

In The
SUPREME COURT OF OHIO

Industrial Energy Users-Ohio,

and

Office of the Ohio Consumers'
Counsel,

Appellants,

v.

The Public Utilities Commission of
Ohio,

Appellee.

:
:
: Case No. 2012-0187
:
: On appeal from the Public Utilities Com-
: mission of Ohio, Case Nos. 08-917-EL-SSO,
: *et al.*, 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.*
:
:
:

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

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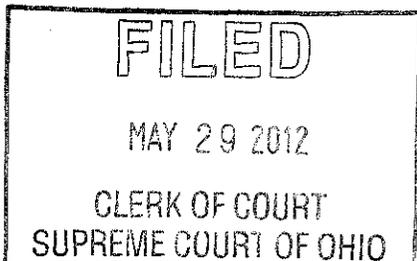
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**In The
SUPREME COURT OF OHIO**

Industrial Energy Users-Ohio,	:	
	:	
and	:	Case No. 2012-0187
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Office of the Ohio Consumers' Counsel,	:	On appeal from the Public Utilities Com-
	:	mission of Ohio, Case Nos. 08-917-EL-
	:	SSO, <i>et al</i> , <i>In the Matter of the Application</i>
Appellants,	:	<i>of Columbus Southern Power Company for</i>
	:	<i>Approval of an Electric Security Plan; an</i>
v.	:	<i>Amendment to its Corporate Separation</i>
	:	<i>Plan; and the Sale or Transfer of Certain</i>
The Public Utilities Commission of Ohio,	:	<i>Generating Assets, et al.</i>
	:	
Appellee.	:	

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

INTRODUCTION

The Court spoke and the Commission listened. This Court directed the Commission to re-examine two issues. The Commission was asked to reconsider whether there was an evidentiary basis for one charge and to determine if there was a statutory basis for the other. The Commission did so and ordered a large amount repaid to customers. The Commission did what it was asked to do and within the statutory powers available to it.

Appellants are not satisfied and want more. They want to retroactively change rates. The law of this State does not permit this. The law provides a means by which

they might have achieved their goal, a stay of the Commission order, but appellants did not pursue that means. Now they want this Court to give them a means to avoid the consequence of their own inaction. This Court must decline and affirm the Commission order.

STATEMENT OF THE FACTS AND CASE

On July 31, 2008, Columbus Southern Power Company and Ohio Power Company (collectively AEP-Ohio or the Company) filed an application for a standard service offer (SSO) under R.C. 4928.141 as part of an electric security plan, or ESP. Following a series of local public hearings and days of adjudicatory hearings, the Commission issued its opinion and order on March 18, 2009. The Commission affirmed and further clarified certain issues in rehearing entries issued on July 23, 2009 and November 4, 2009. Pertinent to this case, the Commission authorized AEP-Ohio to recover incremental capital carrying costs incurred after January 1, 2009 on past environmental investments as well as a provider of last resort (POLR) charge during the ESP term. *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.* (hereinafter *In re AEP*) (Opinion and Order at 24-28, 38-40) (March 18, 2009), 436-438, IEU App. at 94-99, 108,-110,

OCC App. at 422-426;¹ *In re AEP* (Entry on Rehearing at 24-27) (July 23, 2009), OCC App. at 367-370.

Several appeals were taken from the Commission's initial ESP order. In a decision issued on April 19, 2001, the Ohio Supreme Court affirmed the Commission's ESP in numerous respects. The Court did, however, reverse and remand on two issues with instructions to the Commission to consider whether any subsection of R.C. 4928.143(B)(2) authorized recovery of the subject environmental investment carrying charges, and for the Commission to reconsider its characterization of the POLR charge, either as a non-cost-based charge or taking into account AEP-Ohio's actual POLR costs. *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 519-520, 2011-Ohio-1788, ¶ 31, 947 N.E.2d 655, 664-665. Before conducting an evidentiary hearing on the issues remanded by the Court, the Commission issued an order directing AEP to file revised tariffs and ordering that the POLR and environmental carrying charges be collected *subject to refund* with interest if later adjudicated to be unreasonable. *In re AEP* (Entry) (May 25, 2011), IEU App. at 153-158,

The Commission issued its order on remand on October 3, 2011. Pertinent to this case, the Commission determined that the subject environmental investment carrying costs were lawfully reasonable under R.C. 4928.143(B)(2)(d). The Commission further found that AEP-Ohio failed to provide evidence of its actual POLR costs and it directed

¹ References to appellant IEU's appendix are denoted "IEU App. at ____;" references to appellant OCC's appendix are denoted "OCC App. at ____;" references to appellee's appendix are denoted "App. at ____;" and references to appellee's supplement are denoted "Supp. at ____."

the AEP companies to deduct the amount of those charges. *In re AEP* (Order on Remand at 22-24) (October 30, 2011), IEU App. at 180-182, OCC App. at 727-729. In considering the Court's directive, the Commission thoroughly evaluated all aspects of the POLR charge, including valuation of POLR costs, POLR-related risks faced by AEP, and customer bypassability of the POLR charge. *Id.*

Several parties timely sought rehearing of the Commission's order on remand, including AEP-Ohio, the Industrial Energy Users-Ohio (IEU), the Office of the Ohio Consumers' Counsel (OCC), and Ohio Partners for Affordable Energy (OPAЕ). The Commission denied the rehearing applications on December 14, 2011, and IEU and OCC subsequently filed these appeals.

ARGUMENT

Proposition of Law No. I:

The Commission's factual finding that the recovery of carrying charges on past environmental investments had "the effect of stabilizing or providing certainty regarding retail electric service" under R.C. 4928.143(B)(2)(d) is reasonable and lawful.

