

ORIGINAL

IN THE SUPREME COURT OF OHIO

**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 Sale or Transfer of Certain Generating Assets** : Case No. 2012-0187  
 : Appeal from the Public  
 : Utilities Commission of Ohio

**In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan:** : PUCO Case Nos. 08-917-EL-SSO; 08-918-EL-SSO

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## STATEMENT OF THE CASE

This appeal is the continuation of this Court's review of the first electric security plan ("ESP") (covering the period 2009-2011) for Columbus Southern Power and Ohio Power Company (the "Companies" or "AEP Ohio") approved by the Public Utilities Commission of Ohio (the "Commission") on March 18, 2009 in these cases, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO (the "*ESP Order*"). (IEU Appx. 71.)\* The Court first reviewed AEP Ohio's 2009-2011 ESP in *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655 (the "*Remand Decision*"). In its *Remand Decision*, the Court conclusively determined a number of issues raised as error by the Appellants, Industrial Energy Users-Ohio ("IEU") and Office of the Ohio Consumers' Counsel ("OCC"). It reversed the Commission's determinations on two issues because the Commission's order did not adequately present the justification for its order or cite appropriate statutory authority. It remanded these two issues for further consideration by the Commission. The first of the two remanded issues was whether the provider-of-last-resort ("POLR") charge included in AEP Ohio's approved ESP could be justified on a cost-basis, as the Commission had concluded but did not adequately explain to the Court's satisfaction, or could be justified as a non-cost-based charge. *Id.* at ¶ 29-30. The second issue remanded was whether there is specific statutory authority for the inclusion in the ESP of certain carrying costs associated with pre-2009 environmental investments, in light of the Court's ruling that R.C. 4928.143(B)(2) does not permit unlisted items to be included in an ESP. *Id.* at ¶ 35.

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\* Consistent with S.Ct.Prac. R. 6.3(B) & 7(C), AEP Ohio cites to documents already included in IEU's Appendix ("IEU Appx.") and IEU's Supplement ("IEU Supp.") or OCC's Supplement ("OCC Supp.") in order to avoid needless duplication. It also cites to its own Supplement ("OPCo Supp.").

At the conclusion of the proceedings on remand, the Commission determined that the POLR charges authorized in the ESP were not sufficiently supported by the record and ordered AEP Ohio to back out the amount of the POLR charges authorized in the *ESP Order* going forward and to refund to customers POLR charges collected, subject to refund, since the first billing cycle in June 2011. *Order on Remand* at 33, 37. (IEU Appx. 191, 195.) See also May 25, 2011 Entry (ordering AEP Ohio to continue to collect the POLR charge subject to refund until a new order issued at the close of the remand proceeding). (IEU Appx. 153.) AEP Ohio sought rehearing on the POLR issue, which the Commission denied, but has not appealed the Commission's decision as to the elimination of the POLR charge.

On remand, the Commission determined that the inclusion in the ESP of the carrying costs associated with environmental investments was authorized by R.C. 4928.143(B)(2)(d) and that its decision to authorize the recovery of these carrying costs also is consistent with its broad authority under R.C. 4928.143(B)(1). *Order on Remand* at 14-15. (IEU Appx. 172-74.) IEU sought rehearing on this issue, which was denied, and IEU challenges this determination in its first four propositions of law asserted on appeal.

Notwithstanding the limited scope of this Court's *Remand Decision*, in the remand proceedings before the Commission, IEU and OCC also argued that the Commission should "flow through the effects of remand" by allowing customers to recover the amount of the POLR revenue and environmental carrying charges collected from April 2009, the beginning of the ESP period, through May 2011, the point at which the charges became subject to refund by order of the Commission after remand. *Order on Remand* at 34-36. (IEU Appx. 192-94.) To accomplish this refund of charges, IEU and OCC proposed that the Commission should adjust downward the fuel adjustment clause ("FAC") deferral balance that it had approved in the March 18, 2009 *ESP*

*Order*. The Commission found that their proposed “flow through” adjustment would constitute unlawful retroactive ratemaking and denied rehearing on that issue. *Order on Remand* at 36; *Remand Rehearing Entry* at 17, ¶ 45. (IEU Appx. 194; 255.) IEU and OCC appeal on this issue as well.

## LAW AND ARGUMENT

### *Proposition of Law No. 1*

(Response to IEU’s Propositions of Law Nos. 1 through 4)

**THE COMMISSION HAD THE AUTHORITY UNDER R.C. 4928.143 (B)(2)(d) TO APPROVE THE RECOVERY OF CARRYING COSTS ASSOCIATED WITH PRE-2009 ENVIRONMENTAL INVESTMENTS AS A COMPONENT OF AEP OHIO’S 2009-2011 ESP.**

While questions of statutory authority typically are questions of law reviewed *de novo*, the issue of whether R.C. 4928.143(B)(2)(d) authorized the Commission to approve the recovery of carrying costs associated with past environmental investments requires a determination of whether permitting the recovery of such carrying costs “would have the effect of stabilizing or providing certainty regarding retail electric service.” R.C. 4928.143(B)(2)(d). This determination is a question of fact which requires the application of the Commission’s expertise and judgment, and, therefore, is subject to review under the more deferential abuse of discretion standard. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 365, 2009-Ohio-604, 904 N.E.2d 853, ¶ 12; *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 268-269, 527 N.E.2d 777, 780 (1988).

