
(513) 421-2255 Telephone
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com

Attorneys for the Ohio Energy Group

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2009 Annual Filing of)
Columbus Southern Power Company and)
Ohio Power Company Required by Rule) Case No. 10-1261-EL-UNC
4901:1-35-10, Ohio Administrative Code.)

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Off-system sales are sales by a utility to third parties that are not Ohio retail customers. They can be called “opportunity” sales—sales that are made possible because the jurisdictional generation plant produces more power than is needed for Ohio retail electric customers. The revenue from such sales is recorded in FERC Account 447—Sales for Resale. But CSP’s off-system sales, even if reflecting power that exceeds the needs of retail customers, come from generation plant that was built for the benefit of Ohio customers. And, in this regard, CSP’s jurisdictional customers have paid CSP a return on CSP’s plant investment and a return of the costs of such generation assets. In 2009, CSP’s earnings from off-system sales were \$32.977 million, while CSP’s total earnings were \$271.504 million.¹ Consequently, 12.1% of CSP’s total earnings in 2009 were derived from off-system sales.²

At the evidentiary hearing, the Company proposed to exclude the profits of off-system sales from its earned return on equity (“ROE”). PUCO Staff Witness Cahaan took issue with the Company’s exclusion and testified that the Company’s adjusted ROE

¹ Opinion and Order at 23.

² Joint Ex. 2 at 23.

calculation was incorrect.³ Staff proposed to adjust both the net income of CSP and its equity capitalization, to reflect the complete impact of off-system sales on the Company's ROE.⁴

The Customer Parties had objected to excluding the profits of off-system sales in the Company's earned return on equity.⁵ However, Customer Parties, on brief, advocated for the use of Staff's methodology as a starting point, but pointed out that Staff's methodology understated the Company's earned return.⁶ However, the correct quantification was not been made by any witness.⁷ Thus, the Customer Parties argued that the Commission should order no exclusion given the lack of a record that demonstrates the correct exclusion and given the Company's failure to meet *its* burden of proof, as set forth in R.C. 4928.143(C)(1).⁸

The Commission in its Order determined that off-system sales should be excluded from the Company's earned return on equity. It also concluded that it needed to "correct" the equity effect of the exclusion, thus rejecting the Company's quantification.⁹ It then adopted the recalculated return on equity offered by Staff Witness Cahaan.

³ Staff Ex. 1 at 19-21.

⁴ Staff Ex. 1 at 18-22 (Cahaan).

⁵ See Joint Ex. 2 at 23.

⁶ Customer Parties' Brief at 29-31.

⁷ Mr. Cahaan's Exhibit 3 would have to be modified to eliminate the step in which he multiplies the common equity capitalization times a production plant ratio of 51.5%. Additionally, Mr. Cahaan should have calculated the off-system sales margins in the denominator as a % of total earnings, not total revenues. The 13.9% figure used in the denominator of Cahaan Exhibit 2 should have been 12.15%, consistent with Mr. Cahaan's use of 12.15% in the numerator. This too has an effect on the ultimate adjusted ROE.

⁸ Id.

⁹ Opinion and Order at 30 (Jan. 11, 2011).

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that within thirty (30) days after an order is issued by the Commission "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding." Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful." *Id.*

In considering an application for rehearing, Ohio law provides that 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." *Id.* If the Commission grants a rehearing and determines 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 ***." *Id.*

OCC, APJN, and OEG each participated in this case. Customer Parties thus meet the statutory conditions that apply to an applicant for rehearing under R.C. 4903.10. Accordingly, Customer Parties respectfully request that the Commission hold a rehearing on the matters specified below.

III. ARGUMENT

- A. **The PUCO erred in adopting the PUCO Staff methodology to exclude profits from off-system sales in calculating significantly excess earnings, despite such methodology containing mechanical errors, thereby denying customers part of the refund they should have received from CSP.**

As discussed above, the Commission in its Order determined that it needed to "correct" the equity effect of the excluding the profits from off-system sales, thus

rejecting the Company's quantification.¹⁰ It then adopted the recalculated return on equity offered by Staff Witness Cahaan. The result was overstating the impact of excluding off-system sales, thereby diminishing the potential refund of excessive earnings to customers.

The PUCO should grant rehearing on this issue and determine that no exclusion can be made for profits from off-system sales, as the record does not support a correct exclusion. Otherwise the Company is rewarded for its failure to place evidence in the record to allow the PUCO to correct the exclusion.¹¹

The granting of rehearing would be consistent with the Commission's determination in AEP's ESP proceeding¹² where, in setting the baseline fuel adjustment clause, the lack of a record on actual costs was cited as a basis for adopting an alternative position. It was the intervenors there who had asked for the PUCO to order the Company to produce actual costs. The PUCO nonetheless would not do so and the absence of actual costs became one of the reasons why the PUCO rejected the intervenors' position.¹³

Similarly here, there is no record that shows the mechanically correct off-system sales exclusion. The absence of a correct calculation should be reason to reject the Staff's calculation and in turn, make no exclusion of profits from off-system sales. The

¹⁰ Opinion and Order at 30 (Jan. 11, 2011).

¹¹ Mr. Cahaan's Exhibit 3 would have to be modified to eliminate the step in which he multiplies the common equity capitalization times a production plant ratio of 51.5%. Additionally, Mr. Cahaan should have calculated the off-system sales margins in the denominator as a % of total earnings, not total revenues. The 13.9% figure used in the denominator of Cahaan Exhibit 2 should have been 12.15%, consistent with Mr. Cahaan's use of 12.15% in the numerator. This too has an effect on the ultimate adjusted ROE.

¹² See *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*, Case No. 08-917-EL-SSO, Opinion and Order at 19 (Mar. 18, 2009).

¹³ Id. But see concurring opinion of Commissioner Roberto, Entry on Rehearing at 1 (July 23, 2009)(which would have required the Company to produce actual costs).

record should stand as it is and on that basis, profits from off-system sales must be excluded. When profits from off-system sales are included, the true magnitude of CSP's significantly excess profits is revealed—and that should result in greater refunds to customers. This result would be consistent with a determination that the Company failed to meet *its* burden of proof, which burden is explicitly stated under R.C. 4928.143(C)(1).

If the Commission does not grant rehearing as requested above, it should nonetheless correct the off-system sales adjustment, consistent with the Customer Parties' recommendation. The Commission's action here caused the refunds of excessive earnings to customers to be understated. While Mr. Cahaan's methodology can be used as the starting point, it must be adjusted. Specifically, Mr. Cahaan's calculation improperly scaled down the adjustment to the denominator from all of CSP's equity capitalization to only the generation-related component of equity capitalization. Thus, there is a mismatch where the off-system sales margins are totally removed from the numerator, but only partially removed from the denominator.

Total equity capitalization should have been used in the calculation because total earnings were used to determine the relationship between off-system sales margins and total margins. Mr. Cahaan's quantification, though conceptually correct, contains a computational error that understates the resulting earned return on equity in favor of CSP, as pointed out in Customer Parties' brief. The need to correct this adjustment is pressing, as customers are being denied part of the refund due to them and, going forward, others will likely rely upon the PUCO's holding here as precedent.

B. The PUCO erred by unlawfully excluding the profits from off-system sales from the earned return of Columbus Southern Power Company. The exclusion of these profits results in a biased comparison between Columbus Southern Power Company and publicly traded companies that face comparable business and financial risk, and thus is contrary to R.C. 4928.143(F), thereby denying customers part of the refund they should have received from CSP.

The PUCO determined in its Order that the profits from off-system sales should be excluded from CSP's earned return on equity (which means customers are denied receiving a greater refund from CSP).¹⁴ It appears that the basis for the PUCO's exclusion is that the earnings from off-system sales were not the result of adjustments to the ESP. It concluded that where "it can be shown that the electric utility received a return on its OSS, which if included in the calculation could unduly increase its ROE for purposes of SEET comparisons, OSS margins and the related equity in generation facilities should be excluded from the SEET calculation."¹⁵

As discussed above, in 2009, CSP's earnings from off-system sales were \$32.977 million, while CSP's total earnings were \$271.504 million.¹⁶ Consequently, 12.1% of CSP's total earnings in 2009 were derived from off-system sales.¹⁷ Therefore, if earnings from off-system sales are ignored, as proposed by the Company,¹⁸ the Commission is comparing only 87.9% of the Company's earnings with 100% of the earnings of the comparable group. As Witness Kollen testified for the Customer Parties, "the exclusion of the OSS earnings from the CSP SEET earnings would bias the Company's earnings

¹⁴ Opinion and Order at 30.

¹⁵ Id.

¹⁶ Id. at 23.

¹⁷ Joint Ex. 2 at 23.

¹⁸ Company Ex. 6 at 7.

downward in comparison to the group of comparable companies used to determine the SEET earnings threshold.”¹⁹ A comparison of this nature would be biased, meaningless, asymmetrical, and contrary to the language of 4928.143(F).

The statute requires “the earned return on common equity of the electric distribution utility” to be compared with the “return on common equity that was earned during the same period by [comparable] publicly traded companies, including utilities***.” R.C. 4928.143(F). AEP’s proposal to compare only 87.9% of CSP’s profits²⁰ with 100% of the earnings of the companies in the comparable group, results in a biased comparison that does not comply with the statute. The effect of the Commission’s ruling is that customers did not receive the full refund they were due under R.C. 4928.143(F). Customers should have received an additional \$22 million over and above the \$42.6 million refund ordered.²¹

- C. The PUCO erred by failing to require the Company to comply with its \$1 million commitment to Partnership With Ohio initiative for the benefit of its low-income customers. The Commission’s decision was unreasonable in this respect and inconsistent with R.C. 4928.02(A) and (L).**

On November 30, 2010, AEP Ohio submitted a Joint Stipulation and Recommendation in this case that was signed by the Kroger Company, Ormet Primary Aluminum Corporation, the Ohio Hospital Association (“OHA”), the Ohio Manufacturers’ Association (“OMA”), and the PUCO Staff. Among other things, the Stipulation contained four commitments under Section IX, characterized as

¹⁹ Joint Ex.2 at 23.

²⁰ The volume of CSP’s off-system sales in 2009 was 5,363,938 mWh, compared to retail sales in Ohio of 20,673,469 mWh. See Joint Ex. 2 at 23.

²¹ Unadjusted return on equity (20.84) minus adjusted return (19.73) multiplied by 20.039 equals \$22.24 million. See Joint Customer Parties Ex. 2, LK-2, which explains that every 1% excessive return on equity equals a refund of \$20.039 million, which quantification was not rebutted by the Company.

“Miscellaneous Terms and Commitments.” Three of the four commitments were payments to OHA, OMA, and Kroger. The fourth commitment under that section of the Stipulation was a \$1 million commitment to Partnership with Ohio initiative, for the benefit of the Company’s low income customers.

On December 16, 2010, AEP filed to withdraw the stipulation. In its notice of withdrawal it uni-laterally and voluntarily agreed to fulfill certain obligations under the stipulation which included three of the four obligations listed in Section IX of the Stipulation. AEP did not agree to fulfill its obligation to contribute \$1 million to the Partnership with Ohio initiative.

The Commission in its Opinion and Order ordered the Company to comply with the commitments it set forth in its notice of withdrawal. Thus, the Company was not ordered to fund the Partnership with Ohio initiative, the sole commitment that could have provided much needed assistance to CSP’s low income customers.

This assistance is especially crucial at this time. Columbus Southern Power disconnected 34,322²² residential customers for non-payment during 2010 representing approximately 5.5% of their customer base. In addition, as of December 2010, there were 47,743 customers on the Percentage of Income Payment Plan PIPP Plus program – a 17.7 percent increase from the previous December.²³

PIPP Plus is a low-income payment plan that enables customers whose household income is at or below 150 percent of the federal poverty guidelines to pay 6 percent of

²² According to the twelve month summary of disconnection data provided to the PUCO Staff in the OSCAR Reports.