The General Assembly authorized the recovery of "charges relating to . . . carrying costs" as part of an Electric Security Plan. Ohio Rev. Code Ann. § 4928.143(B)(2)(d) (West 2012), App. at 5. Appellant IEU correctly notes that the Commission found that the Company satisfied the requirements of Section 4928.143(B)(2). Using its discretion, the Commission exercised this grant of authority by authorizing the Company to recover current year carrying costs associated with capitalized investments made between 2001

and 2008 to comply with environmental requirements. It further permitted the recovery of additional carrying costs incurred for environmental investments made during the three years of the ESP. Specifically, the Commission found that “the environmental investment carrying charges have the effect of providing certainty to both the Company and their customers regarding retail electric service, specifically generation service.” *In re AEP* (Order on Remand at 14) (October 3, 2011), IEU App. at 172, OCC App. at 719 .

But IEU argues that the Commission failed to apply the law properly, and that no record support exists for the decision to permit recovery of environmental investment carrying costs. On rehearing, IEU argued that any such charges must be *necessary* to make retail electric service “probable.” *In re AEP* (Entry on Rehearing at 5) (December 14, 2011), IEU App. at 243, OCC App. at 667. In a slightly different vein, it argues in its merit brief that the Commission’s decision must be supported by evidence that demonstrates a negative; that is, that “retail electric service would become ‘less’ certain if the Company was not permitted to recover the requested carrying charges.” IEU Brief at 12. IEU’s argument has no merit.

IEU misapplies the statute. R.C. 4928.143(B)(2)(d) does not require that carrying charges either make retail electric service *more* certain, or that they be *necessary* to provide certainty in the provision of retail electric service. That is not what the statute requires, and the Commission properly so found. *Id.* The statute authorizes carrying charges that “would *have the effect* of stabilizing or providing certainty regarding retail electric service.” Ohio Rev. Code Ann. § 4928.143(B)(2)(d) (West 2012), App. at 5 (emphasis added). Charges may have the effect of stabilizing or providing certainty

regarding service without being necessary to make the service certain or probable. IEU asks the Court to require a threshold that the General Assembly simply did not mandate under R.C. 4928.143(B)(2)(d).

IEU also suggests that “the Commission did not have any evidence to support the legitimacy of the (carrying) charge” because, it alleges, there was no quantification demonstrating that environmental investment costs would be lower than purchased power. IEU further faults the Commission for failing to address a “need” to fund incremental environmental investment to provide certainty. IEU-Ohio Brief at 15. But the record demonstrates that the Commission’s factual finding has adequate evidentiary support, and should be affirmed.

R.C. 4903.13 provides that “[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.” Ohio Rev. Code Ann. § 4903.13 (West 2012), App. at 1. Applying this statute to an appeal from the Commission, the Court stated that it “will not reverse or modify a determination unless it is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Ohio Partners for Affordable Energy v. Pub. Util. Comm’n*, 115 Ohio St.3d 208, 210, 2007-Ohio-4790, ¶ 10, 874 N.E.2d 764, 767; *Monongahela Power Co. v. Pub. Util. Comm’n*, 104 Ohio St.3d 571, 577-578, 2004-Ohio-6896, ¶ 29, 820 N.E.2d 921, 927. The appellant bears the burden of demonstrating that the Commission’s decision is against the manifest weight of the evidence or is clearly unsupported by the

record. *AK Steel Corp. v. Pub. Util. Comm'n*, 95 Ohio St.3d 81, 2002-Ohio-1735, 765 N.E.2d 862, 867. IEU has not met its burden in this appeal.

At the outset, the Commission determined that R.C. 4928.143(B)(2)(d) does not require that that “the determination regarding the stabilizing effect must be made from the perspective of the customer.” *In re AEP* (Order on Remand at 13) (October 3, 2011), IEU App. at 170-171, OCC App. at 717-718. The Commission continued to find, as a matter of fact, that the recovery of environmental investment carrying costs would have the effect of stabilizing or providing certainty whether made from the perspective of customers, the Company, or the investment community. Relying specifically on the testimony of Company witness Nelson, the Commission concluded that:

With respect to AEP-Ohio, inclusion of the carrying charges in the ESP compensates the Companies for their investment in their generating plant. Companies witness Nelson explained that the Companies’ investors expect to earn a return on their capital investments and that the carrying cost rate includes the cost of money, among other components. AEP-Ohio’s recovery of the carrying costs works to ensure that the investors earn a return on their investment.

However, customers benefit as well. As Mr. Nelson pointed out, the carrying charges recover the ongoing costs of environmental investments that were necessary to continue operation of the Companies’ generation units and extend the useful lives of those facilities. Customers benefit from the lower cost power that they receive as a result. The alternative to the investments in the Companies’ generation assets would be increased use of purchased power to serve the Companies’ SSO load. The record reflects that this cost of the environmental investments was below the market rate for purchased power at the time the Commission considered the ESP.

Id. at 14, IEU App. at 172, OCC App. at 719.

IEU further argues that the actual dispatch of generation assets by PJM contradicts the finding of customer benefits. This too lacks merit. As a matter of fact, the manner by which PJM dispatches resources simply does not negate the established practice that the Company pass the benefits of lower-cost power to customers through the FAC. Relying upon the factual record before it, the Commission specifically found:

* * * no relevance in IEU-Ohio's argument regarding the dispatch of power by PJM, as AEP-Ohio, in actual practice, generally uses its own generating units to serve its customers and passes the benefit of the lower cost power to its customers through the FAC (Tr. XI at 58, 60; Cos. Ex. 7B at 6). Moreover, the presence of lower cost units in the PJM market will tend to lower current and future PJM energy market prices and contribute to stabilizing prices for the benefit of the Companies' customers.