R.C. 4928.143(B)(2)(d) expressly authorizes the Commission to include in an ESP “terms, conditions or charges relating to ... carrying costs ... as would have the effect of stabilizing or providing certainty regarding retail electric service.” The Commission correctly found that this provision empowered it to approve the recovery of carrying costs associated with

environmental investments, and in particular, the incremental capital carrying costs incurred after January 1, 2009, on environmental investments completed in 2001-2008 that were not previously reflected in AEP Ohio's rates prior to the *ESP Order*. There can be no dispute that the statute expressly authorizes the recovery of "carrying costs." Thus, the sole issue for review is whether the record supports the Commission's determination that including the recovery of these carrying costs "would have the effect of stabilizing or providing certainty regarding retail electric service." *Order on Remand* at 13-14. (IEU Appx. 171-72.)

In this instance the Commission carefully heeded the Court's admonition that it "explain its rationale, respond to contrary positions, and support its decision with appropriate evidence." *Columbus S. Power*, at ¶ 30. It cited to the specific testimony in the record upon which it based its determination that "the environmental investment carrying charges have the effect of providing certainty to both the Companies and their customers regarding retail electric service, specifically generation service." *Order on Remand* at 14. (IEU Appx. 172.) From this testimony, it concluded that the "recovery of the carrying costs works to ensure that the investors earn a return on their investment" and that because such investment extended the useful life of the Companies' low-cost coal-fired generating units, customers benefit from the lower cost power that they receive as a result. *Id.* It also agreed that AEP Ohio's "compliance with the current and future environmental requirements is in the public interest," such that it should be encouraged to continue investing in environmental equipment. The Commission responded to IEU's contrary argument both in its *Order on Remand* at 13-15 and, again, in its *Remand Rehearing Entry* at 4-9, specifically rejecting each of the arguments IEU now advances on appeal. (IEU Appx. 171-73; 242-47.) Thus, the Commission properly exercised its expertise

and judgment in determining that the inclusion of these carrying costs in the ESP was authorized by R.C. 4928.143(B)(2)(d), and its order should be affirmed.

- A. Subsection (B)(2)(d) does not require an electric distribution utility to demonstrate that the carrying costs are “necessary” to the provision of retail electric service; it permits the Commission to include in an ESP carrying costs that “would have the effect of stabilizing or providing certainty regarding retail electric service.”**

In its first proposition of law, IEU urges the Court to narrowly read subsection (B)(2)(d) as permitting the recovery of carrying costs only when the carrying costs have the effect of providing “certainty” regarding retail electric service, which it defines to mean “are necessary to make it probable that customers would receive retail electric service.” (IEU Br. at 13-14.) No such “necessity” component appears in the statute, and in fact, the Court would have to re-write the statute to reach the result IEU seeks. The statute on its face allows for the recovery of carrying costs where they would have the effect of “*stabilizing or providing certainty* regarding retail electric service.” (Emphasis added.) Thus, IEU’s argument violates the most basic tenet of statutory construction – that the language controls and the Court should not read words (“necessary”) into the statute or read words (“stabilizing”) out of the statute. *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 420, 2007-Ohio-2203, 865 N.E.2d 1275, ¶ 12; *Columbia Gas Transm. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio- 511, 882 N.E.2d 400, ¶ 19.

There is probative testimony in the record that recovery of the carrying costs on the pre-2009 environmental investments would have the effect of providing certainty regarding retail electric service from the Companies’ perspective. Philip Nelson, AEP’s director of strategic initiatives in its corporate budgeting department, explained that “[t]he capital carrying cost is the annual cost associated with the investment of a dollar of capital asset improvement” and that the

carrying cost rate includes such components as the cost of money, depreciation, taxes and administrative expenses. He also testified “[i]nvestors require both a return on and of their capital expenditures.” (Co. Ex. 7 at 15-16.) (OCC Supp. 121-22.)

Mr. Nelson also testified to the effect of the environmental improvements from the customers’ perspective. He testified that the improvements that resulted in the carrying costs extended the useful life of AEP Ohio’s low-cost coal fired generating units and that retail customers reap the benefit of this investment because AEP Ohio passes the benefit of this lower cost power on through the fuel adjustment clause.

These environmental investments are necessary to keep the Companies’ low-cost coal-fired generating units running. The customers will benefit because the operating costs of these units remain well below the cost of securing the power on the market. The Companies are passing the lower-cost power through the FAC. Furthermore, the Companies’ customers and the State of Ohio benefit when the Companies purchase locally produced high-sulfur coal for use in its generating units, which is facilitated through these environmental investments.

(Co. Ex. 7b at 6.) (OPCo Supp. 6.)

On the basis of this testimony, it was logical and reasonable for the Commission to conclude that the availability of the lower-cost power, made possible by the environmental investments giving rise to the carrying costs, has the effect of stabilizing the price of, and providing certainty regarding, retail electric service. *Order on Remand* at 14; *Remand Rehearing Entry* at 5. (IEU Appx. 172; 243.) Even IEU concedes this point by its statement that: “Lower cost power may in fact have the effect of lowering or ‘stabilizing prices.’” (IEU Br. at 15)

IEU argues on appeal that the Commission’s finding is nevertheless against the manifest weight of the evidence because the Commission ignored the testimony of IEU executive director, Kevin Murray, regarding how PJM, the regional transmission organization, actually dispatches power to load serving entities in its region, which includes AEP Ohio. (IEU Br. at 15-16.) The

Commission did not ignore this testimony. It considered Mr. Murray's testimony but found it irrelevant, because as shown by Mr. Nelson's testimony, AEP Ohio "in actual practice, generally uses its owner generating units to serve its customers and passes the benefit of the lower cost power to its customers through the FAC." *Remand Rehearing Entry* at 5, ¶ 13. (IEU Appx. 243.) It also noted that "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." *Id.* The Commission's determination that Mr. Murray's testimony was not relevant, while Mr. Nelson's testimony was relevant, probative and credible, is precisely the type of finding that invokes the Commission's technical expertise and judgment and is, therefore, entitled to deference in this Court's review. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d at 365, ¶ 12; *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d at 268-269.