²³ According to the CSP OSCAR Report provided to the PUCO Staff, there were 40,579 PIPP customers in December 2009 and 47,743 PIPP customers in December 2010. $47,743 - 40,579 = 7,164 / 40,579 \times 100 = 17.7\%$.

their monthly income for electricity rather than the actual bill. The increase in PIPP Plus enrollments is indicative of an increasing number of customers who are unable to pay the electric bill due to the slow economic recovery in the state and the projected reductions in government assistance. For example, the unemployment level in Ohio is currently at 9.6 percent²⁴ - a 23.1 percent increase from just two years ago.²⁵ The poverty level in Ohio is at 13.7 percent – the highest level experienced since 1994.²⁶

Against this economic back drop, Ohio is experiencing significant reductions in the level of Low Income Home Energy Assistance Program (LIHEAP) funding that is available to help low-income families. Current federal funding for LIHEAP is at \$3.9 billion²⁷, a significant reduction from the \$5.1 billion funding level that states have realized over the last two years. Ohio has received authorization to spend approximately \$110 million²⁸ compared with the approximate \$246 million that was available last year.²⁹ Recent reports by the National Energy Assistance Director's Association NEADA project a 5.5% increase in the number of Ohio households that will apply for LIHEAP this year compared with last year.³⁰

²⁴ December 2010 Unemployment Data
<http://jfs.ohio.gov/RELEASES/unemp/201101/unemprelease.asp>.

²⁵ The December 2008 Unemployment level was at 7.8%.
<http://jfs.ohio.gov/RELEASES/unemp/200901/UnempPressRelease.asp>.

²⁶ The State of Poverty in Ohio: Building a Foundation for Prosperity, Community Research Partners, January 2010, Page V. http://www.oaca.org/index_198_2165961434.pdf.

²⁷ <http://www.hhs.gov/news/press/2011pres/01/20110112a.html>.

²⁸ http://www.acf.hhs.gov/news/press/2011/liheap_allocation.html.

²⁹ http://development.ohio.gov/cms/uploadedfiles/Development.ohio.gov/Divisional_Content/Community/Office_of_Community_Services/2010%20HEAP%20Public%20Hearing.ppt#330,1,Slide 4.

³⁰ <http://www.neada.org/communications/press/2011-02-06LIHEAP11ProjServed.pdf>.

Given these dire circumstances that exist for low-income customers in Ohio, it was unreasonable for the Commission to allow the Company to break its commitment to low income customers when the assistance was sorely needed. Moreover, the Commission's action serves to undermine the policy objectives of R.C. 4928.02. Specifically R.C. 4928.02 (A) establishes that the policy of the State is to "ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory and reasonably priced retail electric service." Additionally, subdivision (L) of R.C. 4928.02 establishes that another policy of the state is to "protect at-risk populations." CSP's low income customers are the at-risk population in this proceeding.

In AEP Ohio's ESP proceeding, this Commission stated that these policy statements, as codified by the General Assembly in Chapter 4928, set forth important objectives which the commission must keep in mind when *considering all cases filed pursuant to that chapter of the code.*³¹ The SEET proceeding was such a proceeding, falling under Chapter 4928 of the Code. Here, the Commission failed to consider these important objectives, thereby undermining R.C. 4928.02(A) and (L). Thus in order to comply with these provisions, and render a reasonable decision, the PUCO should reverse its ruling, and order AEP Ohio to keep its stated commitment to the Partnership with Ohio initiative.

IV. CONCLUSION

For all the reasons discussed above, the Commission should grant rehearing on the Customer Parties' claims of error and modify the January 11, 2011 Opinion and Order consistent with Ohio law and Commission precedent. The PUCO should provide

³¹ AEP-Ohio ESP Cases, Case No. 08-917-EL-SSO, Opinion and Order at 12-13 (March 18, 2009).

CSP's customers with the greater refund intended under Ohio law in this circumstance where CSP has significantly excess earnings.

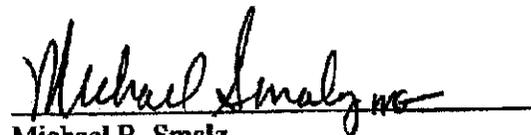
Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Maureen R. Grady, Counsel of Record
Melissa R. Yost
Kyle L. Verrett
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, 18th Floor
Columbus, OH 43215
(614) 466-8574 Telephone
grady@occ.state.oh.us
yost@occ.state.oh.us
verrett@occ.state.oh.edu



Michael R. Smalz
Joseph V. Maskovyak
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, OH 43215
(614) 221-7201 Telephone
m-smalz@ohiopoveritylaw.org
j-maskovyak@ohiopoveritylaw.org

**Attorneys for Appalachian Peace and
Justice Network**



David F. Boehm

Michael L. Kurtz

Boehm, Kurtz & Lowry

36 East Seventh Street, Suite 1510

Cincinnati, OH 45202

(513) 421-2255 Telephone

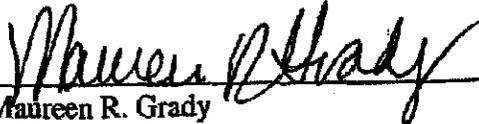
dboehm@BKLlawfirm.com

mkurtz@BKLlawfirm.com

Attorneys for the Ohio Energy Group

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Application for Rehearing by the Customer Parties was served on the persons listed below via electronic mail this 10th day of February, 2011.


Maureen R. Grady
Assistant Consumers' Counsel

SERVICE LIST

Steve Nourse
AEP Service Corp.
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com

Thomas McNamee
Attorney General's Office
Public Utilities Commission of Ohio
180 E. Broad St., 6th Fl.
Columbus, OH 43215
Thomas.mcnamee@puc.state.oh.us

Richard L. Sites
Ohio Hospital Association
155 E. Broad St., 15th Fl
Columbus, OH 43215-3620
ricks@ohanet.org

Thomas J. O'Brien
Bricker & Eckler LLP
100 S. Third St.
Columbus, OH 43215-4291
tobrien@bricker.com

Daniel R. Conway
Porter, Wright, Morris & Arthur LLP
41 South High Street
Columbus, OH 43215
dconway@porterwright.com

John W. Bentine
Mark S. Yurick
Chester Wilcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
jbentine@cwsllaw.com
myurick@cwsllaw.com

Clinton A. Vince
Douglas G. Bonner
Daniel D. Barnowski
Keith C. Nusbaum
Emma C. Hand
Sonnenschein Nath & Rosenthal
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005
cvince@sonnenschein.com
dbonner@sonnenschein.com
dbarnowski@sonnenschein.com
ehand@sonnenschein.com
knusbaum@sonnenschein.com

**Attorneys for Ormet Primary
Aluminum Corporation**

stnourse@aep.com
Thomas.mcnamee@puc.state.oh.us
ricks@ohanet.org
tobrien@bricker.com
dconway@porterwright.com
jbentine@cswslaw.com
myurick@cswslaw.com
cvince@sonnenschein.com
dbonner@sonnenschein.com
dbarnowski@sonnenschein.com
ehand@sonnenschein.com
knusbaum@sonnenschein.com

4903.13 Reversal of final order - notice of appeal.

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

Effective Date: 10-01-1953

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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

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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

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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;

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(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

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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

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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.

Effective Date: 2008 SB221 07-31-2008

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

Each electric utility in this state filing an application for a standard service offer (SSO) in the form of an electric security plan (ESP), a market-rate offer (MRO), or both, shall comply with the requirements set forth in this rule.

(A) SSO applications shall be case captioned as (XX-XXX-EL-SSO). Twenty copies plus an original of the application shall be filed. The application must include a complete set of direct testimony of the electric utility personnel or other expert witnesses. This testimony shall be in question and answer format and shall be in support of the electric utility's proposed application. This testimony shall fully support all schedules and significant issues identified by the electric utility.

(B) An SSO application that contains a proposal for an MRO shall comply with the requirements set forth below.

(1) The following electric utility requirements are to be demonstrated in a separate section of the standard service offer SSO application proposing a market-rate offer MRO:

(a) The electric utility shall establish one of the following: that it, or its transmission affiliate, belongs to at least one regional transmission organization (RTO) that has been approved by the federal energy regulatory commission; or, if the electric utility or its transmission affiliate does not belong to an RTO, then the electric utility shall demonstrate that alternative conditions exist with regard to the transmission system, which include non-pancaked rates, open access by generation suppliers, and full interconnection with the distribution grid.

(b) The electric utility shall establish one of the following: its RTO retains an independent market-monitor function and has the ability to identify any potential for a market participant or the electric utility to exercise market power in any energy, capacity, and/or ancillary service markets by virtue of access to the RTO and the market participant's data and personnel and has the ability to effectively mitigate the conduct of the market participants so as to prevent or preclude the exercise of such market power by any market participant or the electric utility; or the electric utility shall demonstrate that an equivalent function exists which can monitor, identify, and mitigate conduct associated with the exercise of such market power.

(c) The electric utility shall demonstrate that an independent and reliable source of electricity pricing information for any energy product or service necessary for a winning bidder to fulfill the contractual obligations resulting from the competitive bidding process (CBP) is publicly available. ~~The information may be offered through a pay subscription service, but the pay subscription service shall be available under standard pricing, terms, and conditions to any person requesting a subscription. The published information shall be representative of prices and changes in prices in the electric utility's electricity market, and shall identify pricing of on-peak and off-peak energy products that represent contracts for delivery, encompassing a time frame beginning at least two years from the date of the publication. The published information shall be updated on at least a monthly basis.~~

(2) Prior to establishing an MRO under division (A) of section 4928.142 of the Revised Code, an electric utility shall file a plan for a CBP with the commission. The electric utility shall provide justification of its proposed CBP plan, considering alternative possible methods of procurement. Each CBP plan that is to be used to establish an MRO shall include the following:

(a) A complete description of the CBP plan and testimony explaining and supporting each aspect of the CBP plan. The description shall include a discussion of any relationship between the wholesale procurement process and the retail rate design that may be proposed in the CBP plan. The description shall include a discussion of alternative methods of procurement that were considered and the rationale for selection of the CBP plan being presented. The description shall also include an explanation of every proposed non-avoidable charge, if any, and why the charge is proposed to be non-avoidable.

(b) Pro forma financial projections of the effect of the CBP plan's implementation, including implementation of division (D) of section 4928.142 of the Revised Code, upon generation, transmission, and distribution of the electric utility, for the duration of the CBP plan.

(c) Projected generation, transmission, and distribution rate impacts by customer class and rate schedules for the duration of the CBP plan. The electric utility shall clearly indicate how projected bid clearing prices used for this purpose were derived.

(d) Detailed descriptions of how the CBP plan ensures an open, fair, and transparent competitive solicitation that is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code.

(e) Detailed descriptions of the customer load(s) to be served by the winning bidder(s), and any known factors that may affect such customer loads. The descriptions shall include, but not be limited to, load subdivisions defined for bidding purposes, load and rate class descriptions, customer load profiles that include historical hourly load data for each load and rate class for at least the two most recent years, applicable tariffs, historical shopping data, and plans for meeting targets pertaining to load reductions, energy efficiency, renewable energy, advanced energy, and advanced energy technologies. If customers will be served pursuant to time-differentiated or dynamic pricing, the descriptions shall include a summary of available data regarding the price elasticity of the load. Any fixed load provides to be served by winning bidder(s) shall be described.

(f) Detailed descriptions of the generation and related services that are to be provided by the winning bidder(s). The descriptions shall include, at a minimum, capacity, energy, transmission, ancillary and resource adequacy services, and the term during which generation and related services are to be provided. The descriptions shall clearly indicate which services are to be provided by the winning bidder(s) and which services are to be provided by the electric utility.

(g) Draft copies of all forms, contracts, or agreements that must be executed during or upon completion of the CBP.

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(h) A clear description of the proposed methodology by which all bids would be evaluated, in sufficient detail so that bidders and other observers can ascertain the evaluated result of any bids or potential bids.

(i) The CBP plan shall include a discussion of time-differentiated pricing, dynamic retail pricing, and other alternative retail rate options that were considered in the development of the CBP plan. A clear description of the rate structure ultimately chosen by the electric utility, the electric utility's rationale for selection of the chosen rate structure, and the methodology by which the electric utility proposes to convert the winning bid(s) to retail rates of the electric utility shall be included in the CBP plan.

(j) The first application for a market rate offer by an electric utility that, as of July 31, 2008, directly owned, in whole or in part, operating electric generation facilities that had been used and useful in this state shall include a description of the electric utility's proposed blending of the CBP rates for the first five years of the market rate offer pursuant to division (D) of section 4928.142 of the Revised Code. The proposed blending shall show the generation service price(s) that will be blended with the CBP determined rates, and any descriptions, formulas, and/or tables necessary to show how the blending will be accomplished. The proposed blending shall show all adjustments, to be made on a quarterly basis, included in the generation service price(s) that the electric utility proposes for changes in costs of fuel, purchased power, portfolio requirements, and environmental compliance incurred during the blending period. The electric utility shall provide its best current estimate of anticipated adjustment amounts for the duration of the blending period, and compare the projected adjusted generation service prices under the CBP plan to the projected adjusted generation service prices under its proposed electric security plan.