In re AEP (Entry on Rehearing at 5) (December 14, 2011), IEU App. at 243, OCC App. at 667. The Commission correctly rejected IEU's argument.

In matters involving the agency's special expertise and the exercise of discretion, the Court will generally defer to the judgment of the agency. *Constellation New Energy, Inc. v. Pub. Util. Comm'n*, 104 Ohio St.3d 530, 541, 2004-Ohio-6767, ¶ 50, 820 N.E.2d 885, 895; *Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n*, 92 Ohio St.3d 177, 180, 2001-Ohio-134, 180, 749 N.E.2d 262, 264; *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm'n*, 51 Ohio St.3d 150, 154, 555 N.E.2d 288, 292 (1990).

The Court has consistently refused to substitute its judgment for that of the agency on evidentiary matters. *AK Steel Corp.*, 95 Ohio St.3d at 84, 2002-Ohio-1735, 765 N.E.2d 866. It should refuse to do so here, and should affirm the Commission's findings.

Proposition of Law No. II:

R.C. 4928.143(B)(2)(d) imposes no adequate compensation requirement as a pre-condition to recovery of costs under the statute.

While acknowledging the Commission's finding that incremental environmental investments could be collected under R.C. 4928.143(B)(2)(d), IEU claims that the Commission acted unreasonably and unlawfully because AEP-Ohio failed to demonstrate that its other revenues did not provide adequate compensation. IEU Brief at 16. IEU's argument enjoys no support in the law or any other cited authority.

An analysis of IEU's claim must begin with the statute itself. Nothing in R.C. 4928.143(B)(2)(d) expressly or implicitly imposes an "adequate compensation" test. No such test exists. The Commission noted as much. *In re AEP* (Entry on Rehearing at 6) (December 14, 2011), IEU App. at 244, OCC App. at 663-681. Contrary to appellant IEU's assertion, because these costs were not reflected in existing rates, there was an economic basis to support their recovery, as the Commission found and explained. *In re AEP* (Order on Remand at 12-13) (October 3, 2011), IEU App. at 170-171, OCC App. at 717-718; *In re AEP* (Entry on Rehearing at 6) (December 14, 2011), IEU App. at 244, OCC App. at 668.

IEU next mistakenly argues that the Commission violated its policy of requiring a showing of economic need as a pre-condition to recovery of these costs. It claims that the Commission established such a policy in its earlier order. IEU Brief at 17. IEU's misguided position is premised upon a portion of the Commission's lengthy order that addresses a *different subject*, the Company's proposed Enhanced Service Reliability Plan,

and costs that are different from, and unrelated to, the incremental environmental investments that were the subject of the Court's reversal and remand to the Commission. *See, e.g. Id.* at 17-18. Beyond that, IEU points to nothing that shows the Commission adopted, or that the law requires, either an adequate compensation test or threshold be applied and met as a pre-condition to cost recovery under R.C. 4928.143. The Commission observed as much. *In re AEP* (Entry on Rehearing at 6) (December 14, 2011), IEU App. at 244, OCC App. at 668. The Commission did not deviate from prior precedent. IEU mistakenly relies upon a Commission policy that simply does not exist.

Proposition of Law No. III:

The Commission's order complies with the Court's decision and remand instructions and does not violate of the law of the case doctrine.

IEU asserts that the Commission acted by relying upon a "statutory provision not advanced by any party to the proceeding" in its remand determination. IEU Brief at 19-22. Thus, it argues, the Commission exceeded the scope of the Court's remand instructions and, therefore, that the Commission violated the law of the case doctrine. *Id.* IEU is wrong.

The law of the case doctrine is an important judicial construct that promotes consistency of results and preserves the structure of superior and inferior courts² under the

² The Public Utilities Commission of Ohio is not a court. *Marketing Research Inc. v. Pub. Util. Comm'n*, 34 Ohio St.3d 52, 56, 517 N.E.2d 540, 544 (1987); *Milligan v. Ohio Bell Telephone Co.*, 56 Ohio St.2d 191, 381 N.E.2d 190 (1978); *New Bremen v. Pub. Util. Comm'n*, 103 Ohio St. 23, 132 N.E. 162 (1921); *Coss v. Pub. Util. Comm'n*, 101 Ohio St. 528, 130 N.E. 937 (1920).

Ohio Constitution. *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). Absent extraordinary circumstance, an inferior court lacks discretion to disregard the mandate of a superior court in a prior appeal in the same case. *Id.* Importantly, this Court has noted that this doctrine is a *rule of practice rather than a binding rule of substantive law and will not be applied to achieve unjust results.* *Nolan* 11 Ohio St.3d 1 citing *Gohman v. St. Bernard*, 111 Ohio St. 726, 730, 146 N.E. 291 (1924) (emphasis added).

To analyze this “issue,” one must look at what the Commission did in response to the Court’s remand instructions, and the consequences of an improper application of this doctrine. In the original ESP order, the Commission authorized recovery of incremental capital carrying costs, incurred after January 1, 2009, on prior environmental investments that are not presently reflected in the Company’s rates. *In re AEP* (Order on Remand at 10) (October 3, 2011), IEU App. at 168, OCC App. at 715. This recovery, the Commission reasoned, was authorized under R.C. 4928.143(B)(2) as an unenumerated expense encompassed by the section’s “without limitations” language. The Court reversed and remanded with instructions to the Commission to conduct further proceedings to determine whether any of the enumerated subcategories under Section (B)(2) authorized recovery of such costs. *In re Application of Columbus Southern Power Company*, 128 Ohio St.3d 512, 520, 2011-Ohio-1788, ¶ 35, 947 N.E.2d 655, 665. That is precisely what the Commission did.