Even without such deference, however, the Commission's finding should be accepted because the lack of relevance is obvious given that Mr. Murray's testimony was offered solely in connection with the POLR issue and makes no link whatsoever to the carrying cost issue. Mr. Murray was merely opining that because AEP Ohio is a member of an RTO, as required by federal law, it is not at risk regarding its state law obligation to "physically provide generation supply" as the provider of last resort. (IEU Ex. 2 at 5.) (IEU Supp. 57.)

**B. Subsection (B)(2)(d) does not require the electric distribution utility to demonstrate an "economic basis" for authorizing the recovery of carrying costs in an ESP.**

In its second proposition of law, IEU argues that the Commission's decision is unlawful because AEP Ohio did not demonstrate an economic basis for the recovery of the carrying costs on its pre-2009 environmental investments. The Commission properly rejected this argument

because there is nothing in subsection (B)(2)(d) that requires the Commission to conduct an earnings test and find that the electric distribution utility's other revenues do not provide adequate compensation as a prerequisite for authorizing the recovery of carrying costs. IEU is once again attempting to read a requirement into subsection (B)(2)(d) that simply is not found in the statutory language. The only requirement under this statutory subsection is that the recovery of carrying costs in the ESP "would have the effect of stabilizing or providing certainty regarding retail electric service."

The Commission further addressed IEU's position by noting that the record established that there, in fact, was an economic basis for the recovery of the environmental investment carrying costs, even though such finding is not statutorily-required, because the charges were not reflected in the Companies' existing rates prior to the approval of the 2009-2011 ESP. *Remand Rehearing Entry* at 6, ¶ 16. (IEU Appx. 244.) IEU does not dispute this factual finding on appeal. Rather, it insists that the Commission's factual finding that there was indeed an economic basis for authorizing the recovery of the carrying costs is insufficient because an earlier "policy" created by the Commission required the Companies to justify any increase in the ESP rate by showing that the other authorized revenues do not provide adequate compensation. IEU claims that the Commission created this policy in its original *ESP Order*, issued on March 18, 2009, when it refused to approve a separate rider for various elements of AEP Ohio's proposed Enhanced Service Reliability Plan ("Reliability Plan") without addressing the costs of the proposed initiatives in a full rate review. (IEU Br. at 17-18.)

IEU's "policy change" argument has no merit because the Commission has not previously interpreted subsection (B)(2)(d) to require an economic basis for approving charges. It certainly did not create any such policy in its earlier ruling regarding the Companies' proposed

Reliability Plan rider. In its Reliability Plan ruling the Commission limited its approval of the proposed rider to permit the recovery of only the incremental costs associated with an enhanced vegetation initiative, an initiative it had previously reviewed, and not costs associated with other service reliability initiatives that had not previously been reviewed by the Commission. In doing so, the Commission did not create any new policy and certainly did not create any policy applicable to subsection (B)(2)(d). Rather the Commission merely acted consistently with prior policy it had relied on in applying R.C. 4928.143(B)(2)(h).

Consistent with prior decisions<sup>1</sup>, the Commission also believes that, pursuant to the sound policy goals of Section 4928.02, Revised Code, a *distribution rider* established pursuant to Section 4928.143(B)(2)(h), Revised Code, should be based upon the electric utility's prudently incurred costs.

*ESP Order* (Mar. 18, 2009) at 34. (Emphasis added.) (IEU Appx. 104.) A Commission “policy” of requiring a cost-based justification for approval of a distribution rider under subsection (B)(2)(h) has no application to the approval of charges related to generation service under subsection (B)(2)(d). Distribution service, unlike generation service, is not a competitive service, which necessitates a greater focus on cost in setting distribution rates and riders.

**C. The Commission appropriately determined that approving the recovery of the environmental investment carrying costs in the Companies’ ESP rates is consistent with the broad authority granted to the Commission by Section 4928.143(B)(1), Revised Code.**

IEU devotes its third proposition of law to criticizing the Commission for its conclusion that its decision to approve the recovery of carrying costs on environmental investments “is consistent with the broad authority granted to the Commission by [R.C. 4928.143(B)(1)], which authorizes ESPs to include ‘provisions relating to the supply and pricing of electric generation service.’” *Order on Remand* at 15. (IEU Appx. 172.) The Commission made this observation only after first concluding that the inclusion of these carrying costs in the ESP was authorized by

subsection (B)(2)(d). The Commission based this additional conclusion on its finding that “[t]he carrying charges are a specific component of the Companies’ standard service offer generation rates and are directly related to environmental investments made at generating facilities which are used to serve standard service offer customers.” *Id.*

IEU cannot attack this finding on the merits because the statutory provision is plainly and broadly worded to permit provisions related to the pricing of generation service in an ESP. Subsection (B)(1) states that “[a]n electric security plan *shall include* provisions relating to the supply and pricing of electric generation service.” (Emphasis added.) Indeed, the pricing of generation service is the basic purpose of an ESP. An ESP is one of the two alternatives now available to set the terms and conditions of an electric distribution utility’s standard generation service offer. The ESP process exists “[f]or the purpose of complying with section 4928.141 of the Revised Code,” the statute that establishes the utility obligation to provide a SSO for generation service. R.C. 4928.143(A). Because it cannot attack the merit of the Commission’s determination, IEU launches a two-prong procedural attack, which claims that: 1) the Commission may not advance a legal justification for its decision not pressed by the prevailing parties, and 2) the Court’s *Remand Decision* limited the Commission’s ability to look beyond subsection (B)(2)(d). Neither attack has merit.

