ORIGINAL

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**

REPLY BRIEF (FOURTH BRIEF) OF APPELLEE/CROSS-APPELLANT COLUMBUS SOUTHERN POWER COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATE STATUTES

REPLY IN SUPPORT OF COLUMBUS SOUTHERN POWER'S PROPOSITION OF LAW NO. 4

R.C. 4928.143(F) IS VOID AND UNENFORCEABLE BECAUSE IT IS IMPERMISSIBLY VAGUE AND FAILS TO PROVIDE ELECTRIC DISTRIBUTION UTILITIES WITH FAIR NOTICE, OR THE COMMISSION WITH MEANINGFUL STANDARDS, AS TO WHAT IS MEANT BY "SIGNIFICANTLY EXCESSIVE EARNINGS."

The Public Utilities Commission of Ohio (the "Commission") asserts that the "significantly excessive earnings" test ("SEET") required by R.C. 4918.143(F) is "quite clear" and merely directs the Commission to make the type of decisions it has routinely made for decades. (Comm. Br. at 5.) That assertion is untenable and cannot be reconciled with the Commission's well-documented, but woefully unsuccessful attempts to grapple with the meaning of the SEET since its inception. Applying a rigid and prescriptive formula to establish rates on a prospective basis under R.C. Chapter 4909 is hardly the same as retroactively applying an amorphous over-earnings test using a decidedly non-bright line standard for the purpose of clawing back earnings that were produced by Commission-approved rates. Rather, only after struggling for years to apply the statute and being required to defend its decision to order an earnings refund more than a year after the Company's accounting books were closed for 2009 is the Commission now portraying the statute as clear and routine.

If the statute is clear, as the Commission now contends, why was the Commission unable to advise Columbus Southern Power ("CSP") how the test would be applied when CSP, and others, asked the Commission for guidance in CSP's 2008 electric security plan ("ESP") proceeding, or again asked for such advice in the SEET investigation proceeding conducted in 2009? See *In re Columbus Southern Power and Ohio Power Company*, PUCO Case No. 08-917-EL-SSO, Opinion and Order (March 18, 2009) at 68 (the "*ESP Case*"). (IEU Appx. at 157);

In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute S.B. 221 for Electric Utilities, PUCO Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010) ("*SEET Investigation Order*"). (CSP Appx. at 1-5). Both forays into the meaning of the SEET resulted in the Commission throwing up its hands and deferring the question of how the SEET would be interpreted and applied until after the electric distribution utilities made their first annual SEET filings. *ESP Case* at 68. (IEU Appx. at 157.) See CSP Merit Br. at 20 (discussing *SEET Investigation Order*). If the test is "quite clear," as the Commission now asserts, why was it unable to say so for the past four years? The answer is apparent. The statute is not at all clear. It violates the most fundamental notions of due process: fair notice of what the statute requires and sufficient standards to prevent "official arbitrariness" in its enforcement. *Columbia Natural Resources, Inc. v. Tatum* (C.A.6, 1995), 58 F.3d 1101, 1104; *Norwood v. Horney*, 110 Ohio St.3d 353, 379, 2006-Ohio-3799, 853 N.E.2d 1115.

A. A civil statute, even one that does not implicate fundamental rights, is unconstitutionally vague if "it sets forth no standard or rule or if it is substantially incomprehensible. *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 131, 2008-Ohio-511, 882 N.E.2d 400.

The Commission and Appellants/Cross-Appellees[1] argue that R.C. 4928.143(F) is merely an "economic regulation," and, therefore, easily passes constitutional muster under the more relaxed standard applicable to such regulations. (Comm. Br. at 4; IEU Br. at 17; OEG/OCC Br. at 21.) While CSP disagrees that the relaxed standard is the proper standard in a case where, as

[1] Replies to CSP's cross-appeal were filed by Industrial Energy Users ("IEU") and by Ohio Energy Group and Office of the Consumers' Counsel ("OEG/OCC"). A brief amici curae was filed by the First Energy utilities. The First Energy brief seeks an advisory opinion on a question not raised by any party to this appeal. (FE Br. at 2.) In effect, First Energy is seeking review of an error it raised on rehearing in the *SEET Investigation Case* but chose not to appeal. (FE Br. at 5.) Because First Energy is seeking review of an issue not before the Court in this case, and because First Energy's argument supports CSP's position that the lack of standards in the SEET statute opens the door for official arbitrariness (FE Br. at 15-16), CSP does not believe it is appropriate for it to respond to First Energy's argument in this fourth brief.