(k) The electric utility's application to establish a CBP shall include such information as necessary to demonstrate whether or not, as of July 31, 2008, the electric utility directly owned, in whole or in part, operating electric generation facilities that had been used and useful in the state of Ohio.

(l) The CBP plan shall provide for funding of a consultant that may be selected by the commission to assess and report to the commission on the design of the solicitation, the oversight of the bidding process, the clarity of the product definition, the fairness, openness, and transparency of the solicitation and bidding process, the market factors that could affect the solicitation, and other relevant criteria as directed by the commission. Recovery of the cost of such consultant(s) may be included by the electric utility in its CBP plan.

(m) The CBP plan shall include a discussion of generation service procurement options that were considered in development of the CBP plan, including but not limited to, portfolio approaches, staggered procurement, forward procurement, electric utility participation in day-ahead and/or real-time balancing markets, and spot market purchases and sales. The CBP plan shall also include the rationale for selection of any or all of the procurement options.

(n) The electric utility shall show, as a part of its CBP plan, any relationship between the CBP plan and the electric utility's plans to comply with alternative energy portfolio requirements of section 4928.64 of the Revised Code, and energy efficiency requirements and peak demand reduction requirements of section 4928.66 of the Revised Code. The initial filing of a CBP plan shall include a detailed account of how the plan is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code. Following the initial filing, subsequent filings shall include a discussion of how the state policy continues to be advanced by the plan.

(o) An explanation of known and anticipated obstacles that may create difficulties or barriers for the adoption of the proposed bidding process.

(3) The electric utility shall provide a description of its corporate separation plan, adopted pursuant to section 4928.17 of the Revised Code, including but not limited to, the current status of the corporate separation plan, a detailed list of all waivers previously issued by the commission to the electric utility regarding its corporate separation plan, and a timeline of any anticipated revisions or amendments to its current corporate separation plan on file with the commission pursuant to Chapter 4901:1-37 of the Administrative Code.

(4) A description of how the electric utility proposes to address governmental aggregation programs and implementation of divisions (I) and (K) of section 4928.20 of the Revised Code.

(C) An SSO application that contains a proposal for an ESP shall comply with the requirements set forth below.

(1) A complete description of the ESP and testimony explaining and supporting each aspect of the ESP.

(2) Pro forma financial projections of the effect of the ESP's implementation upon the electric utility for the duration of the ESP, together with testimony and work papers sufficient to provide an understanding of the assumptions made and methodologies used in deriving the pro forma projections.

(3) Projected rate impacts by customer class/rate schedules for the duration of the ESP, including post-ESP impacts of deferrals, if any.

(4) The electric utility shall provide a description of its corporate separation plan, adopted pursuant to section 4928.17 of the Revised Code, including, but not limited to, the current status of the corporate separation plan, a detailed list of all waivers previously issued by the commission to the electric utility regarding its corporate separation plan, and a timeline of any anticipated revisions or amendments to its current corporate separation plan on file with the commission pursuant to Chapter 4901:1-37 of the Administrative Code.

(5) Division (A)(3) of section 4928.31 of the Revised Code required each electric utility to file an operational support plan as a part of its electric transition plan. Each electric utility

shall provide a statement as to whether its operational support plan has been implemented and whether there are any outstanding problems with the implementation.

(6) A description of how the electric utility proposes to address governmental aggregation programs and implementation of divisions (I), (J), and (K) of section 4928.20 of the Revised Code.

(7) A description of the effect on large-scale governmental aggregation of any unavoidable generation charge proposed to be established in the ESP.

(8) The initial filing for an ESP shall include a detailed account of how the ESP is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code. Following the initial filing, subsequent filings shall include how the state policy is advanced by the ESP.

(9) Specific information

Division (B)(2) of section 4928.143 of the Revised Code authorizes the provision or inclusion in an ESP of a number of features or mechanisms. To the extent that an electric utility includes any of these features in its ESP, it shall file the corresponding information in its application.

(a) Division (B)(2)(a) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for the automatic recovery of fuel, purchased power, and certain other specified costs. An application including such provisions shall include, at a minimum, the information described below:

(i) The type of cost the electric utility is seeking recovery for under division (B)(2) of section 4928.143 of the Revised Code including a summary and detailed description of such cost. The description shall include the plant(s) that the cost pertains to as well as a narrative pertaining to the electric utility's procurement policies and procedures regarding such cost.

(ii) The electric utility shall include in the application any benefits available to the electric utility as a result of or in connection with such costs including but not limited to profits from emission allowance sales and profits from resold coal contracts.

(iii) The specific means by which these costs will be recovered by the electric utility. In this specification, the electric utility must clearly distinguish whether these costs are to be recovered from all distribution customers or only from the customers taking service under the ESP.

(iv) A complete set of work papers supporting the cost must be filed with the application. Work papers must include, but are not limited to, all pertinent documents prepared by the electric utility for the application and a narrative and other support of assumptions made in completing the work papers.

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(b) Divisions (B)(2)(b) and (B)(2)(c) of section 4928.143 of the Revised Code, authorize an electric utility to include unavoidable surcharges for construction, generation, or environmental expenditures for electric generation facilities owned or operated by the electric utility. Any plan which seeks to impose surcharge under these provisions shall include the following sections, as appropriate:

(i) The application must include a description of the projected costs of the proposed facility. The need for the proposed facility must have already been reviewed and determined by the commission through an integrated resource planning process filed pursuant to rule 4901:5-5-05 of the Administrative Code.

(ii) The application must also include a proposed process, subject to modification and approval by the commission, for the competitive bidding of the construction of the facility unless the commission has previously approved a process for competitive bidding, which would be applicable to that specific facility.

(iii) An application which provides for the recovery of a reasonable allowance for construction work in progress shall include a detailed description of the actual costs as of a date certain for which the applicant seeks recovery, a detailed description of the impact upon rates of the proposed surcharge, and a demonstration that such a construction work in progress allowance is consistent with the applicable limitations of division (A) of section 4909.15 of the Revised Code.

(iv) An application which provides recovery of a surcharge for an electric generation facility shall include a detailed description of the actual costs, as of a date certain, for which the applicant seeks recovery and a detailed description of the impact upon rates of the proposed surcharge.

(v) An application which provides for recovery of a surcharge for an electric generation facility shall include the proposed terms for the capacity, energy, and associated rates for the life of the facility.

(c) Division (B)(2)(d) of section 4928.143 of the Revised Code authorizes an electric utility to include terms, conditions, or charges related to retail shopping by customers. Any application which includes such terms, conditions or charges, shall include, at a minimum, the following information:

(i) A listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service. Such components would include, but are not limited to, terms and conditions relating to shopping or to returning to the standard service offer and any unavoidable charges. For each such component, an explanation of the component and a descriptive rationale and, to the extent possible, a quantitative justification shall be provided.

(ii) A description and quantification or estimation of any charges, other than those associated with generation expansion or environmental investment under divisions (B)(2)(b) and (B)(2)(c) of section 4928.143 of the Revised Code, which will be deferred for future

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recovery, together with the carrying costs, amortization periods, and avoidability of such charges.

(iii) A listing, description, and quantitative justification of any unavoidable charges for standby, back-up, or supplemental power.

(d) Division (B)(2)(e) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for automatic increases or decreases in any component of the standard service offer price. Pursuant to this authority, if the ESP proposes automatic increases or decreases to be implemented during the life of the plan for any component of the standard service offer, other than those covered by division (B)(2)(a) of section 4928.143 of the Revised Code, the electric utility must provide in its application a description of the component, the proposed means for changing the component, and the proposed means for verifying the reasonableness of the change.

(e) Division (B)(2)(f) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for the securitization of authorized phase-in recovery of the standard service offer price. If a phase-in deferred asset is proposed to be securitized, the electric utility shall provide, at the time of an application for securitization, a description of the securitization instrument and an accounting of that securitization, including the deferred cash flow due to the phase-in, carrying charges, and the incremental cost of the securitization. The electric utility will also describe any efforts to minimize the incremental cost of the securitization. The electric utility shall provide all documentation associated with securitization, including but not limited to, a summary sheet of terms and conditions. The electric utility shall also provide a comparison of costs associated with securitization with the costs associated with other forms of financing to demonstrate that securitization is the least cost strategy.

(f) Division (B)(2)(g) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions relating to transmission and other specified related services. Moreover, division (A)(2) of section 4928.05 of the Revised Code states that, notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs (net of transmission related revenues), including ancillary and net congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission.

Any utility which seeks to create or modify its transmission cost recovery rider in its ESP shall file the rider in accordance with the requirements delineated in Chapter 4901:1-36 of the Administrative Code.

(g) Division (B)(2)(h) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for alternative regulation mechanisms or programs, including infrastructure and modernization incentives, relating to distribution service as part of an ESP. While a number of mechanisms may be combined within a plan, for each specific

mechanism or program, the electric utility shall provide a detailed description, with supporting data and information, to allow appropriate evaluation of each proposal, including how the proposal addresses any cost savings to the electric utility, avoids duplicative cost recovery, and aligns electric utility and consumer interests. In general, and to the extent applicable, the electric utility shall also include, for each separate mechanism or program, quantification of the estimated impact on rates over the term of any proposed modernization plan. Any application for an infrastructure modernization plan shall include the following specific requirements:

(i) A description of the infrastructure modernization plan, including but not limited to, the electric utility's existing infrastructure, its existing asset management system and related capabilities, the type of technology and reason chosen, the portion of service territory affected, the percentage of customers directly impacted (non-rate impact), and the implementation schedule by geographic location and/or type of activity. A description of any communication infrastructure included in the infrastructure modernization plan and any metering, distribution automation, or other applications that may be supported by this communication infrastructure also shall be included.

(ii) A description of the benefits of the infrastructure modernization plan (in total and by activity or type), including but not limited to the following as they may apply to the plan: the impacts on current reliability, the number of circuits impacted, the number of customers impacted, the timing of impacts, whether the impact is on the frequency or duration of outages, whether the infrastructure modernization plan addresses primary outage causes, what problems are addressed by the infrastructure modernization plan, the resulting dollar savings and additional costs, the activities affected and related accounts, the timing of savings, other customer benefits, and societal benefits. Through metrics and milestones, the infrastructure modernization plan shall include a description of how the performance and outcomes of the plan will be measured.

(iii) A detailed description of the costs of the infrastructure modernization plan, including a breakdown of capital costs and operating and maintenance expenses net of any related savings, the revenue requirement, including recovery of stranded investment related to replacement of un-depreciated plant with new technology, the impact on customer bills, service disruptions associated with plan implementation, and description of (and dollar value of) equipment being made obsolescent by the plan and reason for early plant retirement. The infrastructure modernization plan shall also include a description of efforts made to mitigate such stranded investment.

(iv) A detailed description of any proposed cost recovery mechanism, including the components of any regulatory asset created by the infrastructure modernization plan, the reporting structure and schedule, and the proposed process for approval of cost recovery and increase in rates.

(v) A detailed explanation of how the infrastructure modernization plan aligns customer and electric utility reliability and power quality expectations by customer class.

(h) Division (B)(2)(i) of section 4928.143 of the Revised Code authorizes an electric utility to include provisions for economic development, job retention, and energy efficiency programs. Pursuant to this section, the electric utility shall provide a complete description of the proposal, together with cost-benefit analysis or other quantitative justification, and quantification of the program's projected impact on rates.

(10) Additional required information

Divisions (E) and (F) of section 4928.143 of the Revised Code provide for tests of the ESP with respect to significantly excessive earnings. Division (E) of section 4928.143 of the Revised Code is applicable only if an ESP has a term exceeding three years, and would require an earnings determination to be made in the fourth year. Division (F) of section 4928.143 of the Revised Code applies to any ESP and examines earnings after each year. In each case, the burden of proof for demonstrating that the return on equity is not significantly excessive is borne by the electric utility.

(a) For the annual review pursuant to division (F) of section 4928.143 of the Revised Code, the electric utility shall provide testimony and analysis demonstrating the return on equity that was earned during the year and the returns on equity earned during the same period by publicly traded companies that face comparable business and financial risks as the electric utility. In addition, the electric utility shall provide the following information:

(i) The federal energy regulatory commission form 1 (FERC form 1) in its entirety for the annual period under review. The electric utility may seek protection of any confidential or proprietary data if necessary. If the FERC form 1 is not available, the electric utility shall provide balance sheet and income statement information of at least the level of detail as required by FERC form 1.