IEU’s position springs from a faulty premise – that is, that the Commission based its remand determination on R.C. 4928.143(B)(1). This is not correct. In point of fact, the Commission did precisely what the Court directed and relied upon a subpart of

(B)(2), R.C. 4928.143(B)(2)(d) to be exact. That subsection provides that an electric security plan or ESP may include “terms, conditions or charges relating to . . . carrying costs . . . as would have the effect of stabilizing or providing certainty regarding retail electronic service.” *In re AEP* (Order on Remand at 13-15) (October 3, 2011), IEU App. at 171-173, OCC App. at 718-720; (Entry on Rehearing at 7) (December 14, 2011), IEU App. at 245, OCC App. at 669. The Commission explained the facts that it relied upon, including the testimony of AEP witness Nelson, in concluding, as a factual matter, that the environmental investment carrying charges provide rate certainty to both the utility and its customers. *In re AEP* (Order on Remand at 13-15) (October 3, 2011), IEU App. at 171-173, OCC App. at 718-720. As the Commission noted, recovery of these costs allows the Companies to earn a fair return on their capital investments, while customers benefit from AEP-Ohio’s continued operation of its lower-cost generating units, thereby avoiding the need to purchase more expensive power from the market to fulfill its ongoing obligation to serve its customers. *Id.* at 14, IEU App. at 172, OCC App. at 719.

IEU’s argument is premised upon its belief that the Commission relied upon a statutory provision outside of section (B)(2) contrary to the Court’s remand decision. This is incorrect. The Commission found that R.C. 4928.143 (B)(2)(d) authorized ESP recovery of the subject carrying costs. The Commission then noted that its decision was further buttressed by R.C. 4928.143(B)(1), which provides that ESPs may include “provisions relating to the supply and pricing of electric generation service.” These environmental investment carrying costs are most assuredly such a provision. *Id.* at 15, IEU App. at 173, OCC App. at 720. This reference is entirely supplemental. It shows that the

Commission decision is in concert with other provisions of the law. However, that does not change the Commission's basis for permitting recovery of carrying costs on environmental investments – R.C. 4928.143(B)(2)(d). Rather than stray beyond the Court's mandate, the Commission acted squarely within it when it analyzed and determined whether any of the listed subcategories of (B)(2) authorized recovery of these costs. As the Commission followed this Court's instructions, IEU's argument should be rejected.

Although the Commission followed the Court's instructions exactly, it should be remembered that there are no cases applying the law of the case doctrine to Commission decisions, and for very good reason. Ratemaking is a legislative function. *Lima Telephone and Telegraph Co. v. Pub. Util. Comm'n*, 98 Ohio St. 110, 120 N.E. 320 (1918) (Syllabus). Both the Commission and the Court perform the roles assigned to them by the General Assembly. The Commission's role in reviewing an application for an ESP is to determine whether the proposed plan is more favorable in the aggregate than a market rate offer would be. Ohio Rev. Code Ann. § 4928.143(C)(1) (West 2012), App. at 6. The Commission's duty on remand is exactly what it was when the case first came to the Commission.³ The Commission order is just another Commission order. There is only one statutory standard for the review of Commission orders, that found in R.C. 4903.13. This Court applies the same standard in reviewing decisions issued by the Commission after remand as it does in any other case. *See, Consumers' Counsel v. Pub. Util.*

³ Although on remand the Commission has the benefit of this Court's direction to enable the Commission to correct errors in its decision.

Comm'n, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853. To the extent that IEU argues that some other standard should apply, IEU is wrong.

In sum, the Court spoke and the Commission listened. In its remand mandate, the Court directed the Commission to analyze the various subcategories under R.C. 4928.143(B)(2) to determine whether any of those subsections authorized recovery of environmental carrying charges. In response, the Commission determined that these costs were recoverable under Section (B)(2)(d) because they have the effect of stabilizing or providing certainty regarding retail electric service. The Commission did what the Court instructed. IEU's argument should be rejected.

Proposition of Law No. IV:

When the Court reverses and remands an order of the Public Utilities Commission establishing a revised rate schedule for a public utility, the reversal does not reinstate the rates in effect before the commission's order or replace that rate schedule as a matter of law, but is a mandate to the commission to issue a new order, and the rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order. *Cleveland Electric Illuminating Co. v. Pub. Util. Comm'n*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976) (Syllabus).

IEU asserts that the Commission unlawfully allowed AEP to collect and retain revenues for a time period dating from the May 25, 2011 Commission order establishing the remand process and ordering collection of existing pre-remand rates subject to refund to the date of the Commission's Order on Remand. This Court has said otherwise. To "remand" is to send a cause back to the original tribunal for further proceedings. A remand does not itself determine the final outcome of the cause; the judgment is given

legal effect only when it is executed upon by the lower tribunal as the Court noted.

Cleveland Electric Illuminating Co. at 111, 346 N.E.2d at 782.

