

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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MERIT BRIEF OF APPELLANT,  
INDUSTRIAL ENERGY USERS-OHIO

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**Samuel C. Randazzo** (Reg. No. 0016386)  
(Counsel of Record)  
**Frank P. Darr** (Reg. No. 0025469)  
**Joseph E. Olikier** (Reg. No. 0086088)  
**Matthew R. Pritchard** (Reg. 0088070)  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 469-8000  
Facsimile: (614) 469-4653  
sam@mwncmh.com  
fdarr@mwncmh.com  
joliker@mwncmh.com  
mpritchard@mwncmh.com

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

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

**William L. Wright** (Reg. No. 0018010)  
Section Chief, Public Utilities Section  
**Thomas McNamee** (Reg. No. 0017352)  
Assistant Attorneys General  
Public Utilities Commission of Ohio  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 466-4397  
Facsimile: (614) 644-8764  
william.wright@puc.state.oh.us  
thomas.McNamee@puc.state.oh.us

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

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SUPREME COURT OF OHIO

**Steven T. Nourse** (Reg. No. 0046705)

(Counsel of Record)

**Matthew J. Satterwhite** (Reg. No. 0071972)

**Yazen Alami** (Reg. No. 0086371)

American Electric Power Service  
Corporation

1 Riverside Plaza, 29<sup>th</sup> Floor

Columbus, Ohio 43215

Telephone: (614) 716-1608

Facsimile: (614) 716-2950

stnourse@aep.com

mjsatterwhite@aep.com

yalami@aep.com

**COUNSEL FOR APPELLEE,  
OHIO POWER COMPANY**

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## **MERIT BRIEF OF APPELLANT INDUSTRIAL ENERGY USERS-OHIO**

The Court has long held that the Public Utilities Commission of Ohio (“Commission”) may not engage in retroactive ratemaking.<sup>1</sup> In the proceeding below, however, the Commission issued an Opinion and Order (“TCRR Order”) that authorized Ohio Power Company (“AEP-Ohio”) to retroactively increase the transmission portion of shopping customers’ bills. Additionally, the Commission unlawfully and unreasonably relies upon R.C. 4928.144, which is inapplicable, and has ignored its own precedent without a lawful and reasonable justification for that deviation. The effect of the Commission’s unlawful and unreasonable decision is to impose tens of millions of dollars of unlawful and unreasonable charges upon shopping customers. As described in more detail below, the Court should reverse the Commission’s decision and remand the proceeding to the Commission with instructions to terminate the non-bypassable portion of AEP-Ohio’s Transmission Cost Recovery Rider (“TCRR”).

### **I. BACKGROUND AND STATEMENT OF FACTS**

In 1999, Ohio passed Amended Substitute Senate Bill 3 (“SB 3”) which restructured Ohio’s regulation of the electric utility industry. SB 3 unbundled electric utility rates into distribution, transmission, and generation components. In 2008, Ohio passed additional legislation, Amended Substitute Senate Bill 221, regarding Ohio electric utility industry restructuring, which maintained the unbundling of the distribution, transmission, and generation components of electric utility service. The restructuring legislation required incumbent utilities, such as AEP-Ohio, to transfer control of their transmission assets to a qualifying transmission entity;<sup>2</sup> all Ohio electric distribution utilities (“EDU”) have transferred control of their

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<sup>1</sup> See, e.g., *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶¶ 9-14.

<sup>2</sup> R.C. 4928.12. (Appx. at 57).

transmission assets to PJM Interconnection, L.L.C. (“PJM”), a regional transmission organization (“RTO”). Because of that transfer of control, transmission service is provided through PJM, which bills load serving entities (“LSE”) and remits the money collected to the owners of the transmission assets. AEP-Ohio and competitive retail electric service (“CRES”) providers are LSEs.

The restructuring legislation, in connection with the Commission’s rules, provides customers with an option to choose a CRES provider for the generation and transmission components of their service.<sup>3</sup> And, since the enactment of electric restructuring legislation, CRES providers in AEP-Ohio’s service area have been responsible for obtaining transmission service on behalf of the shopping customers they serve.<sup>4</sup> In sum, shopping customers pay AEP-Ohio’s distribution rate but the remainder of AEP-Ohio’s rates (the generation and transmission components) are bypassable by shopping customers with the exception of several non-bypassable riders.<sup>5</sup>

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<sup>3</sup> See R.C. Chapter 4928; Ohio Adm. Code Chapter 4901:1-21.

<sup>4</sup> *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, *et al.*, Stipulation and Recommendation at 5-6 (May 8, 2000); available at: <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=F7E3225A7E90026985256CF70054554D>.

Provisions were incorporated into AEP-Ohio’s electric transition plan (“ETP”) (the first rate plan for electric utility companies following restructuring) to accommodate this change. *Id.* Following AEP-Ohio’s ETP, AEP-Ohio operated under a Rate Stabilization Plan (“RSP”), where CRES providers continued to provide transmission service to the shopping customers they serve. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 30-31 (Jan. 26, 2005) (“RSP Case”). <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=E143406C73568E5585256F9500689B84>.

<sup>5</sup> AEP-Ohio’s current non-bypassable riders include the Retail Stability Rider (“RSR”), the Phase-In Recovery Rider (“PIRR”), the Economic Development Rider (“EDR”), the Enhanced

The transmission rates that PJM charges AEP-Ohio for transmission service, incurred on behalf of non-shopping customers,<sup>6</sup> are regulated by the Federal Energy Regulatory Commission (“FERC”).<sup>7</sup> Ohio, in turn, allows EDUs, such as AEP-Ohio, to bill the customers they serve to recover the transmission charges billed by PJM to the EDU.<sup>8</sup> In accordance with this statutory grant of authority,<sup>9</sup> the Commission authorized AEP-Ohio to implement a bypassable reconcilable rider, the TCRR, which has been in place for a number of years.<sup>10</sup>

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Service Reliability Rider (“ESRR”), and the non-bypassable portion of the TCRR. AEP-Ohio also has two placeholder non-bypassable riders, the Generation Resource Rider (“GRR”) and the Pool Termination Rider (“PTR”). All of these non-bypassable riders, with the exception of the EDR and ESRR, are being challenged as being unlawful and/or unreasonable.

<sup>6</sup> Non-shopping customers are those who have not elected to exercise their customer choice rights to select their own generation/transmission provider; instead these customers remain on the EDU’s default service, the standard service offer (“SSO”).

<sup>7</sup> R.C. 4928.34(A)(1) (Appx. at 60).

<sup>8</sup> Application at 1 (June 15, 2012) (Supp. at 1).

<sup>9</sup> R.C. 4928.05(A)(2) provides:

Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility’s distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission. (Supp. at 56).

<sup>10</sup> In its Opinion and Order approving AEP-Ohio’s RSP, the Commission granted AEP-Ohio the authority to file an application to adjust its transmission charges to pass through and collect from non-shopping customers any FERC-approved transmission charges AEP-Ohio incurs when it obtains and pays for transmission service on behalf of non-shopping customers through PJM. *In the Matter of the Application of the Columbus Southern Power Company and Ohio Power Company to Adjust the Transmission Components of the Companies’ Standard Service Tariffs to Reflect the Applicable FERC-Approved Charges or Rates Related to Open Access Transmission, Net Congestion and Ancillary Services*, Case No. 05-1194-EL-UNC, Finding and Order at 1 (Dec. 14, 2005), available at: <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=191114BF90E7D554852570D7006E5F6D>.

Currently, PJM invoices both AEP-Ohio and CRES providers for transmission service based upon the respective customer load they serve.<sup>11</sup> As mentioned above, AEP-Ohio recovers the transmission costs it incurs from PJM on behalf of non-shopping customers through the TCRR. CRES providers, on the other hand, must negotiate prices with the shopping customers they serve, and these prices provide the CRES providers with an opportunity to recover their generation and transmission-related costs.

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On September 28, 2005, AEP-Ohio filed an application to implement the TCRR on a bypassable basis, which the Commission approved on December 14, 2005. *Id.* Subsequently, the Commission approved the combination of the transmission component of each company's standard service tariff with the TCRR reconciliation mechanism that the Commission approved in the RSP Case. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust the Transmission Component of Each Company's Standard Service Tariff and to Combine that Component with its Transmission Cost Recovery Rider*, Case No. 06-273-EL-UNC, Application at 1-2 (Feb. 3, 2006) (hereinafter "2006 TCRR Case") <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=11907810F2AE717D8525710D004600F6>; 2006 TCRR Case, Finding and Order at 4-5 (May 26, 2006), available at: <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=4A0DAF85E420DC788525717A00521FD0>.