here, the civil statute results in a forfeiture of private property (CSP Merit Br. at 18), the SEET statute fails to satisfy due process even under the "economic regulation" standard. All statutes, even those that merely regulate economic behavior, must provide standards giving fair notice to the regulated entity and protecting it against official arbitrariness on the part of the regulator. The SEET statute offers neither fair notice nor protection from arbitrariness. The fact that the Commission could not articulate a common methodology for applying the SEET even after a formal investigation into its meaning, and the fact that it is committed to applying the SEET on an *ad hoc* "case-by-case" basis, confirm that the statute does not give fair notice or protection from arbitrariness.

1. The Commission's and Cross-Appellees' reliance on *Hoffman Estates* is misplaced.

First, *Village of Hoffman Estates v. Flipside Hoffman Estates, Inc.*(1982), 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362, considered only a pre-enforcement facial challenge to the ordinance at issue. The Court noted that a different result might occur once the statute was actually applied. *Id.* 455 U.S. at 504 ("Although it is possible that specific future applications . . . may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." (quoting *Joseph E. Seagram & Sons, Inc. v. Hostetter* (1966), 384 U.S. 35, 52, 86 S.Ct. 1254, 16 L.Ed.2d 336).) Here the statute has been applied and has resulted in a forfeiture of $42.683 million of lawfully incurred earnings based upon the Commission's *ad hoc* application of the statute to CSP.

Second, *Hoffman Estates* explained why it is that economic regulations may be subject to a less strict vagueness test:

> [E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant

> legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to administrative process.

Id. at 498 (footnotes omitted). The rationale does not apply here at all. As the record so plainly shows, CSP did consult the legislation in advance, but to no avail. It specifically sought clarification of the statute by its own inquiry and resort to the administrative process in both the 2008 *ESP Case* and the *SEET Investigation Case*. Again to no avail. Each time CSP, and others, sought clarification they were told to wait until later because the Commission, even after an investigation with widespread participation by most stakeholders, could not come to grips with what the statute intended or how it could be uniformly applied. The lack of clarity is further illustrated by the fact that Cross-Appellees advance disparate views on this issue: IEU says (Br. at 24) that CSP could proactively manage its earnings while the Commission says (Br. at 9) that there is nothing AEP could do to avoid the impact of the SEET.

Third, the reason the Court sometimes gives greater deference to civil statutes rather than criminal statutes is because the consequences of a civil statute are usually "qualitatively less severe." *Id.* at 499. In this case the consequences of the Commission's application of the SEET are now finally known and, though the penalty is civil in nature, it is severe. CSP is being ordered to forfeit \$42.683 million in earnings – earnings the Commission agrees resulted from charges it authorized and CSP was required to collect. (Comm. Br. at n. 2.) This forfeiture occurs well after-the-fact and impacts CSP significantly. Even if CSP's current earnings are at a level to withstand such loss without affecting the profitability of the company or its ability to provide service at the current rates authorized by the Commission, the forfeiture of \$42.683 million likely will impact CSP's ability to make additional investments to improve its network and effectively operate its business.

2. The Commission and IEU wrongly advance an irrelevant confiscation analysis.

The Commission and IEU attempt to confuse the proper analysis of CSP's void for vagueness claim by discussing the "test for confiscation of utility property." (Comm. Br. at 10; IEU Br. at 19-21.) CSP did not assert in the proceedings below or on appeal that the Commission's order in this case results in a confiscation of its property. It has not contended that the $42.683 million forfeiture ordered by the Commission is unjust in the abstract or reduced the 2009 ESP earnings to a confiscatory level. CSP's cross-appeal advances an entirely different, independent constitutional claim – that because of the lack of sufficient standards in the statute, it did not have constitutionally-sufficient notice of how the statute would be applied and the Commission was free to act in an arbitrary, *ad hoc* manner. *Norwood v. Horney*, 110 Ohio St.3d 353, 379. Had the General Assembly provided sufficient standards in R.C. 4928.143(F) to give fair notice and protect against the uncertainty and arbitrariness that has permeated the Commission's struggle to give meaning to the statute in advance of its application, CSP could not, and would not, have advanced the constitutional claim now before the Court, even though a significant forfeiture was ordered.