Rates approved by the Commission cannot be changed unless and until the Commission acts to change them. Ohio Rev. Code Ann. § 4905.32 (West 2012), App. at 2. The law requires that the only proper rate that a utility can charge is that contained in a rate schedule or tariff approved by the Commission. That schedule, and rates contained therein, can be lawfully changed only by a subsequent Commission order. *Id.*; *Cleveland Electric Illuminating Co., supra*. In other words, where the Court reverses a Commission rate order, the rates remain in effect, and may⁴ be lawfully collected, during the pendency of the remand proceedings until the Commission acts upon the Court's mandate and directs otherwise. Because the Court's remand placed the subject issues once again before the Commission for further adjudication, the rates subject to the remand remained effective⁵ until the Commission issued its final order executing the Court's remand. *Cleveland Electric Illuminating Co., supra*. The effective judgment upon remand is the judgment of the lower tribunal. Ohio Rev. Code Ann. § 4909.17 (West 2012), App. at 3; *Cleveland Electric Illuminating Co. v. Pub. Util. Comm'n*, 46 Ohio St.2d 105, 346 N.E.2d 778 (syllabus) (1976).

⁴ In fact, they *must* be collected.

⁵ It should be noted that, prior to passing on the remanded case as a whole, the Commission directed that future collections of the rates during the remand proceedings at the Commission would be collected *subject to refund*. *In re AEP* (Entry) (May 25, 2011), IEU App. at 153-158. These amounts have been refunded. *In re AEP* (Compliance Tariffs PUCO No. 7, Original Sheet 63-1) (October 27, 2011) Supp. at 3.

The Commission correctly applied the Court's precedent and lawfully permitted continued collection of existing rates⁶ until it issued its final decision on remand. *In re AEP* (Entry on Rehearing at 8-9) (December 14, 2011), IEU App. at 246-247. IEU's contrary assertions run counter to settled jurisprudence of the Court and should be rejected.

Proposition of Law No. V:

Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal. *KECO Industries v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (Syllabus 2) (1957).

A. Introduction

Appellants wish to rewrite over five decades of consistent jurisprudence of the Court. The Commission established rates. The Company charged them. They could do nothing else. When this Court determined that a component (POLR) of those rates had not been shown to have been justified, the Commission required that collection of that component should continue but subject to refund⁷ from that point forward. It opened a proceeding to examine the question of justification. After hearing, the Commission

⁶ Again, the Commission ordered that this collection be subject to refund. *In re AEP* (Entry) (May 25, 2011), IEU App. at 153-158.

⁷ These amounts have been refunded. *In re AEP* (Compliance Tariffs PUCO No. 7, Original Sheet 63.1) (October 27, 2011), Supp. at 3.

found that the POLR component had not been justified. The Commission then did two things. It stopped future collection of the POLR component and required a refund of the POLR amounts collected subject to refund. That is all the law allows and what the Commission did.

But appellants want more. Appellants want the Commission to reach back and effectively change the rates that were legally charged. They want to do this by denying recovery of actual fuel costs. That power does not exist. The General Assembly has not authorized the Commission to do so. The Commission is not a Court of Law. It is an administrative agency whose powers are defined (and limited) by statute. It has no equitable powers.

A statutory mechanism that would have allowed the earlier rates to be collected subject to refund exists. Appellants chose not to utilize that statutory mechanism. Having failed to use the means the General Assembly provided, appellants now ask this Court to create a non-statutory mechanism. The Court must decline. Having done all that is possible, the Commission's order should be affirmed.

B. Background

On March 18, 2009, the Commission approved an ESP for Ohio Power Company and Columbus Southern Power Company. As this Court is well aware from the various appeals from a variety of Commission ESP orders for Ohio utilities, these plans are complicated. The AEP plan was no exception. It included rates based on a number of different components, two of which, POLR and fuel, are relevant here. While it was setting up

these rates, the Commission recognized that the increases might be difficult for consumers to absorb due to the economic straits that the country as a whole was facing during that period. To soften the immediate impact of the rate increases, the Commission determined that not all the components of the increases should be charged currently. It required the Company to defer the collection of certain fuel costs to a later period.

The deferral was not merely an accounting matter. The Commission has always had broad general accounting authority for utilities. Ohio Rev. Code Ann. § 4905.13 (West 2012), App. at 1-2. Deferrals created in this way are subject to later determinations as to whether the deferred amounts are proper for recovery at all.

But that is not what the Commission did in this case. R.C. 4928.144 allows the Commission to phase-in rates by creating special deferrals where the recovery is not in doubt. This is the sort of deferral created below. *In re AEP* (Opinion and Order at 22) (March 18, 2009), IEU App. at 92, OCC App. at 420. It is a phase-in of rates that are properly collectible from consumers, money to which the utility is entitled but which the utility is not collecting currently.

Appellants would like to deny AEP the recovery of these deferred fuel costs, not because they challenge the idea that customers should pay for the fuel used to produce the power that those customers consumed, but rather as a means to claw back the POLR amounts that were charged to customers before this Court's earlier decision reversing the Commission's order that established the AEP-Ohio ESP.

The law does not permit the adjustment that appellants advocate. To do as the appellants advocate is to effectively reach back and retroactively change the rates that the

Commission established in the original AEP ESP order. The law does not permit retroactive ratemaking.

C. *KECO* is well established, settled jurisprudence that should be applied in this case.

This Court long ago resolved the issue presented in this case. In *KECO Industries v. Cincinnati & Suburban Bell Telephone Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957), the Court was faced with a situation where the Commission had established a rate for a utility. This Court reversed the Commission decision establishing that rate and the Commission, in response, held a new proceeding and set a new, lower rate. A consumer filed a suit seeking restitution of the difference between the first and the second rates. This Court denied restitution.