IEU’s theory – that it is illegal for the Commission to think for itself in determining whether it has the requisite statutory authority to act – is a very odd and unprecedented theory. It runs counter to the abundant authority recognizing the Commission’s unique role and expertise in administering the complex scheme of public utility rate regulation, which role sometimes requires the Commission to discern, subject to this Court’s review, the legislative intent underlying a statute. *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d

208, 210, 2007-Ohio-4790, 874 N.E.2d 764, ¶ 11; *Consumers' Counsel v. Pub. Util. Comm.*, 58 Ohio St.2d 108, 110, 388 N.E.2d 1370 (1979). See also *Constellation NewEnergy Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 540, 2004-Ohio-6767, 820 N.E.2d 885, ¶ 51 (“Due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility.”)

IEU’s reliance on its novel “no-independent-thinking” theory in this case also runs counter to the well established precedent that a Commission order will not be reversed on appeal if the alleged error had no effect on the ultimate outcome. *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 402 N.E.2d 1175 (1980); *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 161, 378 N.E.2d 480 (1978). Here the fact that the Commission *sua sponte* realized the significance of subsection (B)(1) did not cause any prejudice to IEU. The Commission announced its view in its *Order on Remand* and IEU had the opportunity to challenge the merits of the Commission’s observation on rehearing. IEU did not take advantage of that opportunity, however, because it chose to limit its discussion of this issue to only what it perceived to be the procedural aspects of the Commission’s determination. (IEU AFR at 9-13.) (IEU Appx 212-16.) Because IEU voluntarily waived its right to challenge the merits of the Commission’s interpretation of subsection (B)(1) by not addressing the merits in its application for rehearing, it cannot now credibly argue that the Commission “unfairly invented and injected” this additional issue into the case on remand. (IEU Br. at 21.)

IEU’s reliance on the “law of the case” doctrine to suggest the Commission’s consideration of subsection (B)(1) was unlawful also is completely misplaced. For the law of the case doctrine to apply, the reviewing court must have made a “determination of the applicable law.” *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984) (“Thus, where at a rehearing

following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law.”) The Court made no such binding determination with respect to subsection (B)(1) in its *Remand Decision*. Quite to the contrary, the Court determined only that R.C. 4928.142(B)(2) does not permit ESPs to include unlisted items. *Remand Decision* at ¶ 35. The Court remanded the case to the Commission for the express purpose of having the Commission determine whether there was an express statutory basis for including the environmental improvement carrying costs in the ESP. Although the Court noted that “[o]n remand, the commission may determine whether any of the listed categories of (B)(2) authorize recovery of environmental carrying charges,” *id.*, the Court did not preclude the Commission from considering other alternative or additional provisions in R.C. 4928.143. And, because the Court did not even mention subsection (B)(1) in its discussion of this issue, it certainly did not establish as the law of the case that (B)(1) does not apply in this instance.

**D. The Commission’s May 25, 2011 decision to allow the Companies to continue to collect the environmental investment carrying cost charges in their tariffs, subject to refund, was lawful and in accordance with the Court’s precedent. *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976).**

In its fourth proposition of law, IEU argues it was unlawful for the Commission to permit the Companies to continue to collect the environmental carrying costs charges in their ESP rates, even subject to refund, after the *Remand Decision* reversed the Commission’s legal determination that R.C. 4928.143(B)(2) permits ESPs to include unlisted items. (IEU Br. at 23-25.) IEU’s proposition of law is directly contrary to this Court’s holding in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 346 N.E.2d 778 (1976), that:

When this 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. (*Gene Slagle, Inc. v. Pub. Util. Comm.*, 41 Ohio St.2d 44, 322 N.E.2d 640, overruled.)

The contrary proposition IEU advances on appeal is the same proposition stated in *Gene Slagle v. Pub. Util. Comm.*, which was expressly overruled by the Court in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm. Id.*, 46 Ohio St.2d at 106 (noting that *Slagle* held “that when an order of the commission changing utility rates has been reversed by this court for failing to adequately set forth the reasons prompting the decision, ‘the increased rates pursuant to such order could no longer be lawfully charged, and those rates in effect prior to the above order were reinstated by operation of law, and continued in effect until further order of the commission.’”). Thus, if this Court were now to adopt IEU’s position, it would have to overrule *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* and reinstate *Gene Slagle*.

This Court has follows *stare decisis* as a salutary rule of law unless three conditions are met. In *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, Syllabus 1, the Court held:

A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

AEP Ohio brought this Court holding in *Cleveland Elec. Illum. Co.* to the attention of IEU in its memorandum contra IEU’s application for rehearing at 5 (OPCo Supp. 14) and the Commission relied on the case in its *Remand Rehearing Entry* at 8, ¶ 22. (IEU Appx. 246.) Yet, IEU fails to acknowledge this Court’s prior holding in advancing its fourth proposition of law, and makes no effort to address why the Court’s prior holding in *Cleveland Elec. Illum. Co.* is not applicable or

should be reversed. Having been expressly made aware of the direct precedent contrary to its position, it is inexcusable for IEU not to have acknowledged the case in its opening brief when making the argument that this Court's *Remand Decision* rendered the collection of the environmental carrying costs unlawful after April 11, 2011.