A void for vagueness claim, even one predicated on an economic injury, does not require the plaintiff to show that the law resulted in a confiscatory taking of the type discussed by the Court in *Dayton Power & Light Co. v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 91, 447 N.E.2d 733, or *Ohio Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St.2d 449, 12 O.O.3d 378. These cases, relied upon by IEU (Br. at n. 64), are simply inapposite. The fact that the SEET forfeiture has not resulted in a confiscatory-level taking of CSP's property does not mean that the SEET statute, on its face or as applied here, meets the constitutional standard for fair notice and fair treatment. A vague law – one that "impermissibly delegates basic policy matters .

. . for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications," *Hoffman Estates*, 455 U.S. at 498, is unconstitutional regardless of whether the economic injury is slight, significant, or fatal.

The Commission is wrong in arguing that there is no injury here because '[t]he earnings received because of the ESP do not ultimately belong to the company until after the review under the SEET." (Comm. Br. at 10.) The revenue CSP collected in 2009 as a result of the rates it was required by law to charge was real revenue. It was revenue that was required to be included in CSP's financial statements and became part of the Company's earnings for purpose of general taxes and the special utility assessment imposed by R.C. 4905.10. It was revenue that was available to the Company for its use to support its business operations in 2009 and thereafter. CSP could have prudently spent this revenue on operations or made capital investments to enhance its network, which would have reduced earnings for 2009. The revenue belonged to the Company and requiring it to be refunded cannot be lawfully achieved by a statute that is void for vagueness.

3. Deference to the Commission's judgment in this instance invites "official arbitrariness." *Norwood v. Horney*, 110 Ohio St.3d at 379, ¶ 84.

The Commission's contention that R.C. 4928.143(F) "passes the *Norwood* test because the Commission has fair notice of what is required" (Comm. Br. at 9) ignores the dual purposes of the due process requirement. It is not enough that the Commission thinks it understands the statute's directive; due process also requires that the regulated entity have similar clarity. *Norwood v. Horney*, 110 Ohio St.3d at 379, ¶ 84. Moreover, the Commission's argument that the statutory terms are "easily understood" and "are of the type and kind that the Commission has routinely made for decades" (Br. at 5) cannot be squared with its multiple unsuccessful attempts to provide clarification on how it would interpret and apply the statute. If the Commission was so sure it understood the statutory directive, why did it need to conduct a special investigation in which it posed for debate no less than eleven open issues not answered by the statute? See CSP Merit Brief at 19. And why at the conclusion of that investigation were most of the open issues still open and deferred for a later *ad hoc* determination on a case-by-case basis? See CSP Merit Brief at 20. The answer is obvious. The statute is devoid of adequate standards to the point of being incomprehensible to the Commission and to the various parties (utilities, ratepayers and advocacy groups) that participated in the SEET investigation and continue to advance very divergent interpretations of the SEET as applied for the first time here.

That the Commission really does not understand the SEET statute or how it is to be applied is highlighted by a number of its own arguments. While the following replies to the Commission's argument may appear to criticize the Commission for its lack of understanding of the SEET, the Commission is not at fault in this regard because the statute itself is unconstitutionally vague and fails to provide adequate standards for clawing back utility earnings that were collected under Commission-approved rates.

That the Commission really does not understand the SEET statute or how it is to be applied is highlighted by its claim that "the SEET is in the nature of a true-up," not unlike the fuel adjustment clause ("FAC") in CSP's approved ESP. (Comm. Br. at 9-10.) The SEET is not a true-up. A true-up, like the current FAC, allows for an adjustment in rates or charges "to control the over – or under – recoveries that may occur in a particular quarter [or year]" to accurately reflect actual costs. *ESP Case*, Opinion and Order at 15 (IEU Appx. at 104.) The SEET is an asymmetrical requirement that requires an electric distribution utility to disgorge earnings, which result from charges the utility was required to collect, if the Commission later determines those earnings to be "significantly excessive" by whatever factors the Commission applies on a case-by-case basis, but does not allow the utility to increase its rates to recover earnings that fall below the expected return.

