ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Ohio Power Company to Update its Transmission Cost Recovery Rider Rates	:	Case No. 2013-13-0154
	:	Appeal from the Public Utilities Commission of Ohio
Industrial Energy Users-Ohio,	:	
Appellant,	:	Public Utilities Commission of Ohio Case No. 12-1046-EL-RDR
v.	:	
Public Utilities Commission of Ohio,	:	
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT INDUSTRIAL ENERGY USERS-OHIO

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FILED
JAN 25 2013
CLERK OF COURT
SUPREME COURT OF OHIO

NOTICE OF APPEAL OF APPELLANT
INDUSTRIAL ENERGY USERS-OHIO

Appellant, Industrial Energy Users-Ohio ("IEU-Ohio" or "Appellant"), hereby gives its notice of appeal, pursuant to Sections 4903.11 and 4903.13, Revised Code, and Supreme Court Rule of Practice 2.3(B), to the Supreme Court of Ohio and Appellee, the Public Utilities Commission of Ohio ("Commission" or "PUCO"), from the Commission's October 24, 2012 Finding and Order (Attachment A) ("TCRR Order"),[1] and December 12, 2012 Entry on Rehearing (Attachment B) in Case No. 12-1046-EL-RDR.

Appellant is a party of record in Case No. 12-1046-EL-RDR and timely filed its application for rehearing from the TCRR Order. The Commission denied IEU-Ohio's application for rehearing on December 12, 2012. This notice of appeal is timely as it is within the sixty-day timeframe set forth in Section 4903.11, Revised Code.

The TCRR Order and Entry on Rehearing are unlawful and unreasonable for the reasons set out in the following Assignments of Error:

1. The TCRR Order is unlawful and unreasonable because it retroactively authorizes the collection of AEP-Ohio's[2] under-recovery balance[3] on a non-bypassable basis.
2. The TCRR Order is unlawful and unreasonable because it violates the Commission's precedent without a lawful and reasonable justification for its change in direction. The Commission's precedent requires the true-up of a bypassable rider to also be bypassable.

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[1] "TCRR" stands for Transmission Cost Recovery Rider.

[2] As used herein, "AEP-Ohio" refers to Ohio Power Company.

[3] Under Section 4928.05(A), Revised Code, the Commission has the authority to provide for the recovery, through a reconcilable rider, all transmission and transmission-related costs imposed on or charged to the electric distribution utility by the Federal Energy Regulatory Commission or a regional transmission organization. In prior proceedings, the Commission authorized AEP-Ohio to bill and collect its transmission-related costs on a bypassable basis. In this proceeding before the Commission, AEP-Ohio claimed that it had a $36 million under-recovery balance as a result of the application of the prior approved rate. In the TCRR Order, the Commission continued to authorize the collection of current transmission-related costs on a bypassable basis, but authorized a recovery of the under-recovery balance through a new non-bypassable charge.

3. The TCRR Order is unlawful and unreasonable because the Commission cannot rely on its phase-in authority contained in Section 4928.144, Revised Code, to authorize the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.

WHEREFORE, Appellant respectfully submits that the TCRR Order and Entry on Rehearing are unlawful, unjust, and unreasonable and should be reversed. The case should be remanded to the Appellee with instructions to correct the errors complained of herein.

Respectfully submitted,

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**COUNSEL FOR APPELLANT,
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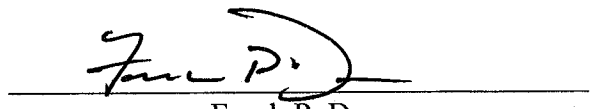
CERTIFICATE OF FILING

I hereby certify that, in accordance with Supreme Court Rule of Practice XIV, Section 2(C)(2), Industrial Energy Users-Ohio's Notice of Appeal has been filed with the Docketing Division of the Public Utilities Commission of Ohio by leaving a copy at the office of the Chairman in Columbus, Ohio, in accordance with Rules 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code, on the 25th day of January 2013.

Frank P. Darr
Counsel for Appellant
Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Appeal of Appellant Industrial Energy Users-Ohio* was served upon the parties of record to the proceeding before the Public Utilities Commission of Ohio listed below and pursuant to Section 4903.13, Revised Code, this 25th day of January 2013, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.



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ATTORNEY EXAMINERS

ATTACHMENT A

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company to Update its Transmission Cost Recovery Rider Rates.	)))	Case No. 12-1046-EL-RDR

FINDING AND ORDER

The Commission finds:

(1) Ohio Power Company (OP or the Company) is a public utility as defined in Section 4905.02, Revised Code, and an electric utility as defined in Section 4928.01(A)(11), Revised Code, and, as such, is subject to the jurisdiction of this Commission.