In March 2009, when the Commission reviewed AEP-Ohio's first electric security plan ("ESP") application, it approved AEP-Ohio's request to retain its then-current bypassable TCRR. *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 Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 49 (Mar. 18, 2009), available at: <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=b125aec6-ded7-4f5c-b908-6520f2e0cb3f>.

In AEP-Ohio's second ESP proceeding, the Commission likewise approved AEP-Ohio's request to retain the existing TCRR structure subject to a change that combined the mechanisms of Columbus Southern Power Company and Ohio Power Company. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 63-64 (Aug. 8, 2012) (hereinafter, "ESP II Case"), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12H08B40046F08138>.

<sup>11</sup> In the case of AEP-Ohio, PJM actually bills AEP-Ohio on a consolidated basis along with AEP-Ohio's other affiliates that operate in PJM's territory. Application at Schedule D-3c (Supp. at 9-12). The consolidated bill from PJM for transmission service is then allocated to AEP-Ohio and its affiliates based upon the respective load that each affiliate company serves. *Id.* (Supp. at 9-12).

In accordance with the Commission's rules, AEP-Ohio files an application on an annual basis to update its TCRR.<sup>12</sup> As part of that annual review, AEP-Ohio projects the amount of transmission-related costs it expects to be invoiced from PJM,<sup>13</sup> and those costs are used as a revenue requirement used to calculate retail rates applicable to non-shopping customers. In June 2011, the Commission authorized AEP-Ohio to implement new TCRR rates that were projected to collect \$354 million from July 2011 through June 2012.<sup>14</sup> The TCRR rates authorized in June 2011 were fully bypassable by shopping customers. In March 2012, AEP-Ohio requested a waiver of the Commission's requirement that the TCRR update be filed on or around April 15 of each year for rates to be effective for the first billing cycle of July. The Commission granted AEP-Ohio's request to delay its annual update to June 2012 for rates to be effective with the first billing cycle of September 2012. The Commission subsequently suspended AEP-Ohio's June 2012 application causing further delay.<sup>15</sup> AEP-Ohio's updated TCRR rates did not go into effect until the first billing cycle of November 2012.<sup>16</sup>

When AEP-Ohio filed its June 2012 application to update its TCRR, AEP-Ohio noted that since its last TCRR update application it had under-recovered \$36,421,033 (the "under-

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<sup>12</sup> Ohio Adm. Code 4901:1-36-03(B) (Appx. at 53).

<sup>13</sup> Entry on Rehearing at 5 (Dec. 12, 2012) (AEP-Ohio experienced an under-recovery based upon the difference in forecasted PJM costs) (Appx. at 19).

<sup>14</sup> *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) (hereinafter "2011 TCRR Case"), available at <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11F22B40533F44667>; *2011 TCRR Case*, Staff Review and Recommendation at 1 (June 13, 2011) (Columbus Southern Power Company customers would be billed "\$161M" and Ohio Power Company customers would be billed "\$193M"), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11F13B14642I72036>.

<sup>15</sup> Entry at 2 (Aug. 15, 2012) (Appx. at 30).

<sup>16</sup> TCRR Order at 8 (Oct. 24, 2012) (Appx. at 8).

recovery balance”) from non-shopping customers when compared to the costs AEP-Ohio was invoiced from PJM.<sup>17</sup> AEP-Ohio’s application suggested that the Commission consider a phase-in of the under-recovery balance and require recovery through a non-bypassable rider pursuant to R.C. 4928.144.<sup>18</sup> On October 24, 2012, the Commission issued a Finding and Order (“TCRR Order”) and authorized AEP-Ohio’s updated TCRR rates for the next annual period, again on a bypassable basis; however, the Commission authorized AEP-Ohio to collect the under-recovery balance on a non-bypassable basis from all customers.<sup>19</sup>

As a result of the TCRR Order, AEP-Ohio will collect approximately \$12.1 million annually, for three years, under the terms of the non-bypassable rider.<sup>20</sup> Based on the information provided in AEP-Ohio’s compliance filing, the estimated effect of the non-bypassable rider is to shift in the first year roughly \$8 million of the \$12.1 million of the under-recovery balance to shopping customers.<sup>21</sup> If the Commission’s authorization has similar effects for the second and third years of the non-bypassable rider, the total three-year shift of costs to shopping customers will be roughly \$24 million.<sup>22</sup> Thus, the effect of the TCRR Order is to raise the rates of shopping customers to retroactively recover costs that were previously the responsibility of non-shopping customers.

IEU-Ohio challenged the lawfulness and reasonableness of recovering the under-recovery balance on a non-bypassable basis in comments filed on July 25, 2012, supplemental comments

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<sup>17</sup> Application at 4 (Jun. 15, 2012) (Supp. at 4).

<sup>18</sup> *Id.* at 5 (Supp. at 5).

<sup>19</sup> TCRR Order at 6-7 (Appx. at 11-12).

<sup>20</sup> AEP-Ohio Compliance Tariffs at Schedule C-3 page 1 of 2 (Oct. 26, 2012) (Supp. at 8).

<sup>21</sup> *Id.* (Supp. at 8). According to AEP-Ohio’s compliance tariffs, roughly two-thirds of AEP-Ohio’s load was shopping; 66% of AEP-Ohio’s total demand and roughly 69% of AEP-Ohio’s total energy sales.

<sup>22</sup> *Id.* (Supp. at 8).

filed on October 19, 2012, and through its application for rehearing of the TCRR Order filed on November 21, 2012. IEU-Ohio identified that AEP-Ohio's proposal violated the Commission's rule that requires TCRRs to be fully bypassable.<sup>23</sup> The Commission agreed, but waived, *sua sponte*, its rule in the TCRR Order.<sup>24</sup> IEU-Ohio also identified that AEP-Ohio's proposal violated the Commission's precedent, which holds that bypassable riders cannot be trued-up on a non-bypassable basis because it provides an anticompetitive subsidy in violation of R.C. 4928.02(H) and because costs associated with serving non-shopping customers should not be recovered from shopping customers.<sup>25</sup> The Commission attempted to distinguish its prior holdings on grounds that AEP-Ohio experienced increased levels of shopping that led to the under-recovery balance, but the Commission rejected the argument in the prior order.<sup>26</sup> In its

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<sup>23</sup> Comments of IEU-Ohio at 3 (July 25, 2012) (Supp. at 16); Supplemental Comments of IEU-Ohio in Response to Staff's October 15, 2012 Review and Recommendation at 5 (Oct. 19, 2012) (Supp. at 26); TCRR Order at 7 (Appx. at 12).

<sup>24</sup> In the TCRR Order, the Commission held:

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.

TCRR Order at 7 (Appx. at 12).

<sup>25</sup> Comments of IEU-Ohio at 4 (July 25, 2012) (Supp. at 17); Supplemental Comments of IEU-Ohio in Response to Staff's October 15, 2012 Review and Recommendation at 6 (Oct. 19, 2012) (Supp. at 27); IEU-Ohio's Application for Rehearing and Memorandum in Support at 10-13 (Nov. 21, 2012); TCRR Order at 7 (Appx. at 12).

<sup>26</sup> TCRR Order at 7-8 (Appx. at 12-13); see *In the Matter of 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 57, 63 (Feb. 23, 2011) ("Duke MRO Order"), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11B23B23737C09965>.

prior order, the Commission held the true-up on a non-bypassable basis of a bypassable rider could not occur “under any circumstances.”<sup>27</sup>

IEU-Ohio further identified that R.C. 4928.144 was inapplicable because the existing TCRR was not approved under R.C. 4928.141 to R.C. 4928.143, because any phase-in is required to be part of an order in a proceeding initiated under R.C. 4928.141 to 4928.143, and because any use of the phase-in authority in R.C. 4928.144 could only be done prospectively.<sup>28</sup> In the TCRR Order, the Commission rejected IEU-Ohio’s arguments that R.C. 4928.144 was inapplicable, stating:

The Commission finds no merit in IEU-Ohio's argument that Section 4928.144, Revised Code, is inapplicable, or that [AEP-Ohio] has not sufficiently identified its incurred costs. [AEP-Ohio]'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.<sup>29</sup>

Although the Commission rejected IEU-Ohio’s argument that R.C. 4928.144 was inapplicable, it did not hold that it was authorizing the recovery of the under-recovery balance on a non-bypassable basis pursuant to R.C. 4928.144.<sup>30</sup> On rehearing, the Commission again did not state that it was invoking any authority it may have under R.C. 4928.144; instead, the Commission stated that the TCRR Order was “consistent with the Commission’s authority under Section 4928.144, Revised Code.”<sup>31</sup>

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<sup>27</sup> *Id.* at 63.