That the Commission does not really understand the SEET test is further highlighted by its claim – a claim echoed by OEG/OCC – that the discretion it is permitted to exercise under R.C. 4928.143(F) is no different than the discretion it uses to make "routine" rate of return determinations. (Comm. Br. at 6-7; OEG/OCC Br. at 23-24.) Under traditional rate-making, a monopolistic utility is provided a forward-looking *opportunity* to earn a "just and reasonable" rate of return over and above actual costs, which rate is based in part on the comparable earnings of other similar businesses. The utility's actual rate of return may exceed or fall below that rate of return authorized by the Commission, and there is no true-up. Moreover, the rate of return judgments exercised in traditional rate-making stand on the shoulders of decades of case law and regulatory proceedings that provide some predictability for how these determinations will be made. See, e.g., *Federal Power Comm. v. Hope Natural Gas Co.* (1944), 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333; *Bluefield Water Works v. West Virginia* (1923), 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176; *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 523, 2011-Ohio-1788, 947 N.E.2d 65, at ¶ 52 (noting that the Court has instructed the Commission to "respect its own precedents in its decisions to assure predictability"). The SEET, on the other hand, exists completely outside the traditional rate-making arena. There is no precedent to give notice or predictability as to how it may be applied, and no standards to control the Commission's discretion. The SEET cannot be compared to an opportunistic rate of return because it punishes a utility, after-the-fact, for doing too well but does not provide it any relief if it does poorly. Because the SEET has no counter-part in traditional rate-making analysis, and is fundamentally different than any concept that previously existed, the General Assembly had an obligation to make the statute clear and to not leave it open to the type of *ad hoc*, case-by-case process the Commission is employing.

That the Commission does not really understand the SEET is further highlighted by its claim – a claim also echoed by OEG/OCC – that there is no action CSP could have taken to control the outcome of the SEET had it known how that test would be implemented in this case. (Comm. Br. at 9; OEG/OCC Br. at 22.) The argument is legally irrelevant and factually inaccurate. A regulated entity is entitled to fair notice of statutory requirements and protection from official arbitrariness, even though its options are otherwise limited by law, and, while CSP's options may have been limited, they were not non-existent.

It is true that CSP had limited ability to control its earnings for 2009 because: it was required to charge the rates the Commission allowed, R.C. 4905.22; it was required to provide service to all customers in its service territory who requested service from it, R.C. 4928.141; it was required to accept the risk of customer-shopping when market rates fell, *id.*; and it was required to meet the statutorily-prescribed benchmarks for energy efficiency and peak-demand reductions, R.C. 4928.66. These statutory limitations, and others, significantly affected the amount of revenue CSP collected in 2009, but did not necessarily pre-determine the amount of its earnings for 2009. There are a number of ways that companies legitimately manage earnings within the bounds of prudent management and accounting. For example, utility management can decide whether to make capital investments or incur certain expenses during a particular calendar year or wait until the next year to do so, thereby impacting the level of earnings in a given year.

Moreover, the statutory limitations on what CSP could charge and collect in 2009 did not affect the equity values that would also factor into its earned return on common equity. Had CSP been given fair notice of how the SEET was to be administered, it could have affected the denominator of the SEET and thus affected the resulting "quotient." The calculation is not as cut-and-dried as the Commission represents. (Comm. Br. at 6.) For example, had CSP known that it was at risk for a substantial forfeiture of earnings, it rightfully could have spent more on network investments, reliability upgrades or other such activities needed to effectively run the utility business. Such added investments might have benefitted customers more than the per-capita refund they received under the order on appeal. Advancing needed or planned investments to avoid a forfeiture is a prudent strategy, especially given the volatile nature of the competitive generation markets, because it assures that the investments will be made and not put at risk due to possibly declining revenues in later years.

B. The unconstitutional SEET provision is properly severed from R.C. 4928.143, leaving the remainder of the statute valid and enforceable.

The Commission argues, without any citation to authority, that CSP should not be permitted to challenge the SEET because it voluntarily chose to file an ESP, rather than seek to provide service under the market-rate offer authorized in R.C. 4928.142. It also argues, again without any citation to authority, that CSP's implementation of an ESP somehow precludes the Company from asserting constitutional rights. (Comm. Br. at 2, 11.) The Commission's argument is disingenuous and legally incorrect.