(2) On June 15, 2012, OP filed an application to update its transmission cost recovery rider (TCRR), pursuant to Section 4928.05(A)(2), Revised Code, and Chapter 4901:1-36, Ohio Administrative Code (O.A.C.). In its application, OP seeks, *inter alia,* approval to collect an under-recovery balance of approximately $36 million, which is attributable to the difference between the level of forecasted costs in the Company's most recent TCRR update and the actual costs incurred by the Company over the prior period. In order to mitigate the rate impact and promote rate stability for customers, OP proposes to collect the under-recovery balance, plus carrying charges, over a three-year period, rather than over the next year. OP also suggests that, if the Commission should find it necessary to further mitigate the rate impact, it could adopt a plan to phase in the under-recovery balance over the three-year period on a nonbypassable basis, pursuant to Section 4928.144, Revised Code.

(3) On July 11, 2012, July 24, 2012, and August 16, 2012, OP filed corrected information in support of its application.

(4) On July 25, 2012, Industrial Energy Users-Ohio (IEU-Ohio) filed comments in this proceeding. OP filed a reply on August 1, 2012.

(5) Rule 4901:1-36-05, O.A.C., provides that, unless otherwise ordered, the Commission shall approve the application or set the matter for hearing within 75 days after the filing of a complete application under Chapter 4901:1-36, O.A.C.

(6) By entry issued on August 15, 2012, the attorney examiner granted the motions to intervene in this proceeding that were filed by IEU-Ohio and the Ohio Consumers' Counsel (OCC). The attorney examiner also suspended the 75-day period contemplated under Rule 4901:1-36-05, O.A.C., in order to allow Staff the opportunity to sufficiently review OP's application. Staff was directed to file a letter in this docket setting forth its recommendations for the Commission, upon completion of Staff's review of OP's application.

(7) On October 15, 2012, Staff filed a letter containing a summary of its review and recommendations for the Commission's consideration. On October 19, 2012, and October 22, 2012, IEU-Ohio and OCC, respectively, filed comments in response to Staff's recommendations. OP filed a reply to IEU-Ohio's comments on October 22, 2012.

(8) In its comments, IEU-Ohio urges the Commission to reject OP's proposal for a nonbypassable charge to collect the under-recovery balance and concludes that any reconciliation mechanism associated with the Company's TCRR must remain avoidable by shopping customers. First, IEU-Ohio argues that Section 4928.144, Revised Code, does not apply to the TCRR, as OP contends in its application. IEU-Ohio asserts that the statute applies only to a phase-in of a rate authorized under Sections 4928.141 to 4928.143, Revised Code, and, therefore, cannot serve as a basis for making any portion of the TCRR nonbypassable. IEU-Ohio also notes that Section 4928.144, Revised Code, requires that incurred costs be identified, which, according to IEU-Ohio, OP has not done in this case. In its reply, OP argues that Section 4928.144, Revised Code, is applicable to the TCRR, which was approved by the Commission as a provision of the Company's electric security plan (ESP), pursuant to Section 4928.143, Revised Code. With respect to IEU-Ohio's argument regarding the identification of incurred costs, OP asserts that the under-collection in this

case is based on incurred costs that have already been accounted for in its filing.

(9) Next, IEU-Ohio contends that Rule 4901:1-36-04(B), O.A.C., requires that the TCRR be avoidable for all shopping customers. OP responds that the general language in the rule applies to the TCRR in the first instance and does not preclude the phase-in collection of under-recovered costs proposed by the Company. According to OP, its proposal contemplated that, rather than embed the under-recovery within the TCRR, the Commission would establish a separate charge for the phase-in of the under-recovery, in order to make the separate charge nonbypassable, while the TCRR would remain bypassable. OP also notes that it would be inequitable to recover the under-collected amount solely from non-shopping customers. Finally, OP argues that, if the Commission believes that the rule is applicable under the circumstances, it can waive the rule, pursuant to Rule 4901:1-36-02(B), O.A.C., in light of the unique and compelling circumstances of this case.

(10) Finally, IEU-Ohio argues that Commission precedent is counter to OP's proposal to establish a nonbypassable true-up mechanism for a rider that is bypassable.[1] OP replies that the precedent cited by IEU-Ohio is inapplicable and that the Commission has not determined, as a general matter, that an under-recovery of costs that were originally avoidable may not be collected through a nonbypassable charge.