(ii) The latest securities and exchange commission form 10-K in its entirety. The electric utility may seek protection of any confidential or proprietary data if necessary.

(iii) Capital budget requirements for future committed investments in Ohio for each annual period remaining in the ESP.

(b) For demonstration under division (E) of section 4928.143 of the Revised Code, the electric utility shall also provide, in addition to the requirements under division (F) of section 4928.143 of the Revised Code, calculations of its projected return on equity for each remaining year of the ESP. The electric utility shall support these calculations by providing projected balance sheet and income statement information for the remainder of the ESP, together with testimony and work papers detailing the methodologies, adjustments, and assumptions used in making these projections.

(D) The first application for an SSO filed after the effective date of section 4928.141 of the Revised Code by each electric utility shall include an ESP and shall be filed at least one hundred fifty days before the electric utility proposes to have such SSO in effect. The first application may also include a proposal for an MRO. First applications that are filed with the commission prior to the initial effective date of this rule and that are determined by the

commission to be not in substantive compliance with this rule shall be amended or refiled at the direction of the commission. The commission shall endeavor to make a determination on an amended or refiled ESP application, which substantively conforms to the requirements of this rule, within one hundred fifty days of the filing of the amended or refiled application.

(E) Subsequent applications for an SSO may include an ESP and/or MRO; however, an ESP may not be proposed once the electric utility has implemented an MRO approved by the commission.

(F) The SSO application shall include a section demonstrating that its current corporate separation plan is in compliance with section 4928.17 of the Revised Code, Chapter 4901:1-37 of the Administrative Code, and consistent with the policy of the state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code. If any waivers of the corporate separation plan have been granted and are to be continued, the applicant shall justify the continued need for those waivers.

(G) A complete set of work papers must be filed with the application. Work papers must include, but are not limited to, all pertinent documents prepared by the electric utility for the application and a narrative or other support of assumptions made in the work papers. 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.

(H) All schedules, tariff sheets, and work papers prepared by, or at the direction of, the electric utility for the application and included in the application must be available in spreadsheet, word processing, or an electronic non-image-based format, with formulas intact, 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 staff and any intervening party that requests it.

Replaces: 4901:1-35-03

Effective: 05/07/2009

R.C. 119.032 review dates: 09/30/2013

Promulgated Under: 111.15

Statutory Authority: 4928.06, 4928.141

Rule Amplifies: 4928.14, 4928.141, 4928.142, 4928.143

Prior Effective Dates: 5/27/04

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AN ACT

To amend sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02; to enact sections 9.835, 3318.112, 4928.141, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051; and to repeal sections 4928.41, 4928.42, 4928.431, and 4928.44 of the Revised Code to revise state energy policy to address electric service price regulation, establish alternative energy benchmarks for electric distribution utilities and electric services companies, provide for the use of renewable energy credits, establish energy efficiency standards for electric distribution utilities, require greenhouse gas emission reporting and carbon dioxide control planning for utility-owned generating facilities, authorize energy price risk management contracts, and authorize for natural gas utilities revenue decoupling related to energy conservation and efficiency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02 be amended and sections 9.835, 3318.112, 4928.141, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051 of the Revised Code be enacted to read as follows:

Sec. 9.835. (A) As used in this section:

(1) "Energy price risk management contract" means a contract that

mitigates for the term of the contract the price volatility of energy sources, including, but not limited to, natural gas, gasoline, oil, and diesel fuel, and that is a budgetary and financial tool only and not a contract for the procurement of an energy source.

(2) "Political subdivision" means a county, city, village, township, park district, or school district.

(3) "State entity" means the general assembly, the supreme court, the court of claims, the office of an elected state officer, or a department, bureau, board, office, commission, agency, institution, or other instrumentality of this state established by the constitution or laws of this state for the exercise of any function of state government, but excludes a political subdivision, an institution of higher education, the public employees retirement system, the Ohio police and fire pension fund, the state teachers retirement system, the school employees retirement system, the state highway patrol retirement system, or the city of Cincinnati retirement system.

(4) "State official" means the elected or appointed official, or that person's designee, charged with the management of a state entity.

(B) If it determines that doing so is in the best interest of the state entity or the political subdivision, and subject to, respectively, state or local appropriation to pay amounts due, a state official or the legislative or other governing authority of a political subdivision may enter into an energy price risk management contract. Money received pursuant to such a contract entered into by a state official shall be deposited to the credit of the general revenue fund of this state, and, unless otherwise provided by ordinance or resolution enacted or adopted by the legislative authority of the political subdivision authorizing any such contract, money received under the contract shall be deposited to the credit of the general fund of the political subdivision.

Sec. 3318.112. (A) As used in this section, "solar ready" means capable of accommodating the eventual installation of roof top, solar photovoltaic energy equipment.

(B) The Ohio school facilities commission shall adopt rules prescribing standards for solar ready equipment in school buildings under their jurisdiction. The rules shall include, but not be limited to, standards regarding roof space limitations, shading and obstruction, building orientation, roof loading capacity, and electric systems.

(C) A school district may seek, and the commission may grant for good cause shown, a waiver from part or all of the standards prescribed under division (B) of this section.

Sec. 4905.31. ~~Except as provided in section 4933.29 of the Revised Code, Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923., 4927., 4928., and 4929.~~ of the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers, or employees, and do not prohibit a mercantile customer of an electric distribution utility as those terms are defined in section 4928.01 of the Revised Code or a group of those customers from establishing a reasonable arrangement with that utility or another public utility electric light company, providing for any of the following:

(A) The division or distribution of its surplus profits;

(B) A sliding scale of charges, including variations in rates based upon ~~either of the following:~~

~~(1) Stipulated stipulated variations in cost as provided in the schedule or arrangement;~~

~~(2) Any emissions fee levied upon an electric light company under Substitute Senate Bill No. 359 of the 119th general assembly as provided in the schedule. The public utilities commission shall permit an electric light company to recover the emissions fee pursuant to such a variable rate schedule.~~

~~(3) Any emissions fee levied upon an electric light company under division (C) or (D) of section 3745.11 of the Revised Code as provided in the schedule. The public utilities commission shall permit an electric light company to recover any such emission fee pursuant to such a variable rate schedule.~~

~~(4) Any schedule of variable rates filed under division (B) of this section shall provide for the recovery of any such emissions fee by applying a uniform percentage increase to the base rate charged each customer of the electric light company for service during the period that the variable rate is in effect.~~

(C) A minimum charge for service to be rendered unless such minimum charge is made or prohibited by the terms of the franchise, grant, or ordinance under which such public utility is operated;

(D) A classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration;

(E) Any other financial device that may be practicable or advantageous to the parties interested. No In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include a device to recover costs incurred in conjunction with

any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program; any development and implementation of peak demand reduction and energy efficiency programs under section 4928.66 of the Revised Code; any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of the advanced metering implementation; and compliance with any government mandate.

No such schedule or arrangement, sliding scale, minimum charge, classification, variable rate, or device is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet.

Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs. ~~The commission shall review the cost data or factors upon which a variable rate schedule filed under division (B)(2) or (3) of this section is based and shall adjust the base rates of the electric light company or order the company to refund any charges that it has collected under the variable rate schedule that the commission finds to have resulted from errors or erroneous reporting. After recovery of all of the emissions fees upon which a variable rate authorized under division (B)(2) or (3) of this section is based, collection of the variable rate shall end and the variable rate schedule shall be terminated.~~

Every such ~~schedule or reasonable~~ arrangement, ~~sliding scale, minimum charge, classification, variable rate, or device~~ shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

Sec. 4928.01. (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 that it consumes electricity it so produces or to the extent it sells that electricity for resale electricity it so produces, or obtains electricity from a generating facility it hosts on its premises.

(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 has a certified territory and is engaged on a for-profit basis either 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 October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, 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, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(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) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users. ~~Such energy includes, including, but is not limited to, wind power, geothermal energy, solar thermal energy, and energy produced by micro turbines in distributed generation applications with high electric efficiencies, by combined heat and power applications, by fuel cells powered by hydrogen derived from wind, solar, biomass, hydroelectric, landfill gas, or geothermal sources, or by solar electric generation, landfill gas, or hydroelectric generation~~ advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(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 undepreciated 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 designed for, or capable of, operation at a capacity of less than two megawatts.~~

~~(29)(28) "Starting date of competitive retail electric service" means January 1, 2001, except as provided in division (C) of this section.~~

~~(30)(29) "Customer-generator" means a user of a net metering system.~~

~~(31)(30) "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 that is fed back to the electric service provider.~~

~~(32)(31) "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)~~(32) "Self-generator" means an entity in this state that owns or hosts on its premises 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~~ another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration of electricity and thermal output simultaneously, primarily to meet the energy needs of the customer's facilities;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States environmental protection agency's waste reduction model

(WARM).

(g) Demand-side management and any energy efficiency improvement.

(35) "Renewable energy resource" means solar photovoltaic or solar thermal energy, wind energy, power produced by a hydroelectric facility, geothermal energy, fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion, biomass energy, biologically derived methane gas, or energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors. "Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak; or distributed generation system used by a customer to generate electricity from any such energy. As used in division (A)(35) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(a) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(b) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(c) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromus fish.

(d) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

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(e) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(f) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(g) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(h) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(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.~~

Sec. 4928.02. 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 including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure;

(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 both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

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

~~(G)~~(H) 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, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

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

~~(I)~~(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

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

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

Sec. 4928.05. (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~~ sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code.

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. Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent

transmission operator, or similar organization approved by the federal energy regulatory commission.

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 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.

Sec. 4928.09. (A)(1) No person shall operate in this state as an electric utility, an electric services company, ~~or~~ a billing and collection agent, or a regional transmission organization approved by the federal energy regulatory commission and having the responsibility for maintaining reliability in all or part of this state on and after the starting date of competitive retail electric service unless that person first does both of the following:

(a) Consents irrevocably to the jurisdiction of the courts of this state and service of process in this state, including, without limitation, service of summonses and subpoenas, for any civil or criminal proceeding arising out of or relating to such operation, by providing that irrevocable consent in accordance with division (A)(4) of this section;

(b) Designates an agent authorized to receive that service of process in this state, by filing with the commission a document designating that agent.

(2) No person shall continue to operate as such an electric utility, electric services company, ~~or~~ billing and collection agent, or regional transmission organization described in division (A)(1) of this section unless that person continues to consent to such jurisdiction and service of process in this state and continues to designate an agent as provided under this division, by refiling in accordance with division (A)(4) of this section the appropriate documents filed under division (A)(1) of this section or, as

applicable, the appropriate amended documents filed under division (A)(3) of this section. Such refiling shall occur during the month of December of every fourth year after the initial filing of a document under division (A)(1) of this section.

(3) If the address of the person filing a document under division (A)(1) or (2) of this section changes, or if a person's agent or the address of the agent changes, from that listed on the most recently filed of such documents, the person shall file an amended document containing the new information.

(4) The consent and designation required by divisions (A)(1) to (3) of this section shall be in writing, on forms prescribed by the public utilities commission. The original of each such document or amended document shall be legible and shall be filed with the commission, with a copy filed with the office of the consumers' counsel and with the attorney general's office.

(B) A person who enters this state pursuant to a summons, subpoena, or other form of process authorized by this section is not subject to arrest or service of process, whether civil or criminal, in connection with other matters that arose before the person's entrance into this state pursuant to such summons, subpoena, or other form of process.

(C) Divisions (A) and (B) of this section do not apply to any of the following:

(1) A corporation incorporated under the laws of this state that has appointed a statutory agent pursuant to section 1701.07 or 1702.06 of the Revised Code;

(2) A foreign corporation licensed to transact business in this state that has appointed a designated agent pursuant to section 1703.041 of the Revised Code;

(3) Any other person that is a resident of this state or that files consent to service of process and designates a statutory agent pursuant to other laws of this state.

Sec. 4928.14. ~~(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 evaluate 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~~ The failure of a supplier to provide retail electric generation service to customers within the certified territory of ~~the an~~ 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~~ sections 4928.141, 4928.142, and 4928.143 of the Revised Code until the customer chooses an alternative supplier. A supplier is deemed under this ~~division~~ section 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)(A)~~ (A) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

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

~~(3)(C)~~ (C) 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)(D)~~ (D) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

Sec. 4928.141. (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.

Sec. 4928.142. (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 the effective date of this section, 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 and not less 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.

Sec. 4928.143. (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.

Sec. 4928.144. The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of

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regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.