Not only has IEU failed to offer any reason for overruling *Cleveland Elec. Illum. Co.*, no good reason exists. That the Court fully examined the significance of a remand decision in its prior decision is clear from its thoughtful opinion and the fact that it took the unusual step of overruling its own precedent from just one year prior. Thus, it cannot be said that the decision was "wrongly decided at the time." Nor have there been any significant changes in the applicable law. While IEU may try to argue belatedly that the case is no longer "good law" given the sea change in the regulatory landscape effected by S.B. 221, such argument ignores the fact that the case turned on the Court's interpretation of its own authority under R.C. 4903.13 and the legal significance of a remand order. The Court concluded:

When a court acts to remand a cause, it is not itself finally determining the outcome of the cause, nor is it executing a judgment in favor of one of the parties. The judgment is given legal effect when it is executed by the lower tribunal, and the judgment as rendered is that of the tribunal to which the cause had been remanded.

*Id.*, 46 Ohio St.2d at 110. The Court's decision did not depend in any way on the pre- S.B. 3 statutes governing the formula and components for setting rates in the pre-competition era, but rather focused on the procedural aspects for setting rates, the interplay between the Court and the Commission, and the significance of the filed rate doctrine, announced in *Keco v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). The statutes and principles relied on in *Cleveland Elec. Illum. Co.* remain unchanged today. Thus, the Court should not revisit the holding in *Cleveland Elec. Illum. Co.* because the first *Galatis* condition is not met.

Nor are the second and third *Galatis* conditions satisfied in this case. The holding in *Cleveland Elec. Illum. Co.* continues to be a practical and workable standard, one that applies evenly to the utilities and their customers. When the Court remands an issue, as it did here, it is not finding the result – the rate – is unlawful, it is merely saying that the Commission did not adequately support the result it reached. It leaves it up to the Commission, the body entrusted by the Legislature with the authority to set rates, to revisit the issue by either offering alternative support or modifying its original decision. In short, it puts the Commission back in control and defers to the Commission’s greater expertise and competence to determine whether the rates should be maintained or modified on either an interim or final basis.

The result IEU seeks is both impractical and unfair. If, as IEU suggests, the effect of a remand decision is to render the existing rates on file with the Commission unlawful and ineffective, and restore the rates in effect prior to the Commission’s action, the result is charging rates that the Commission determined were not reasonable. *See Cleveland Elec. Illum. Co.*, 46 Ohio St.2d at 115. Leaving in place the rates the Commission previously reviewed and found reasonable, and more appropriate and defensible than the prior rate schedule, is a more workable alternative in that it fosters stability and predictability, until the Commission has adequate time to thoughtfully consider the issues on remand. While there is some unfairness, as the Court recognized, the unfairness is evenly balanced. If the import of the Court’s reversal with a remand is that the rates are temporarily too high, the delay affects the customers, but, if the import is that the rates are too low, the unfairness is to the utility, not the customer. *Id.* at 117. In short, this Court fully considered the practical and fairness aspects of its holding in *Cleveland Elec. Illum. Co.* It determined that the *Slagle* rule, which IEU is seeking to restore, was impractical and unfair and that the current rule, though not perfect, was workable and even-

handed and better comported with the statutory structure and the respective roles of the Court and the Commission. IEU has not offered any reason, nor is there any reason, to overrule *Cleveland Elec. Illum. Co.*

***Proposition of Law No. 2***

(Response to IEU's Propositions of Law Nos. 5 through 8 and OCC Proposition of Law No. 1)

**THE COMMISSION-APPROVED RATES REMAIN THE LAWFUL RATES TO BE CHARGED UNTIL SUCH TIME AS THE COMMISSION ORDERS DIFFERENT RATES TO BE CHARGED. EVEN IF THE COMMISSION CONCLUDES ON REMAND THAT A DIFFERENT RATE SHOULD BE CHARGED, THE COMMISSION MAY NOT REFUND OR CREDIT THE AMOUNTS COLLECTED UNDER THE APPROVED RATES OR REDUCE OTHER APPROVED RATES OR CHARGES BY AN EQUIVALENT AMOUNT.**

On appeal IEU and OCC challenge the Commission's rejection of their request that it "flow through the effects" of this Court's *Remand Decision*, by reducing the deferred fuel adjustment clause ("FAC") expense balance remaining at the end of 2011 (that is to be recovered, as ordered by the Commission in its *ESP Order* via an unavoidable surcharge from 2012 to 2018) by an amount equal to the POLR and environmental investment carrying cost charges they contend were "unlawfully" collected from customers during the period April 2009 through May 11, 2011. IEU pushes its "flow through" argument even further by arguing that the Commission should have made downward adjustments in other areas affected by the allegedly "unlawful" recovery of POLR and environmental investment carrying charges, such as mechanisms that allow the recovery of delta revenue, the universal service fund and the operation of the significantly excessive earnings test under R.C. 4928.143(F). (IEU Br. at 29-30.)

This "flow through" argument has no merit because it is based on the faulty premise that the POLR and environmental investment carrying charges were "unlawfully" collected during

this period of time. As this Court squarely held in the *Cleveland Elec. Illum. Co.* case, a remand order does not render the existing rates unlawful, the “rate schedule filed with the Commission remains in effect until the commission executes this court’s mandate by an appropriate order.” *Id.*, 46 Ohio St.2d at Syllabus 1. See also *Keco v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. at 259. In addition, the relief IEU and OCC seek constitutes unlawful retroactive ratemaking. Regardless of whether they call it an adjustment, a credit, a reduction in deferrals, or an offset, what IEU and OCC seek is a refund of the amounts AEP Ohio lawfully collected in accordance with its approved ESP and the tariffs on file with the Commission.