(11) Staff recommends that the Commission approve OP's application, as corrected on July 11, 2012, July 24, 2012, and August 16, 2012, subject to the recommendations made by Staff. In its letter, Staff notes that OP's proposed rates, as updated, reflect a $33 million increase over the revenue that would be collected under current rates for the September 2012 through August 2013 timeframe. According to Staff, the proposed rates include an

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1 *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 56-57 (February 23, 2011).

adjustment of approximately $12 million to reflect a third of the prior year's under-collection. Staff agrees with OP's proposal to spread the total amount of approximately $36 million over a three-year period, as well as to recover the under-collection from all customers by way of a nonbypassable charge, in order to minimize the rate impact that would otherwise occur.

Staff believes that a three-year recovery period is appropriate in order to avoid the excessive increase that would result if the full amount were to be recovered in only one year, and in light of a projected increase in costs. Staff also believes that a nonbypassable charge is appropriate, given that the under-collection occurred during a period in which OP experienced minimal customer shopping. Staff explains that non-shopping customers should not have to bear the burden of paying for costs that were caused by customers that have since elected to shop. Therefore, Staff recommends that OP establish a separate nonbypassable rate as part of the TCRR, which should be designed to recover the under-collection of approximately $36 million over a three-year period and terminate once the full amount has been collected.

Additionally, Staff recommends that a new methodology be used to allocate Net Marginal Loss (NML) costs. Staff explains that projected NML costs are currently allocated on the basis of historical base generation revenue. Staff believes that projected NML costs should be allocated on a projected kilowatt hour (kWh) basis, which would better assign costs to those ratepayers that created the costs. Because the change in methodology may result in cost shifts, Staff recommends a transition to the new methodology by allocating 50 percent of the projected NML costs based on OP's proposed methodology in its July 24, 2012, filing and allocating the other 50 percent based on the new methodology using projected energy billing determinants. Staff further recommends that all projected NML costs be allocated based on projected kWh in OP's TCRR filing in 2013.

Staff concludes its review by finding that OP has appropriately included in its TCRR only those costs and

credits that are incurred as a result of serving its retail customers in Ohio.

(12) In its supplemental comments, IEU-Ohio urges the Commission to reject Staff's proposed nonbypassable charge for the same reasons enumerated in IEU-Ohio's comments. Additionally, IEU-Ohio argues that the Commission should reject Staff's proposed methodology for allocating NML costs. IEU-Ohio points out that Staff has offered no analysis of the magnitude or reasonableness of the cost shifts that may result from the change in methodology, which IEU-Ohio believes will likely increase rates for manufacturers and other high load factor customers. IEU-Ohio notes that Staff's proposed methodology does not account for the precedent established in OP's prior TCRR cases, in which the current allocation methodology was proposed by the Company and approved by the Commission.[2] IEU-Ohio further notes that Staff's recommendation is inconsistent with the Commission's recent finding in the ESP proceedings that the current TCRR process operates appropriately.[3] IEU-Ohio concludes that the Commission should not adopt Staff's recommendation until the parties and the Commission have an opportunity to evaluate the reasonableness of the proposed methodology and understand its scope and effect.

(13) OCC argues that the Commission should reject OP's and Staff's proposal for a three-year collection period for the under-recovery. Initially, OCC notes that the Commission's decision in this proceeding will impact the rates paid by customers under the ESP, which includes a 12-percent cap on rate increases that was ordered by the

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2 *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, Case No. 10-477-EL-RDR, Finding and Order (June 23, 2010); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, Case No. 11-2473-EL-RDR, Finding and Order (June 22, 2011).

3 *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order at 63-64 (August 8, 2012) (ESP 2 Order).

Commission.[4] OCC asserts that, although a three-year collection period may mitigate the rate increase in the first year, customers will pay more in subsequent years due to the deferred cost recovery and associated carrying charges. OCC adds that any additional increases to the TCRR that may occur in 2013 and 2014 would exacerbate the situation. OCC further notes that the Commission has stated that it is generally opposed to the creation of deferrals.[5] As an alternative to OP's and Staff's proposal, OCC recommends that the under-recovery be collected over a one-year period through a nonbypassable charge, if the Commission determines that a nonbypassable charge is lawful. OCC points out that its recommendation would help to mitigate the rate increase, while also avoiding the accrual of carrying charges.

Regarding Staff's proposal for the allocation of NML costs, OCC contends that Staff has provided no information regarding the effect of its proposal on the various customer classes or how the new methodology would impact the 12-percent cap on rate increases.