Sec. 4928.145. During a proceeding under sections 4928.141 to 4928.144 of the Revised Code and upon submission of an appropriate discovery request, an electric distribution utility shall make available to the requesting party every contract or agreement that is between the utility or any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission.

Sec. 4928.146. Nothing in sections 4928.141 to 4928.145 of the Revised Code precludes or prohibits an electric distribution utility providing competitive retail electric service to electric load centers within the certified territory of another such utility.

Sec. 4928.151. The public utilities commission shall adopt and enforce rules prescribing a uniform, statewide policy regarding electric transmission and distribution line extensions and requisite substations and related facilities that are requested by nonresidential customers of electric utilities, so that, on and after the effective date of the initial rules so adopted, all such utilities apply the same policies and charges to those customers. Initial rules shall be adopted not later than six months after the effective date of this section. The rules shall address the just and reasonable allocation to and utility recovery from the requesting customer or other customers of the utility of all costs of any such line extension and any requisite substation or related facility, including, but not limited to, the costs of necessary technical studies, operations and maintenance costs, and capital costs, including a return on capital costs.

Sec. 4928.17. (A) Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying 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 public utilities

commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines

reasonably require a hearing. The commission may reject and require refile of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) ~~Notwithstanding section 4905.20, 4905.21, 4905.46, or 4905.48 of the Revised Code, an No electric distribution utility may divest itself of shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval, subject to the provisions of Title XLIX of the Revised Code relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset.~~

Sec. 4928.20. (A) The legislative authority of a municipal corporation may adopt an ordinance, or the board of township trustees of a township or the board of county commissioners of a county may adopt a resolution, under which, on or after the starting date of competitive retail electric service, it may aggregate in accordance with this section the retail electrical loads located, respectively, within the municipal corporation, township, or unincorporated area of the county and, for that purpose, may enter into service agreements to facilitate for those loads the sale and purchase of electricity. The legislative authority or board also may exercise such authority jointly with any other such legislative authority or board. For customers that are not mercantile ~~commercial~~ customers, an ordinance or resolution under this division shall specify whether the aggregation will occur only with the prior, affirmative consent of each person owning, occupying, controlling, or using an electric load center proposed to be

aggregated or will occur automatically for all such persons pursuant to the opt-out requirements of division (D) of this section. The aggregation of mercantile ~~commercial~~ customers shall occur only with the prior, affirmative consent of each such person owning, occupying, controlling, or using an electric load center proposed to be aggregated. Nothing in this division, however, authorizes the aggregation of the retail electric loads of an electric load center, as defined in section 4933.81 of the Revised Code, that is located in the certified territory of a nonprofit electric supplier under sections 4933.81 to 4933.90 of the Revised Code or an electric load center served by transmission or distribution facilities of a municipal electric utility.

(B) If an ordinance or resolution adopted under division (A) of this section specifies that aggregation of customers that are not mercantile ~~commercial~~ customers will occur automatically as described in that division, the ordinance or resolution shall direct the board of elections to submit the question of the authority to aggregate to the electors of the respective municipal corporation, township, or unincorporated area of a county at a special election on the day of the next primary or general election in the municipal corporation, township, or county. The legislative authority or board shall certify a copy of the ordinance or resolution to the board of elections not less than seventy-five days before the day of the special election. No ordinance or resolution adopted under division (A) of this section that provides for an election under this division shall take effect unless approved by a majority of the electors voting upon the ordinance or resolution at the election held pursuant to this division.

(C) Upon the applicable requisite authority under divisions (A) and (B) of this section, the legislative authority or board shall develop a plan of operation and governance for the aggregation program so authorized. Before adopting a plan under this division, the legislative authority or board shall hold at least two public hearings on the plan. Before the first hearing, the legislative authority or board shall publish notice of the hearings once a week for two consecutive weeks in a newspaper of general circulation in the jurisdiction. The notice shall summarize the plan and state the date, time, and location of each hearing.

(D) No legislative authority or board, pursuant to an ordinance or resolution under divisions (A) and (B) of this section that provides for automatic aggregation of customers that are not mercantile ~~commercial~~ customers as described in division (A) of this section, shall aggregate the electrical load of any electric load center located within its jurisdiction unless it in advance clearly discloses to the person owning, occupying,

controlling, or using the load center that the person will be enrolled automatically in the aggregation program and will remain so enrolled unless the person affirmatively elects by a stated procedure not to be so enrolled. The disclosure shall state prominently the rates, charges, and other terms and conditions of enrollment. The stated procedure shall allow any person enrolled in the aggregation program the opportunity to opt out of the program every ~~two~~ three years, without paying a switching fee. Any such person that opts out before the commencement of the aggregation program pursuant to the stated procedure shall default to the standard service offer provided under ~~division (A)~~ of section 4928.14 or division (D) of section 4928.35 of the Revised Code until the person chooses an alternative supplier.

(E)(1) With respect to a governmental aggregation for a municipal corporation that is authorized pursuant to divisions (A) to (D) of this section, resolutions may be proposed by initiative or referendum petitions in accordance with sections 731.28 to 731.41 of the Revised Code.

(2) With respect to a governmental aggregation for a township or the unincorporated area of a county, which aggregation is authorized pursuant to divisions (A) to (D) of this section, resolutions may be proposed by initiative or referendum petitions in accordance with sections 731.28 to 731.40 of the Revised Code, except that:

(a) The petitions shall be filed, respectively, with the township fiscal officer or the board of county commissioners, who shall perform those duties imposed under those sections upon the city auditor or village clerk.

(b) The petitions shall contain the signatures of not less than ten per cent of the total number of electors in, respectively, the township or the unincorporated area of the county who voted for the office of governor at the preceding general election for that office in that area.

(F) A governmental aggregator under division (A) of this section is not a public utility engaging in the wholesale purchase and resale of electricity, and provision of the aggregated service is not a wholesale utility transaction. A governmental aggregator shall be subject to supervision and regulation by the public utilities commission only to the extent of any competitive retail electric service it provides and commission authority under this chapter.

(G) This section does not apply in the case of a municipal corporation that supplies such aggregated service to electric load centers to which its municipal electric utility also supplies a noncompetitive retail electric service through transmission or distribution facilities the utility singly or jointly owns or operates.

(H) A governmental aggregator shall not include in its aggregation the

accounts of any of the following:

- (1) A customer that has opted out of the aggregation;
- (2) A customer in contract with a certified ~~competitive electric services company retail electric services provider~~ electric services provider;
- (3) A customer that has a special contract with an electric distribution utility;
- (4) A customer that is not located within the governmental aggregator's governmental boundaries;
- (5) Subject to division (C) of section 4928.21 of the Revised Code, a customer who appears on the "do not aggregate" list maintained under that section.

(I) Customers that are part of a governmental aggregation under this section shall be responsible only for such portion of a surcharge under section 4928.144 of the Revised Code that is proportionate to the benefits, as determined by the commission, that the governmental aggregation's customers as an aggregated group receive. The proportionate surcharge so established shall apply to each customer of the governmental aggregation while the customer is part of that aggregation. If a customer ceases being such a customer, the otherwise applicable surcharge shall apply. Nothing in this section shall result in less than full recovery by an electric distribution utility of any surcharge authorized under section 4928.144 of the Revised Code.

(J) On behalf of the customers that are part of a governmental aggregation under this section and by filing written notice with the public utilities commission, the legislative authority that formed or is forming that governmental aggregation may elect not to receive standby service within the meaning of division (B)(2)(e) of section 4928.143 of the Revised Code from an electric distribution utility in whose certified territory the governmental aggregation is located and that operates under an approved electric security plan under that section. Upon the filing of that notice, the electric distribution utility shall not charge any such customer to whom electricity is delivered under the governmental aggregation for the standby service. Any such consumer that returns to the utility for competitive retail electric service shall pay the market price of power incurred by the utility to serve that consumer plus any amount attributable to the utility's cost of compliance with the alternative energy resource provisions of section 4928.64 of the Revised Code to serve the consumer. Such market price shall include, but not be limited to, capacity and energy charges; all charges associated with the provision of that power supply through the regional transmission organization, including, but not limited to, transmission,

ancillary services, congestion, and settlement and administrative charges; and all other costs incurred by the utility that are associated with the procurement, provision, and administration of that power supply, as such costs may be approved by the commission. The period of time during which the market price and alternative energy resource amount shall be so assessed on the consumer shall be from the time the consumer so returns to the electric distribution utility until the expiration of the electric security plan. However, if that period of time is expected to be more than two years, the commission may reduce the time period to a period of not less than two years.

(K) The commission shall adopt rules to encourage and promote large-scale governmental aggregation in this state. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly. Further, within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan, except any nonbypassable generation charge that relates to a cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly.

Sec. 4928.24. The public utilities commission shall employ a federal energy advocate to monitor the activities of the federal energy regulatory commission and other federal agencies and to advocate on behalf of the interests of retail electric service consumers in this state. The attorney general shall represent the advocate before the federal energy regulatory commission and other federal agencies. Among other duties assigned to the advocate by the commission, the advocate shall examine the value of the participation of this state's electric utilities in regional transmission organizations and submit a report to the public utilities commission on whether continued participation of those utilities is in the interest of those consumers.

Sec. 4928.31. (A) Not later than ninety days after the effective date of this section, an electric utility supplying retail electric service in this state on that date shall file with the public utilities commission a plan for the utility's provision of retail electric service in this state during the market development period. This transition plan shall be in such form as the commission shall prescribe by rule adopted under division (A) of section

4928.06 of the Revised Code and shall include all of the following:

(1) A rate unbundling plan that specifies, consistent with divisions (A)(1) to (7) of section 4928.34 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, the unbundles components for electric generation, transmission, and distribution service and such other unbundled service components as the commission requires, to be charged by the utility beginning on the starting date of competitive retail electric service and that includes information the commission requires to fix and determine those components;

(2) A corporate separation plan consistent with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;

(3) Such plan or plans as the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service consistent with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code;

(4) An employee assistance plan for providing severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter;

(5) A consumer education plan consistent with former section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

A transition plan under this section may include tariff terms and conditions to address reasonable requirements for changing suppliers, length of commitment by a customer for service, and such other matters as are necessary to accommodate electric restructuring. Additionally, a transition plan under this section may include an application for the opportunity to receive transition revenues as authorized under sections 4928.31 to 4928.40 of the Revised Code, which application shall be consistent with those sections and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code. The transition plan also may include a plan for the independent operation of the utility's transmission facilities consistent with section 4928.12 of the Revised Code, division (A)(13) of section 4928.34 of the Revised Code, and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

The commission may reject and require refiling, in whole or in part, of any substantially inadequate transition plan.

(B) The electric utility shall provide public notice of its filing under division (A) of this section, in a form and manner that the commission shall

prescribe by rule adopted under division (A) of section 4928.06 of the Revised Code. However, the adoption of rules regarding the public notice under this division, regarding the form of the transition plan under division (A) of this section, and regarding procedures for expedited discovery under division (A) of section 4928.32 of the Revised Code are not subject to division (D) of section 111.15 of the Revised Code.

Sec. 4928.34. (A) The public utilities commission shall not approve or prescribe a transition plan under division (A) or (B) of section 4928.33 of the Revised Code unless the commission first makes all of the following determinations:

(1) The unbundled components for the electric transmission component of retail electric service, as specified in the utility's rate unbundling plan required by division (A)(1) of section 4928.31 of the Revised Code, equal the tariff rates determined by the federal energy regulatory commission that are in effect on the date of the approval of the transition plan under sections 4928.31 to 4928.40 of the Revised Code, as each such rate is determined applicable to each particular customer class and rate schedule by the commission. The unbundled transmission component shall include a sliding scale of charges under division (B) of section 4905.31 of the Revised Code to ensure that refunds determined or approved by the federal energy regulatory commission are flowed through to retail electric customers.

(2) The unbundled components for retail electric distribution service in the rate unbundling plan equal the difference between the costs attributable to the utility's transmission and distribution rates and charges under its schedule of rates and charges in effect on the effective date of this section, based upon the record in the most recent rate proceeding of the utility for which the utility's schedule was established, and the tariff rates for electric transmission service determined by the federal energy regulatory commission as described in division (A)(1) of this section.

(3) All other unbundled components required by the commission in the rate unbundling plan equal the costs attributable to the particular service as reflected in the utility's schedule of rates and charges in effect on the effective date of this section.

(4) The unbundled components for retail electric generation service in the rate unbundling plan equal the residual amount remaining after the determination of the transmission, distribution, and other unbundled components, and after any adjustments necessary to reflect the effects of the amendment of section 5727.111 of the Revised Code by Sub. S.B. No. 3 of the 123rd general assembly.