Although the question of whether Commission action constitutes retroactive ratemaking is predominantly a question of law for *de novo* review, the analysis in this instance depends on certain predicate factual determinations made by the Commission, such as effect of the deferral of the incremental FAC costs and the mechanism by which they are to be recovered. As to these factual determinations, the Court follows the more deferential abuse of discretion standard. *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d at 365, ¶ 12; *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d at 268-269.

**A. AEP Ohio did not unlawfully collect any POLR charges or environmental investment carrying charges during the ESP term.**

The predicate of the Appellants’ proposed “flow through” remedy – that AEP Ohio collected unlawful charges – is plainly wrong. AEP Ohio lawfully collected POLR charges and environmental investment carrying charges, consistent with the Commission’s approval of its ESP, and the Court’s *Remand Decision* did not render the collection of the charges unlawful. As discussed above, the applicable rule of law is that stated in *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, which clearly holds that when this Court reverses and remands a Commission rate order, in whole or part, it does not render the approved rates on file with the Commission

unlawful or ineffective. “The rate schedule filed with the commission remains in effect until the commission executes this court’s mandate by an appropriate order.” *Id.* at Syllabus 1.

Nothing in the Court’s *Remand Decision* suggests that it intended to deviate from this rule of law or render it inapplicable in this case. Quite to the contrary, the Court clearly stated that while it was reversing the Commission’s specific determinations, it was not saying the charges were unlawful. The Court remanded the two issues with the instruction that the Commission look again at the issues and better support and explain, or modify, its order. With respect to the POLR charge, the Court concluded only that the Commission’s “characterization of the POLR charge as cost-based lacks any record support.” *Remand Decision* at ¶ 24. In remanding the POLR issue for further consideration by the Commission, the Court emphasized that the remand proceeding need not result in a change to the POLR charge. The Court stated:

To be clear, we express no opinion on whether a formula-based POLR charge is per se unreasonable or unlawful, and the commission may consider on remand whether a non-cost based POLR charge is reasonable and lawful. Alternatively, the commission may consider whether it is appropriate to allow AEP to present evidence of its actual POLR costs. However the commission chooses to proceed, it should explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.

*Remand Decision* at ¶ 30. With respect to the recovery of environmental investment carrying costs, the Court disagreed with the Commission’s interpretation of R.C. 4928.143(B)(2)(d), but left the door open for the Commission to justify the recovery of these costs in the ESP under one of the listed items in subsection (B)(2)(d) or another statutory provision. *Id.* at ¶ 35. There is nothing in the Court’s opinion upon which IEU and OCC can properly rely to say the effect of the Court’s *Remand Decision* was to render the POLR charges or the recovery of the carrying costs unlawful going back to April 2009 and until the Commission issued its *Order on Remand*.

Moreover, after receiving the Court’s mandate, the Commission expressly revisited the

question of whether these charges should be eliminated pending its further review. On May 25, 2011, the Commission issued an Entry directing the Companies:

to file revised tariffs specifically stating that the POLR riders and the environmental carrying charges are subject to refund by May 27, 2011, to be effective as of the first billing cycle of June 2011. Until the Commission issues its decision on remand, AEP-Ohio shall continue to collect the current tariff rates, subject to refund, commencing with the first billing cycle of June 2011.

Entry, May 25, 2011 at 4, ¶ 9. (IEU Appx. 156.) Thus, consistent with its obligation under R.C. 4905.32, this Court's precedents and the Commission's order, AEP Ohio was required by law to charge and collect the POLR charges and the environmental investment carrying charges from the start of the ESP term in April 2009 through October 3, 2011, when the Commission issued its *Order on Remand*. Thus, there are no unlawful charges to be recouped or overstated balances to be adjusted.

**B. Appellant's proposed "flow through remedy" constitutes unlawful retroactive ratemaking.**

The indisputable rule of law followed by this Court prohibits retroactive ratemaking. The Court reaffirmed this well-settled rule in its *Remand Decision* at ¶ 16.

[U]nder *Keco*, we have consistently held that the law does not allow refunds in appeals from commission orders. As we stated only two years ago, "any refund order would be contrary to our precedent declining to engage in retroactive ratemaking." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21; see also, e.g., *Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, ¶ 27 ("Neither the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in *Keco* \* \* \*"); *Keco*, 166 Ohio St. 254, 2 O.O.2d 85, 141 N.E.2d 465, paragraph two of the syllabus (R.C. Title 49 "affords no right of action for restitution of the increase in charges collected during the pendency of the appeal"). These precedents remain good law and still apply to these facts, thus prohibiting the granting of a refund.

OCC's and IEU's "flow-through theory" is nothing more than a ruse for prohibited retroactive ratemaking. The proposed reduction in the balance of the deferred fuel costs is nothing more

than a refund by a different name. What Appellants are asking the Court to do is to order the Commission to do indirectly something it cannot do directly – refund lawfully collected rates previously approved by the Commission.

1. **The fuel deferral balance is not a “pot of revenues” deferred for future collection; it is comprised of actual fuel expenses and carrying costs the Commission has ordered to be recovered by means of an unavoidable surcharge as required by R.C. 4928.144.**

OCC attempts to disguise and justify its latest refund theory by mischaracterizing the nature of the deferral balance it seeks to reduce by the amount of the POLR and environmental carrying charges. OCC argues that the deferred FAC expense balance is really just an undifferentiated “pot of increased revenues,” which includes POLR revenues and other revenues that have “nothing to do with fuel expenses,” and have yet to be collected. (OCC Br. at 3, 13, 29.) It then suggests that because there were still POLR revenues in the deferral balance, the Commission could rightfully reach into that “pot” and extract them without crossing the line of retroactive ratemaking. Alternatively, it argues that there is no unlawful retroactive ratemaking because the deferral component of the ESP was just an accounting mechanism, and did not rise to the level of “ratemaking.” (OCC Br. at 19.) IEU echoes OCC’s points and argues that its “flow-through” mechanism is not retroactive ratemaking because “[t]he phase-in deferral balance, however, is an accounting estimate of the yet-to-be collected portion of the total revenue authorized by the Commission in its initial, and now illegal, ESP decision.” (IEU Br. at 40.)