(14) The Commission finds that the application to update OP's TCRR, as corrected on July 11, 2012, July 24, 2012, and August 16, 2012, is consistent with Section 4928.05(A)(2), Revised Code, and Chapter 4901:1-36, O.A.C., does not appear to be unjust or unreasonable, and should be approved to the extent set forth herein. We also find that it is unnecessary to hold a hearing in this matter.

With respect to Staff's recommendations, the Commission finds that Staff's proposal to transition to a kWh-based methodology for allocating projected NML costs is reasonable and should be adopted, such that 50 percent of the projected NML costs should be based on the prior methodology with the remaining 50 percent to be allocated under the new methodology. Beginning with OP's TCRR filing in 2013, all projected NML costs should be allocated using the new methodology. We also find that OP should be authorized to establish a separate nonbypassable rate as

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4 ESP 2 Order at 70.

5 ESP 2 Order at 36.

part of the TCRR, in order to collect the under-recovery of approximately $36 million, plus carrying charges at the Company's long-term cost of debt rate, evenly over a three-year period. The separate nonbypassable rate should terminate once the full amount of the under-recovery has been collected. We agree with Staff and OP that the three-year collection period is necessary in order to avoid the significant rate impact that would otherwise result from collecting the under-recovery over just one year, in combination with the other projected cost increases.

The Commission finds no merit in IEU-Ohio's argument that Section 4928.144, Revised Code, is inapplicable, or that OP has not sufficiently identified its incurred costs. OP's TCRR was approved as part of its prior ESP, and again as part of its current ESP, consistent with Section 4928.143(B)(2)(g), Revised Code, as well as our authority under Section 4928.05(A)(2), Revised Code.[6] Neither do we find merit in IEU-Ohio's contention that Commission precedent precludes the separate nonbypassable rate proposed in this proceeding. Finally, we agree with IEU-Ohio that Rule 4901:1-36-04(B), O.A.C., provides that the TCRR shall be avoidable by all customers that choose alternative generation suppliers. However, we find that the rule should be waived, pursuant to Rule 4901:1-36-02(B), O.A.C., to the extent necessary to approve the separate nonbypassable rate established to collect the under-recovery. We agree with Staff and OP that a separate nonbypassable rate is appropriate under the particular circumstances of this case, specifically where the under-recovery occurred during a period of limited customer shopping. As OP notes in its reply, the level of shopping increased from less than 10 percent to approximately 40 percent during the past year. It would be unreasonable to require non-shopping customers to shoulder the entire burden of the under-collection, given that the associated costs were incurred for customers that were receiving service from OP during the period in which

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6 *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, *et al.*, Opinion and Order at 49-50 (March 18, 2009); ESP 2 Order at 63-64.

> the costs were incurred, but have since decided to switch to an alternative generation supplier.
>
> Additionally, the Commission agrees with Staff that a kWh-based methodology for allocating projected NML costs will result in such costs being more closely aligned with the ratepayers that caused them. We find that Staff's recommendation to phase in the new methodology, which we adopt, should serve to mitigate concerns regarding the potential for abrupt cost shifts. In response to OCC's arguments regarding the 12-percent cap on rate increases, we note that rate changes that occur in proceedings subsequent to the ESP proceedings are not factored into the cap.[7] Accordingly, the Commission finds that OP's application should be approved, subject to Staff's recommendations.

It is, therefore,

ORDERED, That the application filed by OP, as corrected on July 11, 2012, July 24, 2012, and August 16, 2012, be approved, subject to Staff's recommendations. It is, further,

ORDERED, That OP file, in final form, four complete copies of its tariffs, consistent with this finding and order. One copy shall be filed in this case docket, one shall be filed in OP's TRF docket, and the remaining two copies shall be designated for distribution to the Rates and Tariffs Division of the Commission's Utilities Department. It is, further,

ORDERED, That the effective date of the new tariffs shall be a date not earlier than the first day of the November 2012 billing cycle, and the date upon which four complete printed copies of OP's final tariffs are filed with the Commission. The new tariffs shall be effective for bills rendered on or after such effective date. It is, further,

ORDERED, That OP shall notify all affected customers via a bill message or bill insert within 30 days of the effective date of the tariffs. A copy of the customer notice shall be submitted to the Commission's Service Monitoring and Enforcement Department, Reliability and Service Analysis Division, at least 10 days prior to its distribution to customers. It is, further,

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7 ESP 2 Order at 70.