<sup>28</sup> Comments of IEU-Ohio at 2-3 (July 25, 2012) (Supp. at 15-16); Supplemental Comments of IEU-Ohio in Response to Staff’s October 15, 2012 Review and Recommendation at 3-5 (Oct. 19, 2012) (Supp. at 24-26); IEU-Ohio’s Application for Rehearing and Memorandum in Support at 14-17 (Nov. 21, 2012) (Appx. at 47-50).

<sup>29</sup> TCRR Order at 7 (Appx. at 12).

<sup>30</sup> *See id.* (Appx. at 12).

<sup>31</sup> Entry on Rehearing at 4, 8 (Dec. 12, 2012) (Appx. at 18, 22).

Finally, IEU-Ohio identified that the TCRR Order amounted to unlawful retroactive ratemaking.<sup>32</sup> But, the Commission rejected IEU-Ohio's argument on grounds that the TCRR Order was consistent with its phase-in authority in R.C. 4928.144, and held that the under-recovery balance was not attributable to regulatory lag but rather was "attributable to the difference between the level of forecasted costs in [AEP-Ohio]'s most recent TCRR update and the actual costs incurred by [AEP-Ohio] over the prior period."<sup>33</sup>

As demonstrated below, collecting the under-recovery balance on a non-bypassable basis is unlawful and unreasonable. The Commission has engaged in retroactive ratemaking, lacks authority under R.C. 4928.144 to authorize a phase-in of the TCRR, and ignored its prior precedent without a lawful and reasonable justification for that deviation.

## II. STANDARD OF REVIEW

"R.C. 4903.13 provides that a [Commission] order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable."<sup>34</sup> As to factual determinations, the Court will not reverse or modify a Commission decision "when the record contains sufficient probative evidence to show that the [Commission]'s determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record that it shows misapprehension, mistake, or willful disregard of

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<sup>32</sup> IEU-Ohio's Application for Rehearing and Memorandum in Support at 5-10 (Nov. 21, 2012) (Appx. at 38-43).

<sup>33</sup> Entry on Rehearing at 5 (Dec. 12, 2012) (Appx. at 19).

<sup>34</sup> *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, ¶ 50.

duty.”<sup>35</sup> The Court “has ‘complete and independent power of review as to all questions of law’ in appeals from the commission.”<sup>36</sup>

### III. ARGUMENT

**A. Proposition of Law 1: The TCRR Order is unlawful and unreasonable because it retroactively authorizes the collection of AEP-Ohio’s under-recovery balance on a non-bypassable basis.**

The TCRR Order is unlawful and unreasonable because it authorizes AEP-Ohio to retroactively make shopping customers responsible for the costs AEP-Ohio incurred to serve non-shopping customers. The retroactive rate increase applicable to shopping customers occurs through the new non-bypassable portion of the TCRR that will collect AEP-Ohio’s \$36 million under-recovery balance. Because the Commission’s authorization of a retroactive increase in shopping customers’ rates is unlawful and unreasonable, the Court should reverse the Commission’s decision and remand the case back to the Commission with instructions to remedy the unlawful and unreasonable effects of the TCRR Order.

R.C. 4928.05(A)(2) provides the Commission “authority to provide for the recovery, through a reconcilable rider on an electric distribution utility’s distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission.” By rule, the Commission has provided that transmission costs are to be collected through a rider that is reconciled annually.<sup>37</sup> The rider is to

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<sup>35</sup> *Id.*

<sup>36</sup> *Elyria Foundry Co. v. Pub. Util. Comm.*, 118 Ohio St.3d 269, 2008-Ohio-2230, ¶ 13 (quoting *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469 (1997)).

<sup>37</sup> Ohio Adm. Code 4901:1-36-04(A) (Appx. at 55).

include all costs and off-setting revenues charged or credited to the EDU to the extent that those costs and revenues are not included in any other schedule or rider of the EDU's tariffs.<sup>38</sup> Finally, "[t]he transmission cost recovery rider shall be avoidable by all customers who choose alternative generation suppliers and the electric utility no longer bears the responsibility of providing generation and transmission service to the customers."<sup>39</sup>

Until the Commission issued the TCRR Order in this proceeding, AEP-Ohio had collected its PJM-related transmission costs through a bypassable rider that was reconciled for any under- or over-recovery annually from non-shopping customers only. AEP-Ohio did not have a tariff that authorized it to collect any transmission-related costs from shopping customers and shopping customers were *not* responsible to AEP-Ohio for *any* transmission-related costs that AEP-Ohio incurred for serving non-shopping customers. The TCRR Order, however, authorizes AEP-Ohio to collect the \$36 million under-recovery balance with carrying charges at AEP-Ohio's long-term cost of debt over a three-year period through a non-bypassable rider applicable to both shopping and non-shopping customers for costs AEP-Ohio previously incurred for serving only non-shopping customers.<sup>40</sup> Thus, for all shopping customers, the TCRR Order retroactively makes shopping customers responsible for the costs AEP-Ohio incurred to serve non-shopping customers over the prior annual period. While shopping customers are being held responsible to pay for their own transmission service (through their contracts with their CRES providers), they will now also be held responsible to pay a portion of the transmission service cost AEP-Ohio incurred from PJM to serve non-shopping customers over the prior annual period.

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<sup>38</sup> Ohio Adm. Code 4901:1-36-04(C) (Appx. at 55).

<sup>39</sup> Ohio Adm. Code 4901:1-36-04(B) (Appx. at 55).

<sup>40</sup> TCRR Order at 6-7 (Appx. at 11-12).

By authorizing AEP-Ohio to collect the under-recovery balance from shopping customers, the Commission engaged in retroactive ratemaking.<sup>41</sup> As a result, the TCRR Order is unlawful and unreasonable. In its Entry on Rehearing, the Commission rejects IEU-Ohio's argument that the Commission engaged in retroactive ratemaking.<sup>42</sup> To support its assertion, the Commission claims that R.C. 4928.144 allows the Commission to make the under-recovery balance non-bypassable, asserts that the TCRR Order complies with past Court decisions regarding retroactive ratemaking, and claims that the under-recovery balance is not related to regulatory delay. None of these claims are correct. As discussed below in IEU-Ohio's Proposition of Law 2, R.C. 4928.144 does not provide the Commission with authority to make the collection of the under-recovery balance non-bypassable.

Furthermore, this Court's past decisions do not permit the Commission to true-up a rider by retroactively increasing the charges on shopping customers. "A rate increase making up for revenues lost due to regulatory delay is precisely the action that [the Supreme Court] found contrary to law in *Keco*."<sup>43</sup> Unless a different result is statutorily authorized, retroactive ratemaking to increase or decrease a utility's authorized rate is prohibited. As the Court recently stated, "[b]y approving rates that recouped losses due to past regulatory delay, the commission violated this court's case law on retroactive ratemaking ..."<sup>44</sup> "[U]tility ratemaking by the Public Utilities Commission is prospective only."<sup>45</sup>

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<sup>41</sup> *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997).

<sup>42</sup> Entry on Rehearing at 4-6 (Dec. 12, 2012) (Appx. at 18-20).

<sup>43</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶ 11 (citing *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957)).

<sup>44</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶¶ 10-11.

<sup>45</sup> *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997).

The prospective nature of utility ratemaking is not absolute; under some limited circumstances, the Commission may authorize a rate or charge to allow recovery of previously incurred costs. In this instance, the TCRR is authorized under R.C. 4928.05(A)(2), which provides that the Commission may authorize a reconcilable rider. Thus, the Commission clearly has some authority to increase or decrease the TCRR to reconcile an EDU's collections with the federally authorized transmission costs that it incurs.

That statutory authorization, however, does not include authority to invent a new and previously unauthorized reconciliation mechanism, *i.e.* the non-bypassable recovery of the under-recovery balance. As the Supreme Court stated in *Lucas County*,<sup>46</sup> the Commission's authority to reconcile a rate for past under- or over-recovery must be incorporated in the initial rate approved by the Commission.<sup>47</sup> In the previously approved TCRR, consistent with the Commission's rule,<sup>48</sup> there was no provision for reconciliation through a non-bypassable charge. Because the existing TCRR did not authorize reconciliation on a non-bypassable basis, the Commission has no lawful basis to assign a revenue responsibility to shopping customers through the non-bypassable charge in this case. Thus, the Commission cannot claim any support for its position that prior decisions of this Court support the TCRR Order. The Commission engaged in retroactive ratemaking when it authorized AEP-Ohio to bill and collect the \$36 million under-recovery balance through a new non-bypassable charge that was not previously authorized.

Finally, the Commission's assertion that the under-recovery balance is not the result of regulatory delay is not correct and is contradicted by the Commission's own order. The TCRR

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<sup>46</sup> 80 Ohio St.3d at 348.