The argument is disingenuous because, no electric distribution utility in Ohio has implemented a market-rate offer ("MRO") under R.C. 4928.142. As the Commission well knows, it has discouraged use of this option since its inception, preferring the greater regulatory control it retains under the ESP option. Moreover, prior to approving CSP's ESP, the Commission made the express determination required by R.C. 4928.143(C)(1) that CSP's ESP, "including its pricing and all other terms and conditions, including deferrals and future recovery of deferrals, as modified by this order, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code." *ESP Case*, Opinion and Order at 72. (IEU Appx. at 161.) The Commission's finding was not that the ESP was more favorable than the MRO alternative *for CSP*; its finding was that the ESP was favorable *for CSP's customers*. Indeed, in approving CSP's ESP the Commission found that the "cost of the ESP is $673 million for CSP . . . and the cost of the MRO is $1.3 billion for CSP." *Id.* If CSP benefitted from the ESP (and that remains to be seen because the 2008 ESP remains the subject of significant litigation as a result of this Court's remand in *In re Columbus S. Power Co. v. Pub. Util. Comm.*), CSP's customers benefitted to a greater extent.

The argument that CSP must "take the [ESP] statute as it finds it" (Br. at 2, 11) is legally incorrect because the law expressly provides for the severance of unconstitutional provisions from state statues. R.C. 1.50 states:

> If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

Under R.C. 1.50 invalid provisions within statutory schemes are "presumptively severable." *State ex rel. Maurer v. Sheward* (1994), 71 Ohio St.3d 513, 523, 644 N.E.2d 369.

The Court has on any number of occasions severed an invalid provision within a statute and enforced the statutory scheme without the offending part. See e.g., *Norwood v. Horney*, 110 Ohio St.3d at 389-390, ¶¶ 126-27 (severing one provision in one of many statutes comprising the statutory authority to implement eminent domain proceedings); *Maurer v. Sheward*, 71 Ohio St.3d at 523-24 (severing unconstitutional inclusion of commutation and reprieves from statutory scheme governing pardons and paroles); *South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 503

N.E.2d 136 (severing unconstitutional provision within motor vehicle financial responsibility law). The Commission's argument that the ESP statute is too "complex" to be enforced without the SEET provision (Comm. Br. at 11) does not support deviating from the presumption that the statute is subject to severability. Courts have severed offending parts of complex statutes, including public utility rate-making statutes. See, e.g. *O'Brien v. Columbus S. Power Co.* (1992), 73 Ohio App.3d 355, 597 N.E.2d 188 (severing unconstitutional refund provision from automatic rate increase statute in R.C. Chpt. 4909.).

Severability of an unconstitutional provision within a statute is appropriate when severance "will not fundamentally disrupt the statutory scheme." *Maurer v. Sheward*, 71 Ohio St.3d at 523. This Court follows a three-part test to determine whether severance is appropriate. *Id.* (citing *Geiger v. Geiger* (1967), 117 Ohio St. 451, 466, 160 N.E. 28). The *Geiger* test is composed of three questions:

> (1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself?
>
> (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out?
>
> (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?

Id., 117 Ohio St. at 466.

Severing R.C. 4928.143(F) is consistent with the first and third parts of the *Geiger* test. R.C. 4928.143 (A)-(E) may be sensibly read without subsection (F). There is no cross-reference in subsections (A) through (E) to subsection (F). There is no need to insert words or terms into the statute in order to have subsections (A) through (E) stand alone without subsection (F).[2]

The second part of the *Geiger* test is also satisfied. The SEET forfeiture provision is not so connected with the general scope of the ESP as to make it impossible to give effect to the apparent intention of the General Assembly in enacting R.C. 4928.143 if the SEET provision is stricken. The statute was enacted in S.B. 221, the primary purpose of which was to undo and replace the General Assembly's prior S.B. 3 requirement that all electric distribution utilities offer generation at market-based rates after an initial five-market development period that would end no later than 2005. By enacting S.B. 221, the General Assembly intended to give EDUs two alternatives for satisfying their obligation to provide a standard service offer for generation service: the revised MRO provided for in R.C. 4928.142 or the ESP authorized in R.C.4928.143. There is nothing in these statutes or in S.B. 221 to suggest that the General Assembly would prefer to have no ESP alternative, if the current SEET provision is eliminated.

The ESP alternative provides a mechanism for assuring that retail customers have some protection from the volatility that may occur with only market-based rates. In addition, prior to approval, every ESP must meet the test that it, including its pricing and all other terms and conditions, is more favorable in the aggregate for retail customers as compared to the expected results that would otherwise apply under an MRO. Once approved by the Commission, an ESP establishes the rates, terms and conditions under which the EDU will offer generation service for the period of the ESP. The ESP is fully functional upon approval and the lack of the *possibility*

[2] R.C. 4928.143(E) also contains a SEET requirement that applies to circumstances not at issue here, as well as other requirements. Even if a finding that subsection (F) is unconstitutional necessarily implies that the SEET in subsection (E) is unconstitutional (and it probably does) that would not affect severability, as the remaining provisions in subsection (E) also stand alone and could be enforced.

to claw back some portion of the EDU's earnings after-the-fact does not undermine the functioning of the ESP or the benefit retail customers receive from taking service under the ESP.