Its reasoning was clear, statutory, and is still applicable. The Court reasoned that public utilities are subject to extensive statutory control, only the Public Utilities Commission is empowered to set rates, and only this Court is permitted to review them and, where indicated, to declare these rates to be unlawful. *KECO Industries*, 166 Ohio St. at 257, 141 N.E.2d at 468. These rates are effective immediately. Ohio Rev. Code Ann. § 4903.15 (West 2012), App. at 1. Next this Court observed that the General Assembly has established one mechanism that delays the effectiveness of a Commission order. That mechanism is the stay provision which reads:

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Ohio Rev. Code Ann. § 4903.16 (West 2012), App. at 1. A stay was not obtained in either KECO or the case below.

Next the Court observed that a utility has no alternative but to charge the rates established by the Commission. Ohio law requires this:

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

Ohio Rev. Code Ann. § 4905.32 (West 2012), App. at 2. AEP did exactly this when it charged the amounts set by the Commission in the original ESP order. AEP did nothing wrong.

The Court then proceeded to characterize the situation before it with words equally applicable here, saying:

In the present case we have rates which were established by the proper designated authority after a hearing and consideration in full compliance with the law, and, until such time as they were set aside by the Supreme Court, they were, in the absence of a stay, the lawful rates and the only ones which could be collected by the utility.

KECO Industries, 166 Ohio St. at 258, 141 N.E.2d at 468. Given this statutory structure, the Court then proceeded to reach the only conclusion possible, specifically:

From the above consideration it is our conclusion that the rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection; that 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; and that the General Assembly, by providing a method whereby such rates may be suspended until final determination as to their reasonableness or lawfulness by the Supreme Court, has completely abrogated the common-law remedy of restitution in such cases.

Id. at 259, 141 N.E.2d at 469. Simply, customers cannot get back amounts properly charged by the utility pursuant to Commission-approved tariffs.

There should be no mistake. Appellants seek restitution here. They believe that customers were improperly charged rates prior to the Court's earlier order and restitution is the means "...to prevent one from retaining property to which he is not justly entitled."

Id. at 258, 141 N.E.2d at 469. Appellants' reasoning is faulty. AEP was entitled to collect the amounts that it did. Indeed AEP had to collect those amounts. That being the case, there is nothing to grant restitution for. There is no "wrong" to be "righted".

Lest this outcome seem unfair, the Court further explained:

It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953, order of the commission and the rates finally fixed by the commission on June 4, 1954, but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation.

In any event, a consideration of the applicable statutes and the authorities cited by counsel leads me to conclude that a rate fixing order of the Public Utilities Commission of Ohio stands on a different footing than the judgment or order of a court of law and that the common-law right of restitution is not available to the plaintiffs under the circumstances of this case.

KECO Industries, 166 Ohio St. at 259, 141 N.E.2d at 469 (quoting Judge Hoy). Thus, there is no unfairness here, simply a balance between competing interests struck by the General Assembly. A statutory mechanism that would have addressed Appellant's concern exists. Appellants chose not to utilize that method and they cannot now complain.

D. AEP is entitled to Fuel Cost Recovery.

As discussed above, the "wrong" that appellant OCC seeks to "right" is not a wrong at all but merely the effect of its own inaction. OCC compounds this error by

seeking to create an entirely new wrong. It wants to seize property to which AEP is entitled. This cannot be permitted.

OCC misunderstands the nature of the fuel adjustment clause (FAC) and its associated deferrals. As a part of the order establishing the ESP for AEP, the Commission approved the FAC. The FAC mechanism was established to recover: "...fuel, including consumables related to environmental compliance, purchased power costs, emission allowances, and costs related to carbon-based taxes and other carbon-based regulations." *In re AEP* (Opinion and Order at 14) (March 18, 2009), IEU App. at 84, OCC App. at 412. These items all represent real costs of providing electric service either physically (fuel and purchased power) or by imposing environmental requirements (consumables, emission allowances, etc.) on that service. These items are all "fuel" in the old electric fuel component sense.

The Commission limited the immediate increases that customers would face as a result of the ESP by ordering a *phase-in of the rates* pursuant to R.C. 4928.144. This phase-in was accomplished by placing a cap on the amount of fuel costs that the Company could recover in a given quarter. *In re AEP* (Opinion and Order at 22) (March 18, 2009), IEU App. at 92, IEU App. at 420. AEP could recover all of its costs in a given quarter, including its fuel costs, up to that cap. Once that cap was reached, additional fuel costs would be recorded as a regulatory asset for later recovery. *Id.* at 22-23, IEU App. at 92-93, IEU App. at 420-421. By statute, these deferrals are a regulatory asset that must be recovered. Ohio Rev. Code Ann. § 4928.144 (West 2012), App. at 13. In the event that total costs were less than the cap amount, these deferrals could be added into the cur-

rent rate up to the cap amount. Per R.C. 4928.144, any unrecovered amounts at the end of the ESP would be collected through a non-bypassable surcharge. *Id.*

The Company was always entitled to recover its fuel costs. That recovery could occur in three ways. A simplified example may be helpful. If, in a given quarter the actual fuel costs were \$100 and the cap amount was \$75, the \$75 would be charged to customers through the FAC rider and the balance, \$25, would be deferred as a regulatory asset. If in the next quarter the actual fuel costs were \$70, customers would still be charged the cap amount of \$75, with \$70 reflecting the current fuel costs and \$5 as a reduction of the deferred amount, leaving a deferred regulatory asset of \$20. If the ESP ended at that point, a non-bypassable charge would be established to collect that regulatory asset, or the remaining \$20 deferred fuel amount.