<sup>47</sup> *Id.*

<sup>48</sup> Ohio Adm. Code 4901:1-36-04(B) (Appx. at 55).

Order permits the unauthorized recovery, from shopping customers, of costs attributable to the prior annual period, the essence of retroactive ratemaking. Further, the Commission acknowledged that the under-recovery balance was “attributable to the difference between the level of forecasted costs in [AEP-Ohio]’s most recent TCRR update and the actual costs incurred by [AEP-Ohio] over the prior period.”<sup>49</sup> The Commission then identified the timing difference that resulted in the under-recovery balance:

[the Commission] agree[s] with Staff and [AEP-Ohio] 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 [AEP-Ohio] 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 [AEP-Ohio] during the period in which the costs were incurred, but have since decided to switch to an alternative generation supplier.<sup>50</sup>

Thus, according to the Commission, regulatory delay does exist; the Commission has claimed that there is a mismatch between those customers who have caused AEP-Ohio to incur costs and those non-shopping customers who remain on AEP-Ohio’s standard service offer (“SSO”). The Commission’s claim that the under-recovery balance was not the result of regulatory delay is not correct and cannot serve as a basis to support the TCRR Order.

The result of the TCRR Order and the retroactive increase is that shopping customers are being billed twice for transmission service: once for their own transmission service that is provided through their CRES provider, and once to pay a portion of the cost AEP-Ohio incurred to serve non-shopping customers over the prior annual period.<sup>51</sup> Because the Commission has no

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<sup>49</sup> Entry on Rehearing at 5 (Dec. 12, 2012) (Appx. at 19).

<sup>50</sup> TCRR Order at 7-8 (Appx. at 12-13)..

<sup>51</sup> The Commission states that customers will not be billed twice, asserting that a portion of the under-recovery balance is assignable to customers that switched. Entry on Rehearing at 6-7

authority to authorize the retroactive recovery of the under-recovery balance through a non-bypassable charge, the Court should reverse the Commission's decision and remand the case back to the Commission with instructions that the Commission authorize the collection of the under-recovery balance as part of the bypassable TCRR.

**B. Proposition of Law 2: The TCRR Order is unlawful and unreasonable because the Commission cannot rely on its phase-in authority contained in R.C. 4928.144 to authorize the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.**

The TCRR Order is unlawful and unreasonable to the extent the Commission has relied upon R.C. 4928.144 to authorize AEP-Ohio to collect its under-recovery balance on a non-bypassable basis.<sup>52</sup> Any use of the phase-in authority under R.C. 4928.144 must be done in the context of an SSO proceeding, *i.e.*, under the Commission's authority in R.C. 4928.141 to 4928.143, and the use of such phase-in authority may only be used prospectively.

R.C. 4928.144 provides that the Commission:

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.

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(Dec. 12, 2012) (Appx. at 20-21). Because the Commission did not conduct a hearing, there is no record to support that conclusion. Additionally, the statement concedes a portion of the cost will be assigned to customers that switched before the prior annual period.

<sup>52</sup> The Commission did not state that the TCRR Order relied upon R.C. 4928.144; however, it rejected IEU-Ohio's argument that the statute did not apply. TCRR Order at 7 (Appx. at 12).

By its terms, R.C. 4928.144, is only applicable to a “rate or price established under sections 4928.141 to 4928.143 of the Revised Code.”<sup>53</sup> Although R.C. 4928.143(B)(2)(g) allows an ESP to include “[p]rovisions relating to transmission ... service,” the Commission did not authorize the TCRR under this Section; instead, the Commission authorized AEP-Ohio’s TCRR under R.C. 4928.05.<sup>54</sup> Thus, the Commission cannot rely upon its phase-in authority in R.C. 4928.144 to authorize the collection of AEP-Ohio’s under-recovery balance on a non-bypassable basis.

R.C. 4928.144 further requires that a phase-in of “a rate or price established under sections 4928.141 to 4928.143 of the Revised Code” occur in the Commission’s order authorizing the underlying rate or price. Neither of the Commission’s orders in AEP-Ohio’s first or second ESP proceedings, however, authorized a phase-in of AEP-Ohio’s TCRR. The Commission cannot retroactively impose such a condition upon shopping customers.<sup>55</sup>

In the TCRR Order, the Commission rejected IEU-Ohio’s arguments that R.C. 4928.144 was inapplicable stating:

The Commission finds no merit in IEU-Ohio's argument that Section 4928.144, Revised Code, is inapplicable, or that [AEP-Ohio] has not sufficiently identified

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<sup>53</sup> R.C. 4928.144 (Appx. at 59).

<sup>54</sup> *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 Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 49 (Mar. 18, 2009) (authorizing AEP-Ohio to retain its TCRR as approved in Case No. 08-1202-EL-UNC which authorized AEP-Ohio to continue its TCRR as approved under AEP-Ohio’s RSP in Case No. 04-169-EL-UNC before the enactment of R.C. 4928.141 to 4928.143), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A09C18B42525F08513>; *2011 TCRR Case*, Finding and Order at 3 (Jun. 22, 2011) available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11F22B40533F44667>; *ESP II Case*, Opinion and Order at 63 (Aug. 8, 2012) (the Commission authorized AEP-Ohio’s TCRR “[p]ursuant to Commission authority, as set forth in Section 4928.05(A)(2), Revised Code”), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12H08B40046F08138>.

<sup>55</sup> See R.C. 4928.144 (Appx. at 59); see also Section III.A for a discussion of the prohibition on retroactive ratemaking.

its incurred costs. [AEP-Ohio]'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.<sup>56</sup>

Although the Commission rejected IEU-Ohio's argument that R.C. 4928.144 was inapplicable, it did not hold that it was authorizing the recovery of the under-recovery balance on a non-bypassable basis pursuant to R.C. 4928.144.<sup>57</sup> On rehearing, the Commission again did not state that it was invoking any authority it may have under R.C. 4928.144; instead, the Commission stated that the TCRR Order was "consistent with the Commission's authority under Section 4928.144, Revised Code."<sup>58</sup>

But, in any event, as described above, R.C. 4928.144 cannot be made applicable to this proceeding. The Commission's phase-in authority under that Section may only be invoked in a proceeding to establish SSO rates, may only be invoked to phase in a rate established under R.C. 4928.141 to 4928.143, and may only be invoked in a prospective manner. Because these conditions have not been satisfied, the Court should reverse the Commission's decision in this case and remand the case to the Commission with instructions to terminate the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.

**C. Proposition of Law 3: 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.**

As the Court has held:

[T]he commission [should] respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law. This does not mean that the commission may never revisit a

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<sup>56</sup> TCRR Order at 7 (Appx. at 12).

<sup>57</sup> *See id.* (Appx. at 12).

<sup>58</sup> Entry on Rehearing at 4, 8 (Dec. 12, 2012) (Appx. at 18, 22).

particular decision, only that if it does change course, it must explain why. The new course also must be substantively reasonable and lawful.<sup>59</sup>

As discussed below, the Commission's precedent requires AEP-Ohio's TCRR to remain fully bypassable. The Commission, however, has not explained its change in position relative to the precedent discussed below (that was brought to the Commission's attention through IEU-Ohio's comments and application for rehearing in this proceeding<sup>60</sup>). Further, as demonstrated herein, the Commission's deviation from its precedent is not substantively reasonable or lawful, and therefore the Commission's failure to follow precedent was unlawful and unreasonable.

The Commission's past precedent mandates that over/under-recoveries of a bypassable rider must remain bypassable. In Duke Energy Ohio, Inc.'s ("Duke") Market Rate Offer ("MRO") proceeding, Duke requested authority to conduct a final true-up of two of its ESP riders (Rider PTC-FPP and Rider SRA-SRT)<sup>61</sup> that would terminate once Duke's proposed MRO began.<sup>62</sup> One of the two riders (Rider PTC-FPP) was bypassable by shopping customers, and the other (SRA-SRT) was conditionally bypassable; the preponderance of the under-recovery balance was related to the fully bypassable Rider PTC-FPP.<sup>63</sup> Duke proposed to conduct the

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<sup>59</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶ 52 (internal citations omitted).

<sup>60</sup> Comments of IEU-Ohio at 4 (July 25, 2012) (Supp. at 17); Supplemental Comments of IEU-Ohio in Response to Commission Staff's October 15, 2012 Review and Recommendation at 6 (Oct. 19, 2012) (Supp. at 27); IEU-Ohio's Application for Rehearing and Memorandum in Support at 10-13 (Nov. 21, 2012) (Appx. at 43-46).