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

ORDERED, That a copy of this finding and order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

SJP/sc

Entered in the Journal
OCT 24 2012

Barcy F. McNeal
Secretary

ATTACHMENT B

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company to Update its Transmission Cost Recovery Rider Rates.	))))	Case No. 12-1046-EL-RDR

ENTRY ON REHEARING

The Commission finds:

(1) Ohio Power Company (OP or the Company) is a public utility as defined in Section 4905.02, Revised Code, and an electric utility as defined in Section 4928.01(A)(11), Revised Code, and, as such, is subject to the jurisdiction of this Commission.

(2) On June 15, 2012, OP filed an application to update its transmission cost recovery rider (TCRR), pursuant to Section 4928.05(A)(2), Revised Code, and Chapter 4901:1-36, Ohio Administrative Code (O.A.C.). In its application, OP sought, *inter alia*, approval to collect an under-recovery balance of approximately $36 million, which is attributable to the difference between the level of forecasted costs in the Company's most recent TCRR update and the actual costs incurred by the Company over the prior period. In order to mitigate the rate impact and promote rate stability for customers, OP proposed to collect the under-recovery balance, plus carrying charges, over a three-year period, rather than over the next year. OP also suggested that, if the Commission should find it necessary to further mitigate the rate impact, it could adopt a plan to phase in the under-recovery balance over the three-year period on a nonbypassable basis, pursuant to Section 4928.144, Revised Code.

(3) On July 11, 2012, July 24, 2012, and August 16, 2012, OP filed corrected information in support of its application.

(4) On July 25, 2012, Industrial Energy Users-Ohio (IEU-Ohio) filed comments in this proceeding. OP filed a reply on August 1, 2012.

(5) On October 15, 2012, Staff filed a letter containing a summary of its review and recommendations for the Commission's consideration. On October 19, 2012, and October 22, 2012, IEU-Ohio and the Ohio Consumers' Counsel (OCC), respectively, filed comments in response to Staff's recommendations. OP filed a reply to IEU-Ohio's comments on October 22, 2012.

(6) By finding and order issued on October 24, 2012, the Commission approved OP's application to update the TCRR, as corrected on July 11, 2012, July 24, 2012, and August 16, 2012 (TCRR Order). Specifically, the Commission found that OP should be authorized to establish a separate nonbypassable rate as part of the TCRR, in order to collect the under-recovery of approximately $36 million, plus carrying charges at the Company's long-term cost of debt rate, evenly over a three-year period. The Commission agreed with Staff and OP that the three-year collection period is necessary in order to avoid the significant rate impact that would otherwise result from collecting the under-recovery over just one year, in combination with the other projected cost increases related to the TCRR.

Additionally, the Commission adopted Staff's proposal to transition to a kilowatt hour based methodology for allocating projected Net Marginal Loss (NML) costs, such that 50 percent of the projected NML costs will be based on the prior methodology with the remaining 50 percent to be allocated under the new methodology. Beginning with OP's TCRR filing in 2013, the Commission determined that all projected NML costs should be allocated using the new methodology.

(7) Section 4903.10, Revised Code, states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

(8) On November 21, 2012, applications for rehearing were filed by IEU-Ohio and OCC. A memorandum contra the

applications for rehearing was filed by OP on December 3, 2012.

(9) In its first ground for rehearing, IEU-Ohio argues that the TCRR Order is unlawful and unreasonable, because it retroactively authorized the collection of OP's under-recovery balance on a nonbypassable basis. Specifically, IEU-Ohio asserts that, by shifting the revenue responsibility for a significant part of the under-recovery balance to shopping customers, the Commission has retroactively increased their rates. IEU-Ohio notes that the under-recovery balance is a function of the delay inherent in the annual TCRR review process, and that a rate increase granted to make up for revenue lost due to regulatory delay is contrary to the Ohio Supreme Court's prohibition on retroactive ratemaking. IEU-Ohio further notes that OP did not comply with Rule 4901:1-36-03(E), O.A.C., which provides that an electric utility should file an interim application to adjust the TCRR in order to avoid excessive carrying costs and to minimize the rate impact of the upcoming annual filing, if costs are or will be substantially different than the amounts authorized as the result of the previous application. IEU-Ohio believes that OP exacerbated the problem by seeking and obtaining a delay in the annual review of its TCRR.

IEU-Ohio adds that, consistent with Ohio Supreme Court precedent, the Commission's authority to reconcile a rate for a past under-recovery must be incorporated in the initial rate approved by the Commission. IEU-Ohio points out that the TCRR, as previously approved by the Commission, did not provide for a nonbypassable charge, which cannot now be established. IEU-Ohio also notes that shopping customers will pay for their own transmission service, as well as for a portion of the transmission service provided to OP's non-shopping customers. IEU-Ohio concludes that the Commission should grant rehearing and direct that the under-recovery be collected on a bypassable basis.