(5) All unbundled components in the rate unbundling plan have been

adjusted to reflect any base rate reductions on file with the commission and as scheduled to be in effect by December 31, 2005, under rate settlements in effect on the effective date of this section. However, all earnings obligations, restrictions, or caps imposed on an electric utility in a commission order prior to the effective date of this section are void.

(6) Subject to division (A)(5) of this section, the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period, except as specifically provided in this chapter, the total of all rates and charges in effect under the applicable bundled schedule of the electric utility pursuant to section 4905.30 of the Revised Code in effect on the day before the effective date of this section, including the transition charge determined under section 4928.40 of the Revised Code, adjusted for any changes in the taxation of electric utilities and retail electric service under Sub. S.B. No. 3 of the 123rd General Assembly, the universal service rider authorized by section 4928.51 of the Revised Code, and the temporary rider authorized by section 4928.61 of the Revised Code. For the purpose of this division, the rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the commission under section 4905.31 of the Revised Code is, for the term of the arrangement, the total of all rates and charges in effect under the arrangement. For any rate schedule filed pursuant to section 4905.30 of the Revised Code or any arrangement subject to approval pursuant to section 4905.31 of the Revised Code, the initial tax-related adjustment to the rate cap required by this division shall be equal to the rate of taxation specified in section 5727.81 of the Revised Code and applicable to the schedule or arrangement. To the extent such total annual amount of the tax-related adjustment is greater than or less than the comparable amount of the total annual tax reduction experienced by the electric utility as a result of the provisions of Sub. S.B. No. 3 of the ~~123RD~~ 123rd general assembly, such difference shall be addressed by the commission through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the electric utility or its shareholders. Any adjustments in the rate of taxation specified in 5727.81 of the Revised Code section shall not occur without a corresponding adjustment to the rate cap for each such rate schedule or arrangement. The department of taxation shall advise the commission and self-assessors under section 5727.81 of the Revised Code prior to the effective date of any change in the rate of taxation specified under that section, and the commission shall modify the rate cap to reflect that adjustment so that the rate cap adjustment is effective as of the

effective date of the change in the rate of taxation. This division shall be applied, to the extent possible, to eliminate any increase in the price of electricity for customers that otherwise may occur as a result of establishing the taxes contemplated in section 5727.81 of the Revised Code.

(7) The rate unbundling plan complies with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(8) The corporate separation plan required by division (A)(2) of section 4928.31 of the Revised Code complies with section 4928.17 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(9) Any plan or plans the commission requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service comply with any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(10) The employee assistance plan required by division (A)(4) of section 4928.31 of the Revised Code sufficiently provides severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under this chapter.

(11) The consumer education plan required under division (A)(5) of section 4928.31 of the Revised Code complies with former section 4928.42 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code.

(12) The transition revenues for which an electric utility is authorized a revenue opportunity under sections 4928.31 to 4928.40 of the Revised Code are the allowable transition costs of the utility as such costs are determined by the commission pursuant to section 4928.39 of the Revised Code, and the transition charges for the customer classes and rate schedules of the utility are the charges determined pursuant to section 4928.40 of the Revised Code.

(13) Any independent transmission plan included in the transition plan filed under section 4928.31 of the Revised Code reasonably complies with section 4928.12 of the Revised Code and any rules adopted by the commission under division (A) of section 4928.06 of the Revised Code, unless the commission, for good cause shown, authorizes the utility to defer compliance until an order is issued under division (G) of section 4928.35 of the Revised Code.

(14) The utility is in compliance with sections 4928.01 to 4928.11 of the Revised Code and any rules or orders of the commission adopted or issued under those sections.

(15) All unbundled components in the rate unbundling plan have been

adjusted to reflect the elimination of the tax on gross receipts imposed by section 5727.30 of the Revised Code.

In addition, a transition plan approved by the commission under section 4928.33 of the Revised Code but not containing an approved independent transmission plan shall contain the express conditions that the utility will comply with an order issued under division (G) of section 4928.35 of the Revised Code.

(B) Subject to division (E) of section 4928.17 of the Revised Code, if the commission finds that any part of the transition plan would constitute an abandonment under sections 4905.20 and 4905.21 of the Revised Code, the commission shall not approve that part of the transition plan unless it makes the finding required for approval of an abandonment application under section 4905.21 of the Revised Code. Sections 4905.20 and 4905.21 of the Revised Code otherwise shall not apply to a transition plan under sections 4928.31 to 4928.40 of the Revised Code.

Sec. 4928.35. (A) Upon approval of its transition plan under sections 4928.31 to 4928.40 of the Revised Code, an electric utility shall file in accordance with section 4905.30 of the Revised Code schedules containing the unbundled rate components set in the approved plan in accordance with section 4928.34 of the Revised Code. The schedules shall be in effect for the duration of the utility's market development period, shall be subject to the cap specified in division (A)(6) of section 4928.34 of the Revised Code, and shall not be adjusted during that period by the public utilities commission except as otherwise authorized by division (B) of this section or as otherwise authorized by federal law or except to reflect any change in tax law or tax regulation that has a material effect on the electric utility.

(B) Efforts shall be made to reach agreements with electric utilities in matters of litigation regarding property valuation issues. Irrespective of those efforts, the unbundled components for an electric utility's retail electric generation service and distribution service, as provided in division (A) of this section, are not subject to adjustment for the utility's market development period, except that the commission shall order an equitable reduction in those components for all customer classes to reflect any refund a utility receives as a result of the resolution of utility personal property tax valuation litigation that is resolved on or after the effective date of this section and not later than December 31, 2005. Immediately upon the issuance of that order, the electric utility shall file revised rate schedules under section 4909.18 of the Revised Code to effect the order.

(C) The schedule under division (A) of this section containing the unbundled distribution components shall provide that electric distribution

service under the schedule will be available to all retail electric service customers in the electric utility's certified territory and their suppliers on a nondiscriminatory and comparable basis on and after the starting date of competitive retail electric service. The schedule also 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.

(D) During the market development period, 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 priced in accordance with the schedule containing the utility's unbundled generation service component. Immediately upon approval of its transition plan, the utility shall file the standard service offer with the commission under section 4909.18 of the Revised Code, during the market development period. The failure of a supplier to deliver retail electric generation service shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under this division until the customer chooses an alternative supplier. A supplier is deemed under this section to have failed to deliver such service if any of the conditions specified in ~~divisions (B)(1) to (4)~~ of section 4928.14 of the Revised Code is met.

(E) An amendment of a corporate separation plan contained in a transition plan approved by the commission under section 4928.33 of the Revised Code shall be filed and approved as a corporate separation plan pursuant to section 4928.17 of the Revised Code.

(F) Any change to an electric utility's opportunity to receive transition revenues under a transition plan approved in accordance with section 4928.33 of the Revised Code shall be authorized only as provided in sections 4928.31 to 4928.40 of the Revised Code.

(G) The commission, by order, shall require each electric utility whose approved transition plan did not include an independent transmission plan as described in division (A)(13) of section 4928.34 of the Revised Code to be a member of, and transfer control of transmission facilities it owns or controls in this state to, one or more qualifying transmission entities, as described in division (B) of section 4928.12 of the Revised Code, that are planned to be operational on and after December 31, 2003. However, the commission may extend that date if, for reasons beyond the control of the utility, a qualifying

transmission entity is not planned to be operational on that date. The commission's order may specify an earlier date on which the transmission entity or entities are planned to be operational if the commission considers it necessary to carry out the policy specified in section 4928.02 of the Revised Code or to encourage effective competition in retail electric service in this state.

Upon the issuance of the order, each such utility shall file with the commission a plan for such independent operation of the utility's transmission facilities consistent with this division. The commission may reject and require refile of any substantially inadequate plan submitted under this division.

After reasonable notice and opportunity for hearing, the commission shall approve the plan upon a finding that the plan will result in the utility's compliance with the order, this division, and any rules adopted under division (A) of section 4928.06 of the Revised Code. The approved independent transmission plan shall be deemed a part of the utility's transition plan for purposes of sections 4928.31 to 4928.40 of the Revised Code.

Sec. 4928.61. (A) There is hereby established in the state treasury the advanced energy fund, into which shall be deposited all advanced energy revenues remitted to the director of development under division (B) of this section, for the exclusive purposes of funding the advanced energy program created under section 4928.62 of the Revised Code and paying the program's administrative costs. Interest on the fund shall be credited to the fund.

(B) Advanced energy revenues shall include all of the following:

(1) Revenues remitted to the director after collection by each electric distribution utility in this state of a temporary rider on retail electric distribution service rates as such rates are determined by the public utilities commission pursuant to this chapter. The rider shall be a uniform amount statewide, determined by the director of development, after consultation with the public benefits advisory board created by section 4928.58 of the Revised Code. The amount shall be determined by dividing an aggregate revenue target for a given year as determined by the director, after consultation with the advisory board, by the number of customers of electric distribution utilities in this state in the prior year. Such aggregate revenue target shall not exceed more than fifteen million dollars in any year through 2005 and shall not exceed more than five million dollars in any year after 2005. The rider shall be imposed beginning on the effective date of the amendment of this section by Sub. H.B. 251 of the 126th general assembly, January 4, 2007, and shall terminate at the end of ten years following the

starting date of competitive retail electric service or until the advanced energy fund, including interest, reaches one hundred million dollars, whichever is first.

(2) Revenues from payments, repayments, and collections under the advanced energy program and from program income;

(3) Revenues remitted to the director after collection by a municipal electric utility or electric cooperative in this state upon the utility's or cooperative's decision to participate in the advanced energy fund;

(4) Revenues from renewable energy compliance payments as provided under division (C)(2) of section 4928.64 of the Revised Code;

(5) Revenue from forfeitures under division (C) of section 4928.66 of the Revised Code;

(6) Interest earnings on the advanced energy fund.

(C)(1) Each electric distribution utility in this state shall remit to the director on a quarterly basis the revenues described in divisions (B)(1) and (2) of this section. Such remittances shall occur within thirty days after the end of each calendar quarter.

(2) Each participating electric cooperative and participating municipal electric utility shall remit to the director on a quarterly basis the revenues described in division (B)(3) of this section. Such remittances shall occur within thirty days after the end of each calendar quarter. For the purpose of division (B)(3) of this section, the participation of an electric cooperative or municipal electric utility in the energy efficiency revolving loan program as it existed immediately prior to the effective date of the amendment of this section by Sub. H.B. 251 of the 126th general assembly, January 4, 2007, does not constitute a decision to participate in the advanced energy fund under this section as so amended.

(3) All remittances under divisions (C)(1) and (2) of this section shall continue only until the end of ten years following the starting date of competitive retail electric service or until the advanced energy fund, including interest, reaches one hundred million dollars, whichever is first.

(D) Any moneys collected in rates for non-low-income customer energy efficiency programs, as of October 5, 1999, and not contributed to the energy efficiency revolving loan fund authorized under this section prior to the effective date of its amendment by Sub. H.B. 251 of the 126th general assembly, January 4, 2007, shall be used to continue to fund cost-effective, residential energy efficiency programs, be contributed into the universal service fund as a supplement to that required under section 4928.53 of the Revised Code, or be returned to ratepayers in the form of a rate reduction at the option of the affected electric distribution utility.

Sec. 4928.621. (A) Any Edison technology center in this state is eligible to apply for and receive assistance pursuant to section 4928.62 of the Revised Code for the purposes of creating an advanced energy manufacturing center in this state that will provide for the exchange of information and expertise regarding advanced energy, assisting with the design of advanced energy projects, developing workforce training programs for such projects, and encouraging investment in advanced energy manufacturing technologies for advanced energy products and investment in sustainable manufacturing operations that create high-paying jobs in this state.

(B) Any university or group of universities in this state that conducts research on any advanced energy resource or any not-for-profit corporation formed to address issues affecting the price and availability of electricity and having members that are small businesses may apply for and receive assistance pursuant to section 4928.62 of the Revised Code for the purpose of encouraging research in this state that is directed at innovation in or the refinement of those resources or for the purpose of educational outreach regarding those resources and, to that end, shall use that assistance to establish such a program of research or education outreach. Any such educational outreach shall be directed at an increase in, innovation regarding, or refinement of access by or of application or understanding of businesses and consumers in this state regarding, advanced energy resources.