S.B. 221, for the first time, empowered the Commission to establish regulatory assets in the amount of rates authorized but not collected currently. The statute provides:

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 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.*

Ohio Rev. Code Ann. § 4928.144 (West 2012), App. at 13 (emphasis added).

Once the Commission has determined that a particular increase is appropriate in an ESP it has two choices. It can either authorize that increase to take effect immediately or it can phase that increase in over time. If the latter option is chosen, the statute is highly prescriptive. The Commission must create regulatory assets, the assets must equal the amounts not collected, must include carrying charges, and must be collected through a nonbypassable charge. The utility is entitled to this money. Although the amounts recorded in the deferred regulatory asset account are subject to an accounting review to determine their accuracy,⁸ the recoverability of the costs *is not subject to later review*. It is just as though the amounts had been collected from customers.

The establishment of this phase-in structure was done in the original order in 2009. This Court did not change, or even address, that aspect of the Commission's order. The appeal time has long passed to challenge that aspect of the decision. That decision is not subject to review in this case. R.C. 4928.144 provides no mechanism under which the Commission could change the phase-in mechanism once established. Once that mechanism has operated, and regulatory assets are created, the law requires that the utility recover those regulatory assets through a non-bypassable charge. The statute provides quite clearly that "...the order shall authorize the collection of those deferrals through a nonbypassable charge..." Ohio Rev. Code Ann. § 4928.144 (West 2012), App. at 13.

⁸ Strangely, IEU refers to one of these cases, *In the Matter of the Fuel Adjustment Component for Columbus Southern Power Company and Ohio Power Company*, PUCO Case No. 09-872-EL-FAC, as an indication that the Commission itself assesses the recoverability of fuel deferrals after the fact. In actuality nothing of the sort occurred in the case. The case revolved around determining whether the correct amounts for fuel were being reported. Recovery of fuel costs was never at issue, merely the accuracy of the accounting.

There is, therefore, no means by which the Commission could provide the relief that appellants seek.

OCC argues that there has been no ratemaking and therefore there can be no bar to retroactive ratemaking. This is incorrect. The Commission did establish a rate mechanism as it had to pursuant to R.C. 4928.144. The cases cited by OCC consider precisely the kind of accounting adjustments that the Commission has⁹ and will consider in its FAC rider cases. In those proceedings the Commission considered whether the amounts recorded as fuel costs were proper. The Commission will continue to do so as regards these fuel deferrals. The argument OCC advances here is different. It would deny recovery of amounts that are proper fuel costs in an effort to provide restitution. That is an entirely different matter and is not permitted by R.C. 4928.144. The statute requires recovery of the deferred amounts so long as they are properly deferred as part of a rate phase-in.

OCC spends substantial time in its brief (pages 19-24)¹⁰ describing cases¹¹ that stand for the proposition that accounting deferrals do not determine the recoverability of the amounts deferred. This entire discussion is misdirected. In every cited instance the

⁹ See for example, In the Matter of the Fuel Adjustment Component for Columbus Southern Power Company and Ohio Power Company, PUCO Case No. 09-872-EL-FAC (Opinion and Order) (January 23, 2012), IEU App. at 345-364, OCC App. at 170-189.

¹⁰ IEU makes an equivalent error citing the additional case of *River Gas v. Pub. Util. Comm'n*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176 (2007).

¹¹ IEU also errs in citing *Columbus Southern Power v. Pub. Util. Comm'n*, 67 Ohio St.3d 535, 620 N.E.2d 835 (1993), a case which concerned normal accounting deferrals done pursuant to R.C. 4905.13, a matter irrelevant to the current case.

Commission was acting under its general accounting authority pursuant to R.C. 4905.13. That has nothing to do with this case because here the Commission exercised its authority under R.C. 4928.144 rather than applying its accounting authority. As described previously, R.C. 4928.144 mandates recovery of proper phase-in deferrals.

OCC cites to three cases in which the Court recognizes the impossibility of retroactively adjusting rates because the rates at issue were no longer in effect, and it suggests that had the rates still been in effect, retroactive ratemaking would have been appropriate. This argument fails on two levels.

First it must be observed that the rates charged to AEP's customers currently were not established by the Commission's 2009 order. That order established an ESP that ended on December 31, 2011. The statute provides a means to set a rate when a prior plan has lapsed but no plan has yet been approved to replace it, specifically R.C. 4928.143(C)(2)(b). That section provides that the Commission is only permitted to continue the prior plan, adjusting only for increases or decreases in fuel costs. There is no statutory provision that would allow the Commission to alter the rates currently being charged for anything other than changes in fuel costs. OCC does not argue that fuel costs have increased or decreased, rather it argues that fuel costs should not be collected at all so as to retroactively adjust prior rates. The statute permits no such adjustment. The rates complained of are no longer being charged and the rates that are being charged cannot be adjusted as OCC mistakenly posits.

Second, even if the rates complained of were still being collected and even if the statute permitted adjustments to those rates for something other than changes in actual

fuel costs, this Court's *KECO* decision still controls. Since the rates at issue had lapsed in the cases cited by OCC (as they have here), it was not necessary for the Court to continue with its *KECO* analysis. Impossibility of implementing an adjustment made that unnecessary. *KECO* is, however, inescapable. As was discussed extensively earlier in this brief, the analysis in *KECO* is simply an exposition of the structure that the General Assembly created. Commission orders are valid until one of two things happen, either the order is stayed by this Court or the Commission itself changes that order prospectively. The power to reach into the past to change a valid order of the Commission simply does not exist.