These are not new arguments. IEU and OCC made these arguments in the remand proceeding below and the Commission rejected them as unfounded. *Order on Remand* at 34-36; *Remand Rehearing Entry* at 17. (IEU Appx. 192-94; 255.) The Commission rejected these arguments because they all flow from a fundamental misreading of the Commission’s prior *ESP*

*Order* and its approval of the fuel deferrals. The fuel deferral allowed the Commission to defer the Companies' fuel costs to a later date to mitigate the rate impact on customers. The costs were recorded and established for future cost recovery as a means to lessen the impact on customers of the new rates at the time. Because the Commission's rejection of IEU's and OCC's position was based on a factual finding well within the Commission's expertise – its interpretation of its own prior order – the Commission's determination is entitled to deference and should not set aside absent a showing that the Commission abused its discretion in interpreting its own order.

As the Commission notes in its *Order on Remand* at 36, the FAC deferral balance is not an undifferentiated pot of ESP revenue increases waiting to be collected. (IEU Appx. 194.) The deferred balance consists exclusively of actual FAC expenses plus carrying costs not recovered as of the end of 2011. Moreover, the Commission's March 18, 2009 *ESP Order* did not merely authorize the deferral of these expenses as an accounting measure, it actually ordered the recovery of these expenses, as required by R.C. 4928.144, which "mandates that any deferrals associated with the phase-in authorized by the Commission shall be collected through an unavoidable surcharge." *ESP Order* at 22-23. (IEU Appx. 92-93.) So as not to be confused by the Appellants' lengthy descriptions of their view of the nature of the deferral ordered in the ESP, the Court should base its determination on the actual order, not their characterization of the order. The key passages of the *ESP Order's* "FAC Deferral" discussion are set out here.

The Companies proposed to *mitigate the rate impact on customers of any FAC increases* by phasing in their new ESP rates by *deferring a portion of the annual incremental FAC costs* during the ESP . . . . The amount of the *incremental FAC expense* that would be recovered from customers would be limited so that total bill increases would not be more than 15 percent for each of the three years of the ESP (Id.) . . . . Under the Companies' proposal, *any incremental FAC expense that exceeds the maximum rate levels will be deferred.*

\* \* \* \*

To ensure rate or price stability for consumers, Section 4928.144, Revised Code, authorizes the Commission to order any just and reasonable phase-in of any electric utility rate or price established pursuant to 4928.143, Revised Code, with carrying charges, through the creation of regulatory assets. *Section 4928.144, Revised Code, also mandates that any deferrals associated with the phase-in authorized by the Commission shall be collected through an unavoidable surcharge.* Section 4928.144, Revised Code, does not, however, limit the time period of the phase-in or the recovery of the deferrals created by the phase-in through the unavoidable surcharge.

Contrary to OCC and others,<sup>1</sup> we believe that a phase-in of the increases is necessary to ensure rate or price stability and to mitigate the impact on customers during this difficult economic period, even with the modifications to the ESP that we have made herein. \* \* \* \*Therefore, we exercise our authority pursuant to Section 4928.144, Revised Code, and find that the Companies should phase-in any authorized increases so as not to exceed, on a total bill basis, an increase of 7 percent for CSP and 8 percent for OP for 2009, an increase of 6 percent for CSP and 7 percent for OP for 2010, and an increase of 6 percent for CSP and 8 percent for OP for 2011 are more appropriate levels.

\* \* \* \*

Any amount over the allowable total bill increase percentage levels will be deferred pursuant to Section 4928.144, Revised Code, with carrying costs. If the *FAC expense* in a given period is less than *the maximum phase-in FAC rate established herein*, the Companies shall begin amortization of the prior deferred FAC balance and increase the FAC rates up to the maximum levels allowed to reduce *any existing deferred FAC expense balance*, including carrying costs. As required by Section 4928.144, Revised Code, *any deferred FAC expense balance remaining at the end of 2011 shall be recovered via an unavoidable surcharge.*

\* \* \* \*

[W]e find that the collection of any deferrals, with carrying costs, created by the phase-in that are remaining at the end of the ESP term shall occur from 2012 to 2018 as necessary to recover the actual fuel expenses incurred plus carrying costs.

*ESP Order* at 20-23 (Emphasis added.) (Citations and footnotes omitted.) (IEU Appx. 90-93.)

As the Commission found in its *Order on Remand* at 35, Appellant's recitation of the nature of the deferral balance cannot be squared with the reality of what the Commission actually ordered. There is no pot of undifferentiated ESP revenues waiting to be collected. What exists is a deferred balance of actual fuel expenses and carrying costs that the Commission ordered will be recovered via an unavoidable surcharge in 2012 to 2018. The *ESP Order* was a ratemaking

order, not merely an accounting order. Had the Commission acquiesced to Appellants' demand to reduce the deferral balance, in order to refund the POLR and carrying cost charges collected during the ESP, it would have engaged in unlawful retroactive ratemaking. The Commission rightfully rejected Appellants' theories and the Court should as well.