(C) Any independent group located in this state the express objective of which is to educate small businesses in this state regarding renewable energy resources and energy efficiency programs, or any small business located in this state electing to utilize an advanced energy project or participate in an energy efficiency program, is eligible to apply for and receive assistance pursuant to section 4928.62 of the Revised Code.

(D) Nothing in this section shall be construed as limiting the eligibility of any qualifying entity to apply for or receive assistance pursuant to section 4928.62 of the Revised Code.

Sec. 4928.64. (A)(1) As used in sections 4928.64 and 4928.65 of the Revised Code, "alternative energy resource" means an advanced energy resource or renewable energy resource, as defined in section 4928.01 of the Revised Code that has a placed-in-service date of January 1, 1998, or after; or a mercantile customer-sited advance energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division

(B)(2)(b) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

(a) A resource that has the effect of improving the relationship between real and reactive power;

(b) A resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer;

(c) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics;

(d) Electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource;

(e) Any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility.

(2) For the purpose of this section and as it considers appropriate, the public utilities commission may classify any new technology as such an advanced energy resource or a renewable energy resource.

(B) By 2025 and thereafter, an electric distribution utility shall provide from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract, a portion of the electricity supply required for its standard service offer under section 4928.141 of the Revised Code, and an electric services company shall provide a portion of its electricity supply for retail consumers in this state from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract. That portion shall equal twenty-five per cent of the total number of kilowatt hours of electricity sold by the subject utility or company to any and all retail electric consumers whose electric load centers are served by that utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within this state. However, nothing in this section precludes a utility or company from providing a greater percentage. The baseline for a utility's or company's compliance with the alternative energy resource requirements of this section shall be the average of such total kilowatt hours it sold in the preceding three calendar years, except that the commission may reduce a utility's or company's baseline to adjust for new economic growth in the utility's certified territory or, in the case of an electric services company, in the company's service area in this state.

Of the alternative energy resources implemented by the subject utility or company by 2025 and thereafter:

(1) Half may be generated from advanced energy resources;

(2) At least half shall be generated from renewable energy resources, including one-half per cent from solar energy resources, in accordance with the following benchmarks:

<u>By end of year</u>	<u>Renewable energy resources</u>	<u>Solar energy resources</u>
<u>2009</u>	<u>0.25%</u>	<u>0.004%</u>
<u>2010</u>	<u>0.50%</u>	<u>0.010%</u>
<u>2011</u>	<u>1%</u>	<u>0.030%</u>
<u>2012</u>	<u>1.5%</u>	<u>0.060%</u>
<u>2013</u>	<u>2%</u>	<u>0.090%</u>
<u>2014</u>	<u>2.5%</u>	<u>0.12%</u>
<u>2015</u>	<u>3.5%</u>	<u>0.15%</u>
<u>2016</u>	<u>4.5%</u>	<u>0.18%</u>
<u>2017</u>	<u>5.5%</u>	<u>0.22%</u>
<u>2018</u>	<u>6.5%</u>	<u>0.26%</u>
<u>2019</u>	<u>7.5%</u>	<u>0.3%</u>
<u>2020</u>	<u>8.5%</u>	<u>0.34%</u>
<u>2021</u>	<u>9.5%</u>	<u>0.38%</u>
<u>2022</u>	<u>10.5%</u>	<u>0.42%</u>
<u>2023</u>	<u>11.5%</u>	<u>0.46%</u>
<u>2024 and each calendar year thereafter</u>	<u>12.5%</u>	<u>0.5%</u>

(3) At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state.

(C)(1) The commission annually shall review an electric distribution utility's or electric services company's compliance with the most recent applicable benchmark under division (B)(2) of this section and, in the course of that review, shall identify any undercompliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control.

(2) Subject to the cost cap provisions of division (C)(3) of this section, if the commission determines, after notice and opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, but subject to division (C)(4) of this section, that the

utility or company has failed to comply with any such benchmark, the commission shall impose a renewable energy compliance payment on the utility or company.

(a) The compliance payment pertaining to the solar energy resource benchmarks under division (B)(2) of this section shall be an amount per megawatt hour of undercompliance or noncompliance in the period under review, starting at four hundred fifty dollars for 2009, four hundred dollars for 2010 and 2011, and similarly reduced every two years thereafter through 2024 by fifty dollars, to a minimum of fifty dollars.

(b) The compliance payment pertaining to the renewable energy resource benchmarks under division (B)(2) of this section shall equal the number of additional renewable energy credits that the electric distribution utility or electric services company would have needed to comply with the applicable benchmark in the period under review times an amount that shall begin at forty-five dollars and shall be adjusted annually by the commission to reflect any change in the consumer price index as defined in section 101.27 of the Revised Code, but shall not be less than forty-five dollars.

(c) The compliance payment shall not be passed through by the electric distribution utility or electric services company to consumers. The compliance payment shall be remitted to the commission, for deposit to the credit of the advanced energy fund created under section 4928.61 of the Revised Code. Payment of the compliance payment shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.

(3) An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more.

(4)(a) An electric distribution utility or electric services company may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division (B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section. The commission may require the electric distribution utility or electric services company to make solicitations for renewable energy resource credits as part of its default service before the utility's or company's request of force majeure under this division can be made.

(b) Within ninety days after the filing of a request by an electric

distribution utility or electric services company under division (C)(4)(a) of this section, the commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the commission shall consider whether the electric distribution utility or electric services company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the commission shall consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.

(c) If, pursuant to division (C)(4)(b) of this section, the commission determines that renewable energy or solar energy resources are not reasonably available to permit the electric distribution utility or electric services company to comply, during the period of review, with the subject minimum benchmark prescribed under division (B)(2) of this section, the commission shall modify that compliance obligation of the utility or company as it determines appropriate to accommodate the finding. Commission modification shall not automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years. If it modifies the electric distribution utility or electric services company obligation under division (C)(4)(c) of this section, the commission may require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation under division (C)(4)(c) of this section.

(5) The commission shall establish a process to provide for at least an annual review of the alternative energy resource market in this state and in the service territories of the regional transmission organizations that manage transmission systems located in this state. The commission shall use the results of this study to identify any needed changes to the amount of the renewable energy compliance payment specified under divisions (C)(2)(a) and (b) of this section. Specifically, the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from renewable energy resources. However, if the

commission finds that the amount of the compliance payment should be otherwise changed, the commission shall present this finding to the general assembly for legislative enactment.

(D)(1) The commission annually shall submit to the general assembly in accordance with section 101.68 of the Revised Code a report describing the compliance of electric distribution utilities and electric services companies with division (B) of this section and any strategy for utility and company compliance or for encouraging the use of alternative energy resources in supplying this state's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts. The commission shall allow and consider public comments on the report prior to its submission to the general assembly. Nothing in the report shall be binding on any person, including any utility or company for the purpose of its compliance with any benchmark under division (B) of this section, or the enforcement of that provision under division (C) of this section.

(2) The governor, in consultation with the commission chairperson, shall appoint an alternative energy advisory committee. The committee shall examine available technology for and related timetables, goals, and costs of the alternative energy resource requirements under division (B) of this section and shall submit to the commission a semiannual report of its recommendations.

(E) All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code.

Sec. 4928.65. An electric distribution utility or electric services company may use renewable energy credits any time in the five calendar years following the date of their purchase or acquisition from any entity, including, but not limited to, a mercantile customer or an owner or operator of a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state, for the purpose of complying with the renewable energy and solar energy resource requirements of division (B)(2) of section 4928.64 of the Revised Code. The public utilities commission shall adopt rules specifying that one unit of credit shall equal one megawatt hour of electricity derived from renewable energy resources. The rules also shall provide for this state a system of registering renewable energy credits by specifying which of any generally available registries shall be used for that purpose and not by creating a registry. That selected system of registering renewable energy credits shall allow a hydroelectric generating

facility to be eligible for obtaining renewable energy credits and shall allow customer-sited projects or actions the broadest opportunities to be eligible for obtaining renewable energy credits.

Sec. 4928.66. (A)(1)(a) Beginning in 2009, an electric distribution utility shall implement energy efficiency programs that achieve energy savings equivalent to at least three-tenths of one per cent of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to customers in this state. The savings requirement, using such a three-year average, shall increase to an additional five-tenths of one per cent in 2010, seven-tenths of one per cent in 2011, eight-tenths of one per cent in 2012, nine-tenths of one per cent in 2013, one per cent from 2014 to 2018, and two per cent each year thereafter, achieving a cumulative, annual energy savings in excess of twenty-two per cent by the end of 2025.

(b) Beginning in 2009, an electric distribution utility shall implement peak demand reduction programs designed to achieve a one per cent reduction in peak demand in 2009 and an additional seventy-five hundredths of one per cent reduction each year through 2018. In 2018, the standing committees in the house of representatives and the senate primarily dealing with energy issues shall make recommendations to the general assembly regarding future peak demand reduction targets.

(2) For the purposes of divisions (A)(1)(a) and (b) of this section:

(a) The baseline for energy savings under division (A)(1)(a) of this section shall be the average of the total kilowatt hours the electric distribution utility sold in the preceding three calendar years, and the baseline for a peak demand reduction under division (A)(1)(b) of this section shall be the average peak demand on the utility in the preceding three calendar years, except that the commission may reduce either baseline to adjust for new economic growth in the utility's certified territory.

(b) The commission may amend the benchmarks set forth in division (A)(1)(a) or (b) of this section if, after application by the electric distribution utility, the commission determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks due to regulatory, economic, or technological reasons beyond its reasonable control.

(c) Compliance with divisions (A)(1)(a) and (b) of this section shall be measured by including the effects of all demand-response programs for mercantile customers of the subject electric distribution utility and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the appropriate loss factors. Any mechanism designed to recover the cost of energy efficiency and peak demand reduction

programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs. If a mercantile customer makes such existing or new demand-response, energy efficiency, or peak demand reduction capability available to an electric distribution utility pursuant to division (A)(2)(c) of this section, the electric utility's baseline under division (A)(2)(a) of this section shall be adjusted to exclude the effects of all such demand-response, energy efficiency, or peak demand reduction programs that may have existed during the period used to establish the baseline. The baseline also shall be normalized for changes in numbers of customers, sales, weather, peak demand, and other appropriate factors so that the compliance measurement is not unduly influenced by factors outside the control of the electric distribution utility.

(d) Programs implemented by a utility may include demand-response programs, customer-sited programs, and transmission and distribution infrastructure improvements that reduce line losses. Division (A)(2)(c) of this section shall be applied to include facilitating efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code.

(e) No programs or improvements described in division (A)(2)(d) of this section shall conflict with any statewide building code adopted by the board of building standards.

(B) In accordance with rules it shall adopt, the public utilities commission shall produce and docket at the commission an annual report containing the results of its verification of the annual levels of energy efficiency and of peak demand reductions achieved by each electric distribution utility pursuant to division (A) of this section. A copy of the report shall be provided to the consumers' counsel.

(C) If the commission determines, after notice and opportunity for hearing and based upon its report under division (B) of this section, that an electric distribution utility has failed to comply with an energy efficiency or peak demand reduction requirement of division (A) of this section, the commission shall assess a forfeiture on the utility as provided under sections

4905.55 to 4905.60 and 4905.64 of the Revised Code, either in the amount per day per undercompliance or noncompliance, relative to the period of the report, equal to that prescribed for noncompliances under section 4905.54 of the Revised Code, or in an amount equal to the then existing market value of one renewable energy credit per megawatt hour of undercompliance or noncompliance. Revenue from any forfeiture assessed under this division shall be deposited to the credit of the advanced energy fund created under section 4928.61 of the Revised Code.

(D) The commission may establish rules regarding the content of an application by an electric distribution utility for commission approval of a revenue decoupling mechanism under this division. Such an application shall not be considered an application to increase rates and may be included as part of a proposal to establish, continue, or expand energy efficiency or conservation programs. The commission by order may approve an application under this division if it determines both that the revenue decoupling mechanism provides for the recovery of revenue that otherwise may be foregone by the utility as a result of or in connection with the implementation by the electric distribution utility of any energy efficiency or energy conservation programs and reasonably aligns the interests of the utility and of its customers in favor of those programs.

(E) The commission additionally shall adopt rules that require an electric distribution utility to provide a customer upon request with two years' consumption data in an accessible form.

~~Sec. 4928.67. (A)(1) Beginning on the starting date of competitive retail electric service, a retail electric service provider in this state~~ Except as provided in division (A)(2) of this section, an electric utility shall develop a standard contract or tariff providing for net energy metering.