(10) In its memorandum contra, OP responds that the TCRR Order does not constitute retroactive ratemaking. OP notes that the under-recovery is not attributable to regulatory

delay and that IEU-Ohio's interpretation of Ohio Supreme Court precedent would render void every reconcilable rider established by the Commission. OP adds that an electric utility may charge to recover previously deferred revenues without violating the prohibition against retroactive ratemaking, when the recovery is pursuant to an initial Commission order. According to OP, the TCRR has always been subject to an annual true-up process and the Company authorized to implement over- and under-recovery accounting for any differences between the revenue collected and the actual costs recorded. OP contends that there has been no retroactive change to the TCRR rate, because the TCRR has been subject to reconciliation since its inception. OP also notes that no new rate mechanism was created in this case, because the nonbypassable charge is part of the TCRR.

Finally, OP asserts that IEU-Ohio's argument that shopping customers will pay twice for transmission service is flawed, because it fails to acknowledge that there are two different time periods involved. OP points out that the current period in which a shopping customer pays its competitive retail electric service (CRES) provider for transmission service is not the same as the period in which the under-recovery was incurred. OP notes that the under-recovery was caused in large part by former customers of the Company that subsequently switched to CRES providers.

(11) The Commission finds no merit in IEU-Ohio's argument that the TCRR Order constitutes retroactive ratemaking. As discussed further below, the TCRR Order is consistent with the Commission's authority under Section 4928.144, Revised Code. In the TCRR Order, the Commission authorized OP to establish a separate nonbypassable charge, as part of the TCRR, to collect the under-recovery over three years, in order to avoid the substantial rate impact that would result from a one-year collection period, along with other projected cost increases.[1] The TCRR Order is also consistent with the Ohio Supreme Court precedent relied upon by IEU-Ohio, which provides that a

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1 TCRR Order at 6-7.

utility's recovery of deferred revenues, having been authorized by an initial order of the Commission, does not violate the proscription against retroactive ratemaking.[2] This precedent does not restrict or even address the Commission's authority to create or subsequently modify a proper reconciliation mechanism, as IEU-Ohio contends.

The TCRR is subject to an annual true-up process, which ensures that OP recovers its actual transmission costs. As IEU-Ohio recognizes, the Commission has authority under Section 4928.05(A)(2), Revised Code, to provide for the recovery of transmission and transmission-related costs through a reconcilable rider. The adjustment to the TCRR in the present case, including the nonbypassable charge authorized to collect the under-recovery, occurred consistent with the Commission's customary reconciliation process. We do not agree that the under-recovery is the result of inherent regulatory lag in the Commission's process, or that our authorization of the nonbypassable charge results in a rate increase intended to compensate OP for revenue lost due to regulatory delay. OP has explained that the under-recovery is attributable to the difference between the level of forecasted costs in the Company's most recent TCRR update and the actual costs incurred by the Company over the prior period. Neither do we agree that OP was required under Rule 4901:1-36-03(E), O.A.C., to file an interim application to adjust the TCRR, although we certainly encourage the Company to do so in the future, if it determines that its costs are or will be substantially different than the amounts authorized as the result of its previous TCRR update filing.

Finally, the Commission does not agree that shopping customers will pay twice for transmission service as a result of the TCRR Order. As already discussed, the under-recovery represents the difference between the level of forecasted costs in OP's most recent TCRR update and the actual costs incurred by the Company over the prior period. The Commission noted in the TCRR Order that a

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2 *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St. 3d 344, 348, 686 N.E.2d 501 (1997); *Columbus S. Power Co. v. Public Util. Comm.*, 67 Ohio St. 3d 535, 541, 620 N.E.2d 835 (1993).

portion of the costs associated with the under-recovery was incurred for customers that were receiving service from OP during the period in which the costs were incurred but that had since elected to switch to a CRES provider.[3] These costs are distinct from the transmission costs that shopping customers will pay to their CRES providers on a going-forward basis. For these reasons, we find that IEU-Ohio's request for rehearing should be denied.

(12) In its second ground for rehearing, IEU-Ohio asserts that the TCRR Order is unlawful and unreasonable, because it violates Commission precedent without a lawful and reasonable justification for the departure from precedent. According to IEU-Ohio, Commission precedent requires that OP's TCRR remain bypassable. IEU-Ohio argues that the Commission has determined that a true-up of a bypassable rider cannot be collected on a nonbypassable basis under any circumstances, because it would create an anticompetitive subsidy flowing from shopping customers to non-shopping customers, in violation of Section 4928.02(H), Revised Code.