Accepting Appellants' theory would seriously undermine the ability of the Commission and the utilities to implement expense deferral mechanisms in the future. It would call into question whether the Commission's deferral orders may be relied upon, and, as a result, would call into question whether the deferrals themselves are legitimate. Such a result would conflict with R.C. 4928.144, which requires that a phase-in 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." It would also conflict with R.C. 4928.143(d), which limits the Commission's authority to include in an ESP only such "deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service." The stated purpose of the deferral was to stabilize rates during the ESP for the customers, while at the same time providing certainty to the Companies and their investors that they would not be denied recovery of their actual fuel costs. And it would conflict with R.C. 4928.143(B)(2)(f)(i), which authorizes an ESP to include "[p]rovisions 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 [R.C. 4928.144]." The authority to securitize deferred expenses and carrying costs will rarely, if ever, be a meaningful rate stabilization mechanism in Ohio if the Commission can retroactively reduce deferral balances subject to securitization.

**2. Appellants seek to modify a prior ratemaking order.**

OCC, in particular, labors hard to analogize this case to other cases in which the Commission or Court has not found retroactive rate regulation. Its lengthy discussion of these cases adds some bulk to its argument, but no weight. Cases involving deferral accounting, where the reasonableness of the deferral amount is not determined or there is no right to collect the deferral, e.g. those cited by OCC at 20-24, are simply inapposite, because the *ESP Order* did mandate the recovery of the FAC deferrals by a specific means, an “unavoidable surcharge” as required by R.C. 4928.144, and at a specific time, 2012 through 2018. The reasonableness or the recoverability of the deferrals were not left for a later determination.

Similarly, OCC’s attempt to distinguish *Lucas County Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997), this Court’s *Remand Decision*, and other cases in which unlawful retroactive ratemaking was found to exist (OCC Br. at 27) is dependent on its misreading of the *ESP Order*. Here, just as in those cases, Appellants are seeking to recoup a charge that has expired; there is no current stream of POLR revenues against which prior payments can be offset. As demonstrated above, the FAC deferral balance is not a pot of “deferred revenue increases” just waiting to be collected; it is comprised of actual fuel expenses and carrying costs that the Commission ordered to be recovered via a surcharge in 2012 through 2018.

OCC’s attempt to compare this case to *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835 (1993) fares no better. In that case, the Court properly required the Commission to provide a mechanism to allow Columbus Southern Power to recover approved revenues the Commission improperly deferred because the revenues sought to be recovered constituted a portion of the rates to which the Company was already entitled under the

existing rate order. The later recovery order, therefore, was consistent with the original ratemaking order. Here in contrast, Appellants are seeking to deprive AEP Ohio of a significant portion of an actual cost recovery the Commission ordered to be collected in a future surcharge. The proposed remedy countermands the original ratemaking order. There is no doubt about it. They are seeking to compel the Commission to retroactively modify its prior ratemaking order.

**C. The FAC cost deferrals were properly approved in the Commission's prior final ESP Order and are not now subject to collateral attack.**

OCC and IEU try to justify their refund theory by arguing that the FAC deferral balance is bloated by the amount of the POLR charges and a portion of the environmental investment carrying cost charges collected during the ESP period and, therefore, is properly reduced by a like amount. They attack the deferral balance as not being "just and reasonable" as required by R.C. 4928.144. In addition to being contrary to the facts and unlawful retroactive ratemaking, their remedy theory is an impermissible collateral attack on the reasonableness of the FAC cost deferral itself.

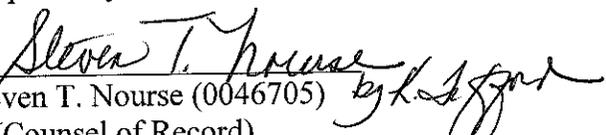
The fuel cost deferral was approved three years ago in the Commission's March 18, 2009 *ESP Order* in this case. IEU did not challenge that portion of the order on rehearing. OCC sought rehearing but argued only that the FAC deferrals were unfair and would have a destabilizing effect. (OCC April 17, 2009, AFR at 42-44.) (OPCo. Supp. 39-41.) OCC did not argue for rehearing of the FAC deferrals on the grounds that they would be overvalued by the amount of any charges subsequently found to be unjustified. It did not make this argument even though in its application for rehearing, it attacked the justification for both the POLR charges and the recovery of the environmental carrying costs. (*Id.* at 29, 37.) OCC did not pursue its assignment of error regarding the FAC deferrals in its prior appeal of the *ESP Order* as is evident from the fact there is no mention of this issue in the Court's *Remand Decision*. As a result,

neither the validity of the FAC deferrals nor the amount of the deferral balance is properly attacked in this second appeal. That the FAC deferral is just and reasonable as required by R.C. 4928.144, and that the amount of the balance is appropriate, is the law of the case. The law of the case doctrine “precludes a litigant from attempting to rely on arguments at a retrial which were fully pursued, or available to be pursued, in a first appeal.” *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404, 659 N.E.2d 781 (1996).

### CONCLUSION

For all the foregoing reasons, AEP Ohio asks that the Commission’s *Order on Remand* be affirmed.

Respectfully submitted,

  
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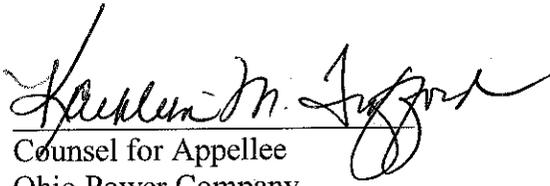
**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and accurate copy of this Merit Brief of Appellee Ohio Power Company was served upon the following counsel of record by regular U.S. Mail, postage pre-paid, the 30<sup>th</sup> day of May, 2012.

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## APPENDIX

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**R.C. 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.

**R.C. 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.

**R.C. 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.

**R.C. 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.

**R.C. 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.