~~Any time that the total rated generating capacity used by customer generators is less than one per cent of the provider's aggregate customer peak demand in this state, the provider shall make this contract or tariff available to customer generators, upon request and on a first come, first served basis. The~~

~~That contract or tariff shall be identical in rate structure, all retail rate components, and any monthly charges; to the contract or tariff to which the same customer would be assigned if that customer were not a customer-generator.~~

(2) An electric utility shall also develop a separate standard contract or tariff providing for net metering for a hospital, as defined in section 3701.01 of the Revised Code, that is also a customer-generator, subject to all of the following:

(a) No limitation, including that in divisions (A)(31)(a) and (d) of section 4928.01 of the Revised Code, shall apply regarding the availability of the contract or tariff to such hospital customer-generators.

(b) The contract or tariff shall be based both upon the rate structure, rate components, and any charges to which the hospital would otherwise be assigned if the hospital were not a customer-generator and upon the market value of the customer-generated electricity at the time it is generated.

(c) The contract or tariff shall allow the hospital customer-generator to operate its electric generating facilities individually or collectively without any wattage limitation on size.

~~(2)(B)(1)~~ Net metering under this section shall be accomplished using a single meter capable of registering the flow of electricity in each direction. If its existing electrical meter is not capable of measuring the flow of electricity in two directions, the customer-generator shall be responsible for all expenses involved in purchasing and installing a meter that is capable of measuring electricity flow in two directions.

~~(3)~~ ~~Such an (2)~~ The electric service provider utility, at its own expense and with the written consent of the customer-generator, may install one or more additional meters to monitor the flow of electricity in each direction.

~~(B)(3)~~ Consistent with the other provisions of this section, the measurement of net electricity supplied or generated shall be calculated in the following manner:

~~(1)(a)~~ The electric service provider utility shall measure the net electricity produced or consumed during the billing period, in accordance with normal metering practices.

~~(2)(b)~~ If the electricity supplied by the electric service provider utility exceeds the electricity generated by the customer-generator and fed back to the electric service provider utility during the billing period, the customer-generator shall be billed for the net electricity supplied by the electric service provider utility, in accordance with normal metering practices. If electricity is provided to the electric service provider utility, the credits for that electricity shall appear in the next billing cycle.

~~(C)(1)(4)~~ A net metering system used by a customer-generator shall meet all applicable safety and performance standards established by the national electrical code, the institute of electrical and electronics engineers, and underwriters laboratories.

~~(2)(C)~~ The public utilities commission shall adopt rules relating to additional control and testing requirements for customer-generators ~~which that the commission determines are necessary to protect public and worker safety and system reliability.~~

(D) An electric ~~service provider~~ utility shall not require a customer-generator whose net metering system meets the standards and requirements provided for in divisions (B)(4) and (C)(1) and ~~(D)~~ of this section to do any of the following:

- (1) Comply with additional safety or performance standards;
- (2) Perform or pay for additional tests;
- (3) Purchase additional liability insurance.

Sec. 4928.68. To the extent permitted by federal law, the public utilities commission shall adopt rules establishing greenhouse gas emission reporting requirements, including participation in the climate registry, and carbon dioxide control planning requirements for each electric generating facility that is located in this state, is owned or operated by a public utility that is subject to the commission's jurisdiction, and emits greenhouse gases, including facilities in operation on the effective date of this section.

Sec. 4928.69. Notwithstanding any provision of Chapter 4928, of the Revised Code and except as otherwise provided in an agreement filed with and approved by the public utilities commission under section 4905.31 of the Revised Code, an electric distribution utility shall not charge any person that is a customer of a municipal electric utility that is in existence on or before January 1, 2008, any surcharge, service termination charge, exit fee, or transition charge.

Sec. 4929.01. As used in this chapter:

(A) "Alternative rate plan" means a method, alternate to the method of section 4909.15 of the Revised Code, for establishing rates and charges, under which rates and charges may be established for a commodity sales service or ancillary service that is not exempt pursuant to section 4929.04 of the Revised Code or for a distribution service. Alternative rate plans may include, but are not limited to, methods that provide adequate and reliable natural gas services and goods in this state; minimize the costs and time expended in the regulatory process; tend to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred; afford rate stability; promote and reward efficiency, quality of service, or cost containment by a natural gas company; ~~or~~ provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced, and readily available natural gas services and goods at just and reasonable rates and charges; or establish revenue decoupling mechanisms. Alternative rate plans also may include, but are not limited to, automatic adjustments based on a specified index or changes in a specified cost or costs.

(B) "Ancillary service" means a service that is ancillary to the receipt or

delivery of natural gas to consumers, including, but not limited to, storage, pooling, balancing, and transmission.

(C) "Commodity sales service" means the sale of natural gas to consumers, exclusive of any distribution or ancillary service.

(D) "Comparable service" means any regulated service or goods whose availability, quality, price, terms, and conditions are the same as or better than those of the services or goods that the natural gas company provides to a person with which it is affiliated or which it controls, or, as to any consumer, that the natural gas company offers to that consumer as part of a bundled service that includes both regulated and exempt services or goods.

(E) "Consumer" means any person or association of persons purchasing, delivering, storing, or transporting, or seeking to purchase, deliver, store, or transport, natural gas, including industrial consumers, commercial consumers, and residential consumers, but not including natural gas companies.

(F) "Distribution service" means the delivery of natural gas to a consumer at the consumer's facilities, by and through the instrumentalities and facilities of a natural gas company, regardless of the party having title to the natural gas.

(G) "Natural gas company" means a natural gas company, as defined in section 4905.03 of the Revised Code, that is a public utility as defined in section 4905.02 of the Revised Code and excludes a retail natural gas supplier.

(H) "Person," except as provided in division (N) of this section, has the same meaning as in section 1.59 of the Revised Code, and includes this state and any political subdivision, agency, or other instrumentality of this state and includes the United States and any agency or other instrumentality of the United States.

(I) "Billing or collection agent" means a fully independent agent, not affiliated with or otherwise controlled by a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code, to the extent that the agent is under contract with such supplier or aggregator solely to provide billing and collection for competitive retail natural gas service on behalf of the supplier or aggregator.

(J) "Competitive retail natural gas service" means any retail natural gas service that may be competitively offered to consumers in this state as a result of revised schedules approved under division (C) of section 4929.29 of the Revised Code, a rule or order adopted or issued by the public utilities commission under Chapter 4905. of the Revised Code, or an exemption granted by the commission under sections 4929.04 to 4929.08 of the

Revised Code.

(K) "Governmental aggregator" means either of the following:

(1) A legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting exclusively under section 4929.26 or 4929.27 of the Revised Code as an aggregator for the provision of competitive retail natural gas service;

(2) A municipal corporation acting exclusively under Section 4 of Article XVIII, Ohio Constitution, as an aggregator for the provision of competitive retail natural gas service.

(L)(1) "Mercantile customer" means a customer that consumes, other than for residential use, more than five hundred thousand cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside of this state. "Mercantile customer" excludes a customer for which a declaration under division (L)(2) of this section is in effect pursuant to that division.

(2) A not-for-profit customer that consumes, other than for residential use, more than five hundred thousand cubic feet of natural gas per year at a single location within this state or consumes natural gas, other than for residential use, as part of an undertaking having more than three locations within or outside this state may file a declaration under division (L)(2) of this section with the public utilities commission. The declaration shall take effect upon the date of filing, and by virtue of the declaration, the customer is not a mercantile customer for the purposes of this section and sections 4929.20 to 4929.29 of the Revised Code or the purposes of a governmental natural gas aggregation or arrangement or other contract entered into after the declaration's effective date for the supply or arranging of the supply of natural gas to the customer to a location within this state. The customer may file a rescission of the declaration with the commission at any time. The rescission shall not affect any governmental natural gas aggregation or arrangement or other contract entered into by the customer prior to the date of the filing of the rescission and shall have effect only with respect to any subsequent such aggregation or arrangement or other contract. The commission shall prescribe rules under section 4929.10 of the Revised Code specifying the form of the declaration or a rescission and procedures by which a declaration or rescission may be filed.

(M) "Retail natural gas service" means commodity sales service, ancillary service, natural gas aggregation service, natural gas marketing service, or natural gas brokerage service.

(N) "Retail natural gas supplier" means any person, as defined in section

1.59 of the Revised Code, that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of a competitive retail natural gas service to consumers in this state that are not mercantile customers. "Retail natural gas supplier" includes a marketer, broker, or aggregator, but excludes a natural gas company, a governmental aggregator as defined in division (K)(1) or (2) of this section, an entity described in division (B) or (C) of section 4905.02 of the Revised Code, or a billing or collection agent, and excludes a producer or gatherer of gas to the extent such producer or gatherer is not a natural gas company under section 4905.03 of the Revised Code.

(O) "Revenue decoupling mechanism" means a rate design or other cost recovery mechanism that provides recovery of the fixed costs of service and a fair and reasonable rate of return, irrespective of system throughput or volumetric sales.

Sec. 4929.02. (A) It is the policy of this state to, throughout this state:

(1) Promote the availability to consumers of adequate, reliable, and reasonably priced natural gas services and goods;

(2) Promote the availability of unbundled and comparable natural gas services and goods that provide wholesale and retail consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(3) Promote diversity of natural gas supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers;

(4) Encourage innovation and market access for cost-effective supply- and demand-side natural gas services and goods;

(5) Encourage cost-effective and efficient access to information regarding the operation of the distribution systems of natural gas companies in order to promote effective customer choice of natural gas services and goods;

(6) Recognize the continuing emergence of competitive natural gas markets through the development and implementation of flexible regulatory treatment;

(7) Promote an expeditious transition to the provision of natural gas services and goods in a manner that achieves effective competition and transactions between willing buyers and willing sellers to reduce or eliminate the need for regulation of natural gas services and goods under Chapters 4905. and 4909. of the Revised Code;

(8) Promote effective competition in the provision of natural gas services and goods by avoiding subsidies flowing to or from regulated

natural gas services and goods;

(9) Ensure that the risks and rewards of a natural gas company's offering of nonjurisdictional and exempt services and goods do not affect the rates, prices, terms, or conditions of nonexempt, regulated services and goods of a natural gas company and do not affect the financial capability of a natural gas company to comply with the policy of this state specified in this section;

(10) Facilitate the state's competitiveness in the global economy;

(11) Facilitate additional choices for the supply of natural gas for residential consumers, including aggregation;

(12) Promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.

(B) The public utilities commission and the office of the consumers' counsel shall follow the policy specified in this section in ~~carrying out~~ exercising their respective authorities relative to sections 4929.03 to 4929.30 of the Revised Code.

(C) Nothing in Chapter 4929. of the Revised Code shall be construed to alter the public utilities commission's construction or application of division (A)(6) of section 4905.03 of the Revised Code.

Sec. 4929.051. An alternative rate plan filed by a natural gas company under section 4929.05 of the Revised Code and proposing a revenue decoupling mechanism may be an application not for an increase in rates if the rates, joint rates, tolls, classifications, charges, or rentals are based upon the billing determinants and revenue requirement authorized by the public utilities commission in the company's most recent rate case proceeding and the plan also establishes, continues, or expands an energy efficiency or energy conservation program.

SECTION 2. That existing sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02 and sections 4928.41, 4928.42, 4928.431, and 4928.44 of the Revised Code are hereby repealed.

SECTION 3. Nothing in this act affects the legal validity or the force and effect of an electric distribution utility's rate plan, as defined in section 4928.01 of the Revised Code as amended by this act, or the plan's terms and conditions, including any provisions regarding cost recovery.

SECTION 4. Section 4929.051 of the Revised Code, as enacted by this

act, shall not be applied in favor of a claim or finding that an application described in that section but submitted to the Public Utilities Commission prior to the act's effective date is an application to increase rates.

SECTION 5. The Governor's Energy Advisor periodically shall submit a written report to the General Assembly pursuant to section 101.68 of the Revised Code and report in person to and as requested by the standing committees of the House of Representatives and the Senate that have primary responsibility for energy efficiency and conservation issues regarding initiatives undertaken by the Advisor and state government pursuant to numbered paragraphs 3 and 4 of Executive Order 2007-02S, "Coordinating Ohio Energy Policy and State Energy Utilization. The first written report shall be submitted not later than sixty days after the effective date of this act.

Speaker _____ *of the House of Representatives.*

President _____ *of the Senate.*

Passed _____, 20____

Approved _____, 20____

Governor.

Am. Sub. S. B. No. 221

127th G.A.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the
____ day of _____, A. D. 20 ____.

Secretary of State.

File No. _____ Effective Date _____

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