(13) OP responds that the Commission has already rejected IEU-Ohio's argument and notes that the precedent cited by IEU-Ohio is not applicable in this case. OP contends that the Commission has made no general legal conclusion that it is unlawful to collect an under-recovery that would have originally been avoidable through a nonbypassable charge. OP believes that the TCRR Order is consistent with Commission precedent.

(14) The Commission finds that IEU-Ohio has raised no new arguments on rehearing. In the TCRR Order, we rejected IEU-Ohio's assertion that our authorization of a separate nonbypassable rate is inconsistent with Commission precedent.[4] In the case cited by IEU-Ohio, the Commission did not conclude, as a general matter, that an under-recovery of costs that were originally avoidable may not be

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3 TCRR Order at 7-8.

4 TCRR Order at 7.

collected through a nonbypassable charge.[5] In the TCRR Order, the Commission explained that a separate nonbypassable rate is appropriate under the particular circumstances of this case. Because the under-recovery occurred during a period of limited customer shopping, and was followed by a significant increase in customer shopping, it would not be reasonable to expect non-shopping customers to carry the entire burden of the under-recovery.[6] IEU-Ohio's argument lacks merit and its request for rehearing should be denied.

(15) In its third ground for rehearing, IEU-Ohio contends that the TCRR Order is unlawful and unreasonable, because the Commission cannot rely on the phase-in authority contained in Section 4928.144, Revised Code, to approve the collection of OP's under-recovery balance on a nonbypassable basis. IEU-Ohio believes that the phase-in authority of Section 4928.144, Revised Code, may only be applied in the context of a proceeding pursuant to Sections 4928.141 to 4928.143, Revised Code, for the purpose of phasing in a rate established under those sections. IEU-Ohio adds that Section 4928.144, Revised Code, may only be invoked on a prospective basis, and that the incurred costs that are being deferred for future collection must first be identified. IEU-Ohio argues that the conditions of the statute have not, and cannot, be satisfied under the circumstances of this case.

(16) In response, OP notes that the Commission has already rejected IEU-Ohio's argument and found that a phase-in of the under-recovery balance is appropriate through a nonbypassable charge, pursuant to Section 4928.144, Revised Code. OP argues that, because the TCRR was approved as part of its electric security plan (ESP) proceedings under Section 4928.143, Revised Code, and because the Company sufficiently identified its incurred costs in Schedules D-1 and D-3 of its TCRR update filing, it

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5 *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order, at 56-57 (February 23, 2011).

6 TCRR Order at 7-8.

was proper for the Commission to rely upon Section 4928.144, Revised Code.

(17) The Commission finds that IEU-Ohio has raised no new arguments for our consideration. In the TCRR Order, we expressly disagreed with IEU-Ohio's contention that Section 4928.144, Revised Code, is inapplicable.[7] We also noted that the TCRR was approved as part of OP's prior ESP, and again as part of its current ESP, which is consistent with the Commission's authority under Section 4928.143(B)(2)(g), Revised Code, as well as Section 4928.05(A)(2), Revised Code.[8] Finally, we rejected IEU-Ohio's argument that OP had not sufficiently identified its costs, which, as the Company notes, are identified in the schedules supporting its application.[9] IEU-Ohio has not explained how the information contained in OP's schedules is insufficient for purposes of Section 4928.144, Revised Code. The Commission finds that the statute is applicable under the circumstances, its conditions have been met, and, accordingly, IEU-Ohio's third ground for rehearing should be denied.

(18) In its first ground for rehearing, OCC argues that the TCRR Order, in authorizing collection of the under-recovery over three years, violates Section 4905.22, Revised Code, which requires that rates be just and reasonable, and Section 4928.02(A), Revised Code, which provides that reasonably priced retail electric service must be available to consumers. OCC notes that customers will unreasonably be required to pay an additional $6 million in carrying charges over the three-year period.

(19) OP responds that it was appropriate for the Commission to rely on its authority under Section 4928.144, Revised Code,

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7 TCRR Order at 7.

8 TCRR Order at 7, citing *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO, *et al.*, Opinion and Order, at 49-50 (March 18, 2009); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order, at 63-64 (August 8, 2012) (ESP 2 Order).

9 TCRR Order at 7.

to authorize the phase-in of the under-recovery balance as a means to ensure rate stability for customers. OP notes that the decision to implement a phase-in is a matter of judgment and that the Commission clearly considered the increase in shopping and the potential rate impact of a shorter recovery period in determining that a phase-in is appropriate under the circumstances.