<sup>61</sup> Rider PTC-FPP stands for Price-to-Compare Fuel and Purchased Power Rider. Rider SRA-SRT stands for System Resource Adequacy and System Reliability Tracker Rider.

<sup>62</sup> Duke MRO Order at 56, available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11B23B23737C09965>.

<sup>63</sup> *Id.*

true-up of Riders PTC-FPP and SRA-SRT through a new rider, the Reconciliation Rider (“Rider RECON”).<sup>64</sup>

Duke also requested authority as part of its MRO application to modify its supplier cost reconciliation rider (“Rider SCR”) from a bypassable to non-bypassable rider if the under-recovery of Rider SCR reached a certain threshold. In support, Duke claimed that if the rider did not become non-bypassable it would “drive[] up the SSO price and encourage[] additional customer switching. In that case, ... there would be fewer customers and less load in succeeding billing periods to recover the SCR deferral balance.”<sup>65</sup> Duke also suggested that this would more appropriately match the recovery of costs with those customers that caused them.<sup>66</sup>

Commission Staff (“Staff”) opposed Duke’s proposal to use a non-bypassable reconciliation mechanism (Rider RECON) to address the over/under-collection consequences of the final true-up of Duke’s Rider PTC-FPP and Rider SRA-SRT stating that “Duke’s generation-related costs should not be attributed to customers not taking generation service from Duke.”<sup>67</sup> Staff also opposed Duke’s proposal to make Rider SCR non-bypassable if the under-recovery balance reached a certain threshold.<sup>68</sup>

The Commission adopted Staff’s recommendations and held that neither of Duke’s riders (Rider RECON and Rider SCR) could be approved as proposed.<sup>69</sup> The Commission reasoned that true-ups of bypassable riders cannot be collected on a non-bypassable basis “under any circumstances” because it “would create an anticompetitive subsidy” in violation of R.C.

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 61.

<sup>66</sup> *Id.* at 61-62.

<sup>67</sup> *Id.* at 56.

<sup>68</sup> *Id.* at 62.

<sup>69</sup> *Id.* at 57, 63.

4928.02(H).<sup>70</sup> The Commission also held that Duke's costs associated with serving SSO customers "should not be borne by customers who do not take ... service from Duke."<sup>71</sup>

The Commission's rationale in the TCRR Order below is directly in conflict with its past precedent in Duke's MRO proceeding. The TCRR Order states that:

[the Commission] agree[s] with Staff and [AEP-Ohio] 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 [AEP-Ohio] 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 [AEP-Ohio] during the period in which the costs were incurred, but have since decided to switch to an alternative generation supplier.<sup>72</sup>

Thus, the Commission authorized exactly what it held it could not and should not do in Duke's MRO proceeding. The Commission has authorized the collection of costs that AEP-Ohio incurred to provide transmission service to non-shopping customers from customers not served by AEP-Ohio and has done so despite the anticompetitive subsidy that will ensue in violation of R.C. 4928.02(H).

The TCRR Order, and December 12, 2012 Entry on Rehearing in the case below distinguish the Commission's decisions in this proceeding from Duke's MRO proceeding on the basis that AEP-Ohio's "under-recovery occurred during a period of limited customer shopping, and was followed by a significant increase in customer shopping ... ." <sup>73</sup> This distinction does not address what the Commission held in the Duke MRO proceeding: that true-ups of bypassable

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<sup>70</sup> *Id.* at 63.

<sup>71</sup> *Id.* at 57.

<sup>72</sup> TCRR Order at 7-8 (Appx. at 12-13).

<sup>73</sup> Entry on Rehearing at 7 (Dec. 12, 2012) (Appx. at 21).

riders cannot be collected on a *non-bypassable* basis “under any circumstances” because it “would create an anticompetitive subsidy” in violation of R.C 4928.02(H).<sup>74</sup>

Additionally, the distinction that the Commission claims exists in this case, increased shopping, was also at issue in Duke’s MRO proceeding. Duke specifically noted that if Rider SCR did not become non-bypassable it would “drive[] up the SSO price and encourage[] additional customer switching. In that case, ... there would be fewer customers and less load in succeeding billing periods to recover the SCR deferral balance.”<sup>75</sup> Thus, there is not a factual distinction, increased shopping, between the circumstances underlying the Commission’s decision in Duke’s MRO proceeding and this proceeding. Accordingly, the Commission has deviated from its past precedent, and that deviation is unlawful and unreasonable because it will cause shopping customers to be billed twice for transmission service, and because it will provide AEP-Ohio with an anticompetitive subsidy.<sup>76</sup>

The TCRR Order is a radical departure from its decision in the Duke MRO case. Despite the Commission’s prior determination that it could not and would not permit Duke to reconcile under- or over-recoveries generated from bypassable riders through a non-bypassable rider on the ground that to do so would unlawfully subsidize the SSO, the Commission in this case has now authorized that result for AEP-Ohio. Therefore, the Court should reverse the Commission’s decision in the case below that authorizes AEP-Ohio to collect its under-recovery balance on a non-bypassable basis.

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<sup>74</sup> Duke MRO Order at 63, available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11B23B23737C09965>.

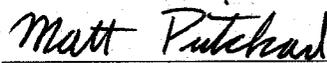
<sup>75</sup> *Id.* at 61.

<sup>76</sup> Collecting the under-recovery balance on a non-bypassable basis is anticompetitive because it provides AEP-Ohio with an advantage over CRES providers; it allows AEP-Ohio to keep its going forward TCRR lower which will have the effect of keeping AEP-Ohio’s price-to-compare lower and will make it harder for CRES providers to beat the price-to-compare.

**IV. CONCLUSION**

Because the TCRR Order is unlawful and unreasonable, the Court should reverse the Commission and remand the case back to the Commission with instructions to terminate the non-bypassable portion of the TCRR. Shopping customers cannot be lawfully charged for costs incurred by AEP-Ohio to serve non-shopping customers through the retroactive rates the Commission authorized. Moreover, the Commission should not be permitted to ignore its precedent with *ad hoc* decision making that is substantively unlawful and unreasonable.

Respectfully submitted,



**Samuel C. Randazzo** (Reg. No. 0016386)  
(Counsel of Record)

**Frank P. Darr** (Reg. No. 0025469)

**Joseph E. Olikier** (Reg. No. 0086088)

**Matthew R. Pritchard** (Reg. 0088070)

McNees Wallace & Nurick  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

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

IN THE SUPREME COURT OF OHIO

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

APPENDIX OF APPELLANT,  
INDUSTRIAL ENERGY USERS-OHIO

**Samuel C. Randazzo** (Reg. No. 0016386)  
(Counsel of Record)  
**Frank P. Darr** (Reg. No. 0025469)  
**Joseph E. Olikier** (Reg. No. 0086088)  
**Matthew R. Pritchard** (Reg. 0088070)  
McNees Wallace & Nurick LLC  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 469-8000  
Facsimile: (614) 469-4653  
sam@mwncmh.com  
fdarr@mwncmh.com  
joliker@mwncmh.com  
mpritchard@mwncmh.com

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

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

**William L. Wright** (Reg. No. 0018010)  
Section Chief, Public Utilities Section  
**Thomas McNamee** (Reg. No. 0017352)  
Assistant Attorneys General  
Public Utilities Commission of Ohio  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 466-4397  
Facsimile: (614) 644-8764  
william.wright@puc.state.oh.us  
thomas.McNamee@puc.state.oh.us

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

**Steven T. Nourse** (Reg. No. 0046705)

(Counsel of Record)

**Matthew J. Satterwhite** (Reg. No. 0071972)

**Yazen Alami** (Reg. No. 0086371)

American Electric Power Service  
Corporation

1 Riverside Plaza, 29<sup>th</sup> Floor

Columbus, Ohio 43215

Telephone: (614) 716-1608

Facsimile: (614) 716-2950

stnourse@aep.com

mjsatterwhite@aep.com

yalami@aep.com

**COUNSEL FOR APPELLEE,  
OHIO POWER COMPANY**

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**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"),<sup>1</sup> 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<sup>2</sup> under-recovery balance<sup>3</sup> 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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<sup>1</sup> "TCRR" stands for Transmission Cost Recovery Rider.

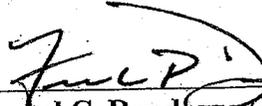
<sup>2</sup> As used herein, "AEP-Ohio" refers to Ohio Power Company.

<sup>3</sup> 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,



**Samuel C. Randazzo** (Reg. No. 0016386)  
(Counsel of Record)

**Frank P. Darr** (Reg. No. 0025469)

**Joseph E. Olikier** (Reg. No. 0086088)

**Matthew R. Pritchard** (Reg. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17<sup>th</sup> Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

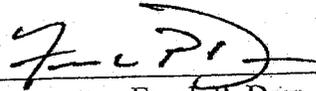
joliker@mwncmh.com

mpritchard@mwncmh.com

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

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.