While the Commission argues that it is impossible to have an ESP without a SEET (Comm. Br. at 12), it offers no reason or rationale why that is the case. It also argues that "the SEET is vital to protect the interests of consumers," but offers no reason why that is the case. R.C. 4928.143(C) already protects the interests of consumers by requiring the Commission to compare the proposed ESP to an MRO and to approve an EDU only if it is expected to be more favorable in the aggregate for consumers than the MRO. It seems odd for the Commission to argue that consumers are unprotected if there is no SEET, when it has the ability to provided that protection up front. For the many decades that preceded S.B. 221, consumers relied on the rate-making process to assure that they were paying just and reasonable rates. There was no claw back – no refund – of "excessive earnings."

The Commission has offered no explanation for why a claw back is now suddenly "vital" to protect consumers and up-front regulation is so inadequate as to leave consumers unprotected. The Commission is arguing that the SEET is vital just because it happens to be in the statute, but that is not the test this Court uses. The test is whether it is "impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out." *Geiger*, 117 Ohio St. at 466. R.C. 4928.143 remains a viable statute even without the SEET. It is not a constitutionally viable statute with the SEET. CSP is not asking the Court to "judicially establish and impose a third mechanism" – an ESP without a SEET, in addition to the ESP with a SEET or an MRO – as the Commission argues. (Comm. Br. at 12.) Rather, CSP is asking the Court preserve the existing ESP option by severing the unconstitutionally vague SEET from the statute.

CONCLUSION

The Court should declare that R.C. 4928.143(F) is unconstitutionally vague and unenforceable, sever it from the statute, and allow the balance of the statute to be enforced as written. The General Assembly, of course, will be free to re-enact a constitutionally adequate SEET that provides fair advance notice as to how it will be applied and protects against the arbitrariness, as seen in this case, that ensues when the Commission has no guidance, can provide no clarification, and must resort to *an hoc,* case-by-case process

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of this Fourth Brief was served upon the following counsel of record by regular U.S. Mail, postage pre-paid, the 2nd day of December 2011.

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COLUMBUS/1610397v.2

APPENDIX

R.C. 1.50

If any provisions of a section of the Revised Code or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections which can be given effect without the invalid provision or application, and to this end the provisions are severable.

R.C. 4905.10

(A) For the sole purpose of maintaining and administering the public utilities commission and exercising its supervision and jurisdiction over the railroads and public utilities of this state, an amount equivalent to the appropriation from the public utilities fund created under division (B) of this section to the public utilities commission for railroad and public utilities regulation in each fiscal year shall be apportioned among and assessed against each railroad and public utility within this state by the commission by first computing an assessment as though it were to be made in proportion to the intrastate gross earnings or receipts, excluding earnings or receipts from sales to other public utilities for resale, of the railroad or public utility for the calendar year next preceding that in which the assessment is made. The commission may include in that first computation any amount of a railroad's or public utility's intrastate gross earnings or receipts that were underreported in a prior year. In addition to whatever penalties apply under the Revised Code to such underreporting, the commission shall assess the railroad or public utility interest at the rate stated in division (A) of section 1343.01 of the Revised Code. The commission shall deposit any interest so collected into the public utilities fund. The commission may exclude from that first computation any such amounts that were overreported in a prior year. The final computation of the assessment shall consist of imposing upon each railroad and public utility whose assessment under the first computation would have been one hundred dollars or less an assessment of one hundred dollars and recomputing the assessments of the remaining railroads and public utilities by apportioning an amount equal to the appropriation to the public utilities commission for administration of the utilities division in each fiscal year less the total amount to be recovered from those paying the minimum assessment, in proportion to the intrastate gross earnings or receipts of the remaining railroads and public utilities for the calendar year next preceding that in which the assessments are made. In the case of an assessment based on intrastate gross receipts under this section against a public utility that is an electric utility as defined in section 4928.01 of the Revised Code, or an electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the