(20) The TCRR Order authorized OP to establish a separate nonbypassable rate as part of the TCRR, in order to collect the under-recovery of approximately $36 million, plus carrying charges at the Company's long-term cost of debt rate, evenly over a three-year period.[10] The Commission recognizes that, as a result, greater carrying charges will be paid over the three-year period than if the under-recovery were collected over just one year. However, as we explained in the TCRR Order, a three-year collection period will avoid the significant rate impact that would result from collection of the under-recovery over a single year, and which would be exacerbated by the other projected cost increases.[11] The Commission continues to find that extending collection of the under-recovery over a three-year period will prevent the considerable rate impact that would otherwise occur. We also find that the TCRR Order is consistent with our discretion to determine the timing and other details of a just and reasonable phase-in authorized under Section 4928.144, Revised Code, as recognized by the Ohio Supreme Court.[12] OCC has not demonstrated that the phase-in of collection of OP's under-recovery is unjust or unreasonable, and OCC's request for rehearing should, therefore, be denied.

(21) In its second ground for rehearing, OCC contends that the TCRR Order violates Sections 4905.22 and 4928.02(A), Revised Code, because it authorized the collection of carrying charges over the three-year period, in addition to the carrying charges that have already been included by

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10 TCRR Order at 6-7.

11 TCRR Order at 7.

12 *In re Columbus Southern Power Co.*, 129 Ohio St. 3d 568, 570, 954 N.E.2d 1183 (2011).

OP in the under-recovery balance. OCC believes that customers should not have to pay interest on interest.

(22) In response to OCC's second ground for rehearing, OP contends that, in authorizing carrying charges on the under-recovery balance, the Commission recognized the distinct risks inherent in fully collecting the under-recovery, as well as the opportunity costs associated with a significant amount of unrecovered revenue. OP further argues that there are two different time periods involved and, therefore, it is appropriate to collect carrying charges on the under-recovery in addition to those already collected as part of the TCRR. OP also points out that, when there is an over-recovery under the TCRR, ratepayers receive carrying charges on the amount of the over-recovery.

(23) The TCRR Order authorized OP to collect the under-recovery, plus carrying charges at the Company's long-term cost of debt rate, over a three-year period.[13] As OP notes, there are two different time periods involved, specifically, the period in which the under-recovery occurred and the period in which the under-recovery balance will be collected over three years. Additionally, we note that the Ohio Supreme Court has determined that, pursuant to Section 4928.144, Revised Code, carrying charges are required to be added to deferred rates.[14] Therefore, the Commission finds that it was appropriate to authorize OP to collect carrying charges on the under-recovery balance. OCC's second ground for rehearing should be denied.

(24) OCC's third ground for rehearing is that the Commission unlawfully and unreasonably determined that the TCRR rate should not be factored in the 12-percent cap on rate increases imposed by the Commission in OP's recent ESP proceedings. OCC argues that the TCRR rate approved in this proceeding arose from the ESP 2 Order and should, therefore, be subject to the cap, pursuant to the terms of the order. OCC adds that the Commission should have

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13 TCRR Order at 6-7.

14 *In re Columbus Southern Power Co.*, 129 Ohio St. 3d 568, 570, 954 N.E.2d 1183 (2011).

determined the impact of the new methodology for allocating NML costs in relation to the cap. As a result, OCC believes that the Commission failed to determine whether the TCRR rate is just and reasonable, and, thus, violated Sections 4905.22 and 4928.02(A), Revised Code.

(25) In reply, OP asserts that the TCRR Order is the result of a proceeding subsequent to the ESP proceedings, and, as such, the TCRR rate is not factored into the 12-percent cap. OP notes that the Commission has already rejected OCC's position. OP concludes that OCC's disagreement with the Commission's judgment and discretion does not constitute a valid basis for rehearing.

(26) In the TCRR Order, the Commission noted that rate changes that occur in proceedings subsequent to the ESP proceedings are not factored into the 12-percent cap.[15] Although we agree that the TCRR was approved in the ESP proceedings, the Commission authorized a new TCRR rate in the present case. Because this rate change occurred in a proceeding subsequent to the ESP proceedings, the new TCRR rate should not be factored in the cap. Accordingly, we find that OCC's request for rehearing on this issue should be denied.

It is, therefore,

ORDERED, That the applications for rehearing filed by IEU-Ohio and OCC be denied in their entirety. It is, further,

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15 TCRR Order at 8, citing ESP 2 Order at 70.

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

Lynn Slaby

SJP/sc

Entered in the Journal

DEC 12 2012

Barcy F. McNeal
Secretary