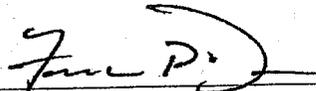


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Frank P. Darr  
Counsel for Appellant  
Industrial Energy Users-Ohio

**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.



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

Steven T. Nourse  
Yazen Alami  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, OH 43215-2373  
stnourse@aep.com  
yalami@aep.com

**COUNSEL FOR OHIO POWER COMPANY**

Terry L. Etter, Counsel of Record  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
etter@occ.state.oh.us

**COUNSEL FOR THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

William Wright  
Chief, Public Utilities Section  
Thomas McNamee  
Assistant Attorney General  
180 E. Broad Street, 6<sup>th</sup> Floor  
Columbus, OH 43215-3793  
william.wright@puc.state.oh.us  
thomas.mcnamee@puc.state.oh.us

**COUNSEL FOR THE STAFF OF THE PUBLIC  
UTILITIES COMMISSION OF OHIO**

Sarah Parrot  
Jonathan Tauber  
Attorney Examiners  
Public Utilities Commission of Ohio  
180 East Broad Street, 12<sup>th</sup> Floor  
Columbus, OH 43215  
sarah.parrot@puc.state.oh.us  
jonathan.tauber@puc.state.oh.us

**ATTORNEY EXAMINERS**

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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.<sup>1</sup> 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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<sup>1</sup> *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.<sup>2</sup> 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.<sup>3</sup> 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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<sup>2</sup> *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).

<sup>3</sup> *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.<sup>4</sup> 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.<sup>5</sup> 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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<sup>4</sup> ESP 2 Order at 70.

<sup>5</sup> 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.<sup>6</sup> 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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<sup>6</sup> *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.<sup>7</sup> 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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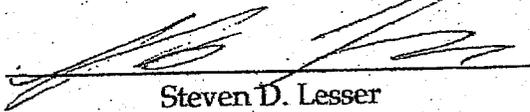
<sup>7</sup> ESP 2 Order at 70.

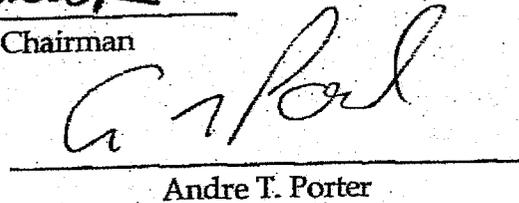
ORDERED, That nothing in this finding and order shall be binding upon this Commission in any future proceeding or investigation involving the justness or reasonableness of any rate, charge, rule, or regulation. It is, further,

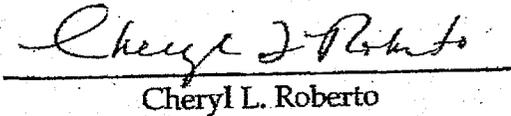
ORDERED, That a copy of this finding and order be served upon all parties of record.

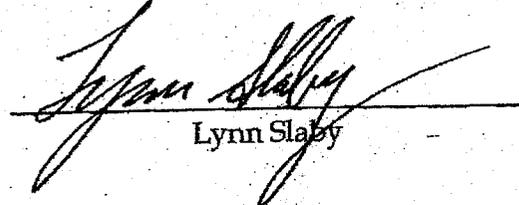
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Snitchler, Chairman

  
Steven D. Lesser

  
Andre T. Porter

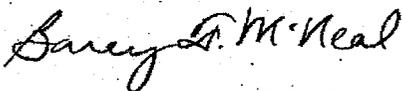
  
Cheryl L. Roberto

  
Lynn Slaby

SJP/sc

Entered in the Journal

**OCT 24 2012**



Barcy F. McNeal  
Secretary

BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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.<sup>1</sup> 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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<sup>1</sup> 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.<sup>2</sup> 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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<sup>2</sup> *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.<sup>3</sup> 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.<sup>4</sup> 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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<sup>3</sup> TCRR Order at 7-8.

<sup>4</sup> TCRR Order at 7.

collected through a nonbypassable charge.<sup>5</sup> 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.<sup>6</sup> 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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<sup>5</sup> *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).

<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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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<sup>7</sup> TCRR Order at 7.

<sup>8</sup> 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).

<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> 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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<sup>10</sup> TCRR Order at 6-7.

<sup>11</sup> TCRR Order at 7.

<sup>12</sup> *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.<sup>13</sup> 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.<sup>14</sup> 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

<sup>13</sup> TCRR Order at 6-7.

<sup>14</sup> *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.<sup>15</sup> 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,

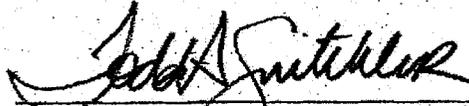
ORDERED, That the applications for rehearing filed by IEU-Ohio and OCC be denied in their entirety. It is, further,

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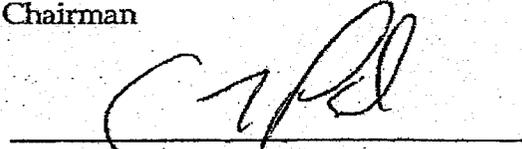
<sup>15</sup> TCRR Order at 8, citing ESP 2 Order at 70.

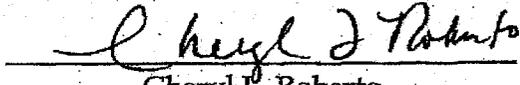
ORDERED, That a copy of this entry on rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Todd A. Spitchler, Chairman

  
Steven D. Lesser

  
Andre T. Porter

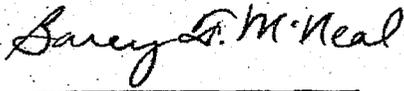
  
Cheryl L. Roberto

  
Lynn Slaby

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Entered in the Journal

**DEC 12 2012**



Barcy F. McNeal  
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The Commission finds:

- (1) On September 17, 2008, the Commission issued new rules, contained in Chapter 4901:1-36, Ohio Administrative Code (O.A.C.), to establish procedures for the implementation of transmission cost recovery riders (TCRRs) authorized by Section 4928.05(A)(2), Revised Code, as amended by Amended Substitute Senate Bill 221. The new rules were effective on April 2, 2009.
- (2) Rule 4901:1-36-03, O.A.C., requires electric utilities with approved transmission cost recovery riders to update the rider pursuant to a schedule set forth by Commission order. By Entry dated April 15, 2009, the Commission established April 16 as the annual filing deadline for Ohio Power Company (Ohio Power or the Company) for its TCRR, for rates to be effective with the first billing cycle of July. *In the Matter of the Adoption of Rules for Standard Service Offers, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as Amended by Amended Substitute Senate Bill 221, Case No. 08-777-EL-ORD, Entry (April 15, 2009).*
- (3) On March 22, 2012, Ohio Power filed a request to modify its schedule for filing updates to the TCRR and a request for expedited consideration. The Company notes that it receives updated NITS charges from PJM Interconnection LLC each year in June, requiring the Company to recalculate its TCRR rates after it has already made its annual filing. In order to eliminate this recurring need to recalculate its TCRR rates, the Company requests that its annual filing deadline be changed to June 15, with rates to be effective with the first billing cycle in September.

- (4) The Commission finds that the Ohio Power's request is reasonable and should be granted. This annual schedule shall be effective commencing with Ohio Power's 2012 TCRR filings.

It is, therefore,

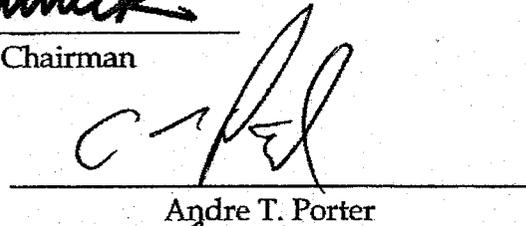
ORDERED, That Ohio Power's request to modify its annual TCRR filing deadline be granted. It is, further,

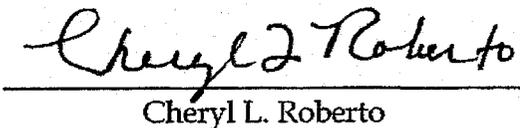
ORDERED, That a copy of this entry be served upon all parties of record.