E. Flow Through is Irrelevant

Appellant IEU attempts to expand on OCC's effort to rewrite the law with its notion of "flow throughs." In addition to the fuel deferrals already discussed previously, IEU identifies Ormet deltas, Universal Service Fund amounts, and the Significantly Excessive Earnings test as matters that it also believes should be adjusted. IEU Brief at 26-37. None of these matters are involved here or improperly calculated in any event.

The Ormet deltas and the USF amounts were correctly calculated based on the rates that were proper at the time. There is simply nothing to be adjusted. There is nothing to flow through. As has been discussed previously, the rates that were in place were the only valid, legal rates. IEU's argument is premised on the notion that incorrect rates were being charged and, has been shown, that did not occur.

As regards the Significantly Excessive Earnings test (SEET) required by R.C. 4928.143(F), statutorily that test requires a review of the level of the earned return on equity of the utility during a given year. The return on equity simply is what it is. Even if the earnings during that year were, in some sense, improper it would not matter one whit. The SEET requires an examination of all the earnings that result from the adjustments to earlier rates which together constitute the then current ESP. There is nothing for the Commission to “flow through”. The SEET will, indeed must, be processed in exactly the same way regardless of the outcome of the decision below.

IEU’s “flow through” arguments are meritless and should be rejected.

F. Summary

Commission-approved rates are valid and must be charged. The only way to prevent them from taking effect is to obtain a stay from this Court. A stay was neither sought nor obtained below by either appellant (OCC or IEU). The rates collected below were therefore valid and there is no mechanism under law to alter them after the fact. Consumers have been charged the correct amounts at all times pursuant to statute. There is therefore no wrong to be righted and even if there were, there is no statutory mechanism that would allow alteration of a previous, valid rate as appellant IEU wishes. This structure was established by the General Assembly and only the General Assembly can change it.

CONCLUSION

This Court gave the Commission two tasks. The Commission was to determine if there was a statutory basis for allowing recovery of carrying charges on environmental expenditures and whether there was an evidentiary basis for POLR charges. The Commission found a basis for the carrying charges but not for the POLR. Therefore, the Commission eliminated the POLR charge to the maximum extent possible under the law. There is nothing more that can be done. The Commission should be affirmed.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 29th day of May, 2012.



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APPENDIX

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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.

4903.15 Orders effective immediately - notice.

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

4903.16 Stay of execution.

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

4905.13 System of accounts for public utilities.

The public utilities commission may establish a system of accounts to be kept by public utilities or railroads, including municipally owned or operated public utilities, or may classify said public utilities or railroads and establish a system of accounts for each class, and may prescribe the manner in which such accounts shall be kept. Such system shall,

when practicable, conform to the system prescribed by the department of taxation. The commission may prescribe the forms of accounts, records, and memorandums to be kept by such public utilities or railroads, including the accounts, records, and memorandums of the movement of traffic as well as of the receipts and expenditure of moneys, and any other forms, records, and memorandums which are necessary to carry out Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code. The system of accounts established by the commission and the forms of accounts, records, and memorandums prescribed by it shall not be inconsistent, in the case of corporations subject to the act of congress entitled "An act to regulate commerce" approved February 4, 1887, and the acts amendatory thereof and supplementary thereto, with the systems and forms established for such corporations by the interstate commerce commission. This section does not affect the power of the public utilities commission to prescribe forms of accounts, records, and memorandums covering information in addition to that required by the interstate commerce commission. The public utilities commission may, after hearing had upon its own motion or complaint, prescribe by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. Where the public utilities commission has prescribed the forms of accounts, records, or memorandums to be kept by any public utility or railroad for any of its business, no such public utility or railroad shall keep any accounts, records, or memorandums for such business other than those so prescribed, or those prescribed by or under the authority of any other state or of the United States, except such accounts, records, or memorandums as are explanatory of and supplemental to the accounts, records, or memorandums prescribed by the commission. The commission shall at all times have access to all accounts kept by such public utilities or railroads and may designate any of its officers or employees to inspect and examine any such accounts. The auditor or other chief accounting officer of any such public utility or railroad shall keep such accounts and make the reports provided for in sections 4905.14 and 4907.13 of the Revised Code. Any auditor or chief accounting officer who fails to comply with this section shall be subject to the penalty provided for in division (B) of section 4905.99 of the Revised Code. The attorney general shall enforce such section upon request of the public utilities commission by mandamus or other appropriate proceedings.

4905.32 Schedule rate collected.

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time. No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

4909.17 Approval required for change in rate

No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the public utilities commission, by order, determines it to be just and reasonable, except as provided in this section and sections 4909.18 , 4909.19, and 4909.191 of the Revised Code. Such sections do not apply to any rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, of railroads, street and electric railways, motor transportation companies, and pipe line companies.

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.

4928.143 [Effective Until 3/22/2012] Application for approval of electric security plan - testing.

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

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

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

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

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

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

may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

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

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

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

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

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

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan

providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

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

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

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

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

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141, division (B) of section 4928.64, or division (A) of section 4928.66 of the Revised Code.

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

termination and the recovery of those amounts as contemplated under that electric security plan.

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

Effective Date: 2008 SB221 07-31-2008

This section is set out twice. See also § 4928.143, as amended by 129th General Assembly File No. 61, HB 364, § 1, eff. 3/22/2012.

4928.143 [Effective 3/22/2012] 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) Consistent with sections 4928.23 to 4928.2318 of the Revised Code, both of the following:

(i) 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;

(ii) 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.

Amended by 129th General Assembly File No. 61, HB 364, § 1, eff. 3/22/2012.

4928.144 Phase-in of electric distribution utility rate or price.

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 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.