Revised Code, such receipts shall be those specified in the utility's, company's, cooperative's, or aggregator's most recent report of intrastate gross receipts and sales of kilowatt hours of electricity, filed with the commission pursuant to division (F) of section 4928.06 of the Revised Code, and verified by the commission. In the case of an assessment based on intrastate gross receipts under this section against a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code, such receipts shall be those specified in the supplier's or aggregator's most recent report of intrastate gross receipts and sales of hundred cubic feet of natural gas, filed with the commission pursuant to division (B) of section 4929.23 of the Revised Code, and verified by the commission. However, no such retail natural gas supplier or such governmental aggregator serving or proposing to serve customers of a particular natural gas company, as defined in section 4929.01 of the Revised Code, shall be assessed under this section until after the commission, pursuant to section 4905.26 or 4909.18 of the Revised Code, has removed from the base rates of the natural gas company the amount of assessment under this section that is attributable to the value of commodity sales service, as defined in section 4929.01 of the Revised Code, in the base rates paid by those customers of the company that do not purchase that service from the natural gas company.

(B) Through calendar year 2005, on or before the first day of October in each year, the commission shall notify each such railroad and public utility of the sum assessed against it, whereupon payment shall be made to the commission, which shall deposit it into the state treasury to the credit of the public utilities fund, which is hereby created. Beginning in calendar year 2006, on or before the fifteenth day of May in each year, the commission shall notify each railroad and public utility that had a sum assessed against it for the current fiscal year of more than one thousand dollars that fifty per cent of that amount shall be paid to the commission by the twentieth day of June of that year as an initial payment of the assessment against the company for the next fiscal year. On or before the first day of October in each year, the commission shall make a final determination of the sum of the assessment against each railroad and public utility and shall notify each railroad and public utility of the sum assessed against it. The commission shall deduct from the assessment for each railroad or public utility any initial payment received. Payment of the assessment shall be made to the commission by the first day of November of that year. The commission shall deposit the payments received into the state treasury to the credit of the public utilities fund. Any such amounts paid into the fund but not expended by the commission shall be credited ratably, after first deducting any deficits accumulated from prior years, by the commission to railroads and public utilities that pay more than the minimum assessment, according to the respective portions of such sum assessable against them for the ensuing fiscal year. The assessments for such fiscal year shall be reduced correspondingly.

(C) Within five days after the beginning of each fiscal year through fiscal year 2006, the director of budget and management shall transfer from the general revenue fund to the public utilities fund an amount sufficient for maintaining and administering the public utilities commission and exercising its supervision and jurisdiction over the railroads and public utilities of the state during the first four months of the fiscal year. The director shall transfer the same amount back to the general revenue fund from the public utilities fund at such time as the director determines that the balance of the public utilities fund is sufficient to support the appropriations from the fund for the fiscal year. The director may transfer less than that amount if the director determines that the revenues of the public utilities fund during the fiscal year will be insufficient to support the appropriations from the fund for the fiscal year, in which case the amount not paid back to the general revenue fund shall be payable to the general revenue fund in future fiscal years.

(D) For the purpose of this section only, "public utility" includes:

(1) In addition to an electric utility as defined in section 4928.01 of the Revised Code, an electric services company, an electric cooperative, or a governmental aggregator subject to certification under section 4928.08 of the Revised Code, to the extent of the company's, cooperative's, or aggregator's engagement in the business of supplying or arranging for the supply in this state of any retail electric service for which it must be so certified;

(2) In addition to a natural gas company as defined in section 4929.01 of the Revised Code, a retail natural gas supplier or governmental aggregator subject to certification under section 4929.20 of the Revised Code, to the extent of the supplier's or aggregator's engagement in the business of supplying or arranging for the supply in this state of any competitive retail natural gas service for which it must be certified.

(E) Each public utilities commissioner shall receive a salary fixed at the level set by pay range 49 under schedule E-2 of section 124.152 of the Revised Code.

R.C. 4905.22

Every public utility shall furnish necessary and adequate service and facilities, and every public utility shall furnish and provide with respect to its business such instrumentalities and facilities, as are adequate and in all respects just and reasonable. All charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

R.C. 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.

R.C. 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 July 31, 2008, directly owns, in whole or in part, operating

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

(1) The electric distribution utility's prudently incurred cost of fuel used to produce electricity;

(2) Its prudently incurred purchased power costs;

(3) Its prudently incurred costs of satisfying the supply and demand portfolio requirements of this state, including, but not limited to, renewable energy resource and energy efficiency requirements;

(4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's

financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

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

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

R.C. 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.

R.C. 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.

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