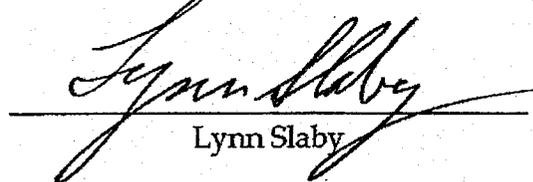
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
 Todd A. Snitchler, Chairman

  
 Steven D. Lesser

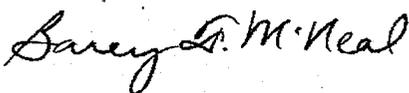
  
 Andre T. Porter

  
 Cheryl L. Roberto

  
 Lynn Slaby

GAP/sc

Entered in the Journal  
APR 11 2012

  
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Barcy F. McNeal  
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ENTRY

The Commission finds:

- (1) On September 17, 2008, the Commission issued new rules, contained in Chapter 4901:1-36, Ohio Administrative Code (O.A.C.), to establish procedures for the implementation of transmission cost recovery riders (TCRR) authorized by Section 4928.05(A)(2), Revised Code, as amended by Amended Substitute Senate Bill 221. The new rules were effective on April 2, 2009.
- (2) Rule 4901:1-36-03, O.A.C., requires electric utilities with approved transmission cost recovery riders to update the rider pursuant to a schedule set forth by Commission order. By Entry dated April 15, 2009, the Commission established April 16 as the annual filing deadline for Ohio Power Company (Ohio Power) for its TCRR, for rates to be effective with the first billing cycle of July. *In the Matter of the Adoption of Rules for Standard Service Offers, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as Amended by Amended Substitute Senate Bill 221, Case No. 08-777-EL-ORD, Entry (April 15, 2009).*
- (3) On March 22, 2012, Ohio Power filed a request to modify its schedule for filing updates to the TCRR. Specifically, Ohio Power requested to change its annual filing deadline to June 15.
- (4) On April 11, 2012, the Commission granted Ohio Power's request to change its annual filing deadline to June 15.
- (5) On June 15, 2012, Ohio Power filed an application to update its TCRR pursuant to Section 4928.05(A)(2), Revised Code, and Chapter 4901:1-36, O.A.C.

- (6) 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.
- (7) In order to allow Staff the opportunity to sufficiently review Ohio Power's application, the attorney examiner finds the 75-day time period should be suspended. Accordingly, upon its review of Ohio Power's application, Staff shall file a letter in this docket setting forth its recommendations for the Commission.
- (8) On June 29, 2012, Industrial Energy Users-Ohio (IEU-Ohio) and the Ohio Consumers' Counsel (OCC) filed motions to intervene. No memoranda contra were filed.
- (9) Upon consideration of the motions to intervene, the attorney examiner finds the motions to intervene filed by IEU-Ohio and OCC are reasonable and should be granted.

It is, therefore,

ORDERED, That the procedural guidelines set forth in Rule 4901:1-36-05, O.A.C., be suspended. It is, further,

ORDERED, That the motions to intervene filed by IEU-Ohio and OCC be granted. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Jonathan Tauber

By: Jonathan J. Tauber  
Attorney Examiner

JRJ/sc

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**8/15/2012 12:07:50 PM**

**in**

**Case No(s). 12-1046-EL-RDR**

**Summary: Attorney Examiner Entry suspending procedural guidelines set forth in Rule 4901:1-36-05, O.A.C. and granting the motions to intervene filed by IEU-Ohio and OCC. - electronically filed by Sandra Coffey on behalf of Jonathan Tauber, Attorney Examiner, Public Utilities Commission of Ohio**

**000000031**



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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**INDUSTRIAL ENERGY USERS-OHIO'S  
APPLICATION FOR REHEARING**

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Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Finding and Order ("TCRR Order") issued by the Public Utilities Commission of Ohio ("Commission") on October 24, 2012, which granted Ohio Power Company's ("AEP-Ohio") Application to adjust its Transmission Cost Recovery Rider ("TCRR") rates. The TCRR Order is unlawful and unreasonable in the following respects:

1. **The TCRR Order is unlawful and unreasonable because it retroactively authorizes the collection of AEP-Ohio's under-recovery balance 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.**
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.**

As discussed in additional detail in the memorandum in support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing.

Respectfully submitted,

/s/ Matthew R. Pritchard

Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. Olikier

Matthew R. Pritchard

MCNEES WALLACE & NURICK LLC

21 East State Street, 17<sup>TH</sup> Floor

Columbus, OH 43215

sam@mwnmch.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**MEMORANDUM IN SUPPORT**

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**I. BACKGROUND**

On March 22, 2012 AEP-Ohio initiated this proceeding and requested a modification to the Commission's schedule for filing its annual update to its TCRR.<sup>1</sup> By Commission rule, the TCRR is updated on an annual basis; and as established by prior Commission Entry, that filing is to be done by April 16<sup>th</sup> of each year with rates effective July 1<sup>st</sup>.<sup>2</sup> AEP-Ohio's request was granted on April 11, 2012.

On June 15, 2012, AEP-Ohio filed its annual application ("Application") to update its TCRR. On July 11, July 24, and August 16, 2012, AEP-Ohio filed updates to its Application. In total, AEP-Ohio requested the Commission increase its TCRR by \$36 million reflecting updated rates for transmission charges billed to AEP-Ohio from PJM Interconnection, L.L.C. ("PJM") and reflecting a \$36 million under-recovery (the "under-recovery balance") during the prior annual TCRR period. AEP-Ohio requested the

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<sup>1</sup> Request to Modify Ohio Power Company's Schedule for Filing Updates to its Transmission Cost Recovery Rider and Request for Expedited Treatment at 1 (Mar. 22, 2012).

<sup>2</sup> *Id.* (citing *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as Amended by Amended Substitute Senate Bill 221*, Case No. 08-777-EL-ORD, Entry at 1 (Apr. 15, 2009)); Rule 4901:1-36-03(B), O.A.C.

Commission authorize AEP-Ohio to collect the \$36 million under-recovery balance over three years on a non-bypassable basis.

Although the Commission's rules require a utility to file an interim update application before the annual filing is due if the utility projects that a significant under-recovery will occur (to minimize carrying costs and rate impacts), AEP-Ohio did not file such an application and, as stated above, requested an extension which further amplified the under-recovery and caused a further synchronization problem of properly assigning the collection of costs to those customers causing those costs.<sup>3</sup> And AEP-Ohio's delay occurred at the same time when AEP-Ohio was claiming that significant increases in the levels of customer switching had occurred and would continue to occur in its service area.<sup>4</sup> Thus, AEP-Ohio was well aware that there could or would be an under-recovery of its TCRR.

Commission Staff ("Staff") ultimately filed a review and recommendation and supported AEP-Ohio's proposal to recover the under-recovery balance through a new non-bypassable charge. Over the objections of IEU-Ohio, on October 24, 2012, the

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<sup>3</sup> Rule 4901:1-36-03(E), O.A.C.

<sup>4</sup> TCRR Order at 7 (shopping assumption built into the last annual update to the TCRR was 9%); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 54 (Aug. 8, 2012) (hereinafter "AEP ESP I") (by December 14, 2012 shopping in AEP-Ohio's territory was approaching or had exceeded 21%); *AEP ESP II*, Direct Testimony of William A. Allen at 4, Exhibit WAA-2 (Mar. 23, 2012) (as of March 1, 2012 customer shopping had increased to 36.71% and AEP-Ohio projected that by the end of 2012 customer switching would increase to 65% for residential customers, 80% for commercial customers, and 90% for industrial customers). AEP-Ohio and the Commission have cited to increases in shopping as a cause of AEP-Ohio's under-recovery balance and justified the non-bypassable TCRR charge on the basis that it would be fair to require shopping customers to help pick up the under-recovery tab since the under-recovery was partially attributed to those customers that had recently began shopping; however, there is no evidence in this proceeding that increases in shopping are directly correlated to the under-recovery balance. While it is true that the revenue AEP-Ohio collects through bypassable charges such as the TCRR decrease as customers leave the SSO, the transmission charges assessed to AEP-Ohio by PJM also decrease as customers leave.

Commission approved a non-bypassable charge that will recover the \$36 million under-recovery balance over a three-year period. The TCRR Order results in shopping customers paying twice for transmission service; having paid their competitive retail electric service ("CRES") provider for the transmission service the CRES provider procured from PJM to serve the customer throughout the past year, and will now also be required to compensate AEP-Ohio for the transmission service AEP-Ohio procured from PJM to serve its non-shopping customers. The TCRR Order has retroactively made shopping customers responsible for AEP-Ohio's costs to serve non-shopping customers. As demonstrated below, the TCRR Order is unlawful and unreasonable.

## II. ARGUMENT

### A. **The TCRR Order is unlawful and unreasonable because it retroactively authorizes the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.**

The TCRR Order is unlawful and unreasonable because it authorizes AEP-Ohio to retroactively increase its compensation from shopping customers through the new non-bypassable portion of the TCRR that will collect AEP-Ohio's \$36 million under-recovery balance. This is prohibited by law and therefore the Commission must grant rehearing to remedy the unlawful and unreasonable effects of the TCRR Order.

Section 4928.05(A)(2), Revised Code, provides the Commission "authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory

commission.” By rule, the Commission has provided that transmission costs are to be collected through a rider that is reconciled annually.<sup>5</sup> The rider is to include all costs and off-setting revenues charged or credited to the electric distribution utility (“EDU”) to the extent that those costs and revenues are not included in any other schedule or rider of the EDU’s tariffs.<sup>6</sup> Finally, “[t]he transmission cost recovery rider shall be avoidable by all customers who choose alternative generation suppliers and the electric utility no longer bears the responsibility of providing generation and transmission service to the customers.”<sup>7</sup>

Until the Commission issued the TCRR Order in this proceeding, AEP-Ohio had collected its PJM-related transmission costs through a bypassable rider that was reconciled for any under- or over-recovery annually from non-shopping customers. AEP-Ohio did not have a tariff that authorized it to collect any transmission-related costs from shopping customers.

The TCRR Order, however, authorized AEP-Ohio to collect the \$36 million under-recovery balance with carrying charges at AEP-Ohio’s long-term cost of debt over a three-year period through a non-bypassable rider.<sup>8</sup> Subsequently, AEP-Ohio filed tariffs applicable to shopping customers that will permit it to bill and collect a portion of the under-recovery balance.<sup>9</sup>

As a result of the TCRR Order, AEP-Ohio will collect approximately \$12.1 million annually under the terms of the non-bypassable rider. Based on the information

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<sup>5</sup> Rule 4901:1-36-04(A), O.A.C.

<sup>6</sup> Rule 4901:1-36-04(C), OAC.

<sup>7</sup> Rule 4901:1-36-04(B), OAC.

<sup>8</sup> TCRR Order at 6-7.

<sup>9</sup> Compliance Tariffs PUCO No. 20 (Oct. 26, 2012).

provided in AEP-Ohio's compliance filing, the estimated effect of the non-bypassable rider is to shift in the first year between \$8.4 million and \$9.1 million (of the \$12.1 million) onto shopping customers. If the Commission's authorization has similar effects for the second and third years of the non-bypassable rider, the total three-year shift of costs to shopping customers is estimated to be between \$25.2 million and \$27.3 million.<sup>10</sup>

By shifting the revenue responsibility for a part of the under-recovery balance to shopping customers, the Commission has retroactively increased their rates. AEP-Ohio was not authorized to bill and collect from shopping customers a transmission-related charge. Thus, for all shopping customers, the TCRR Order increases their electricity rates to retroactively recover a portion of the under-recovery balance from the prior annual period. While shopping customers are being held responsible to pay for their own transmission service (through their contracts with their CRES providers), they will now also be held responsible to pay for the transmission service AEP-Ohio procured from PJM to serve non-shopping customers.

The increase of shopping customers' rates to collect the under-recovery balance results in retroactive ratemaking. "A rate increase making up for revenues lost due to regulatory delay is precisely the action that [the Supreme Court] found contrary to law in *Keco*."<sup>11</sup> In this instance, the under-recovery balance is a function of the delay inherent in the annual review process, and the fact that AEP-Ohio did not avail itself of the interim procedure in the Commission's Rules that allow (and require) an EDU to seek to

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<sup>10</sup> Letter from Yazem Alami to Betty McCauley and attachments (Oct. 26, 2012).

<sup>11</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶ 11 (citing *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957)).

reconcile the TCRR prior to the annual review.<sup>12</sup> And AEP-Ohio further amplified the problem by seeking a delay in the annual update process. Thus, the Commission's authorization of a non-bypassable charge will result in a rate increase to make up revenue lost due to regulatory delay.

Unless a different result is statutorily authorized, retroactive ratemaking to increase or decrease a utility's authorized rate is prohibited. As the Supreme Court recently stated, "[b]y approving rates that recouped losses due to past regulatory delay, the commission violated this court's case law on retroactive ratemaking ... ."<sup>13</sup> "[U]tility ratemaking by the Public Utilities Commission is prospective only."<sup>14</sup>

The prospective nature of utility ratemaking is not absolute. Under some limited circumstances, the Commission may authorize a rate or charge to allow recovery of previously deferred revenues. In this instance, the TCRR is authorized under Section 4928.05(A)(2), Revised Code, which provides that the Commission may authorize a reconcilable rider. Thus, the Commission clearly has some authority to increase or decrease the TCRR to reconcile an EDU's collections with the federally authorized transmission costs that it incurs.

That statutory authorization, however, does not include authority to invent a new and previously unauthorized reconciliation mechanism. As the Supreme Court stated in

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<sup>12</sup> Rule 4901:1-36-03(E), O.A.C., provides:

If at anytime during the period between annual update filings, the electric utility or staff determines that costs are or will be substantially different than the amounts authorized as the result of the electric utility's previous application, the electric utility should file, on its own initiative or by order of the commission, an interim application to adjust the transmission cost recovery rider in order to avoid excessive carrying costs and to minimize rate impacts for the following update filing.

<sup>13</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶¶ 10-11.

<sup>14</sup> *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997).

Lucas County,<sup>15</sup> the Commission's authority to reconcile a rate for past under- or over-recovery must be incorporated in the initial rate approved by the Commission.<sup>16</sup> In the previously approved TCRR, consistent with the Commission's rule,<sup>17</sup> there was no provision for reconciliation through a new non-bypassable charge. Because the existing TCRR did not provide for a non-bypassable reconciliation mechanism, the Commission has no lawful basis to assign a revenue responsibility to shopping customers through the non-bypassable charge in this case.

Thus, the Commission engaged in unlawful retroactive ratemaking when it authorized AEP-Ohio to bill and collect the \$36 million under-recovery balance through a non-bypassable charge. The non-bypassable charge recoups amounts from the prior annual TCRR period that went uncollected and increases the revenue responsibility of

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<sup>15</sup> 80 Ohio St.3d at 348.

<sup>16</sup> *Id.* at 348.

<sup>17</sup> The unbundled component of the retail electric service was set by tariffs rates determined by the Federal Energy Regulatory Commission ("FERC"). Section 4928.34(A)(1), Revised Code. CRES providers were responsible for transmission costs as a result of initial restructuring and provisions were incorporated in the Electric Transition Plan ("ETP") Settlement to accommodate the change. *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plan and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, *et al.*, Stipulation and Recommendation at 5-6 (May 8, 2000). The Commission authorized a reconciliation mechanism for changes in FERC-approved rates and charges as part of the Rate Stabilization Plan ("RSP"). *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 30-31 (Jan. 26, 2005) ("RSP Case"). Subsequently, the Commission approved the combination of the transmission component of each company's standard service tariff with the TCRR reconciliation mechanism the Commission approved in the RSP Case. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust the Transmission Component of Each Company's Standard Service Tariff and to Combine that Component with its Transmission Cost Recovery Rider*, Case No. 06-273-EL-UNC, Application at 1-2 (Feb. 3, 2006) and Finding and Order at 4-5 (May 26, 2006). When the Commission reviewed AEP-Ohio's first ESP application, it approved AEP-Ohio's request to retain its then-current TCRR. *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 Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 49 (Mar. 18, 2009). As noted above, the ESP II Order likewise approved AEP-Ohio's request to retain the existing TCRR structure subject to a change that combined the mechanisms of Columbus Southern Power Company and Ohio Power Company. ESP II Order at 63-64.

shopping customers to AEP-Ohio through a reconciliation mechanism that was not authorized in the previous distribution tariffs applicable to shopping customers. The result of the retroactive increase is that shopping customers are being billed twice for transmission service: once for their own transmission service through their CRES provider, and once to pay a portion of the cost AEP-Ohio incurred to serve non-shopping customers, which will be collected through the non-bypassable TCRR charge. Because the Commission has no authority to authorize the retroactive recovery of the under-recovery balance through a non-bypassable charge, the Commission should grant rehearing and direct that the collection of the under-recovery balance be through a lawful bypassable rider.

- B. 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.**

The TCRR Order is unlawful and unreasonable because it violates the Commission's precedent without a substantively reasonable and lawful explanation for such deviation. According to the Supreme Court, the Commission should:

respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law. This does not mean that the commission may never revisit a particular decision, only that if it does change course, it must explain why. The new course also must be substantively reasonable and lawful.<sup>18</sup>

As discussed below, the Commission's precedent requires AEP-Ohio's TCRR to remain fully bypassable. The Commission, however, has not explained its change in position relative to the precedent discussed below (that was brought to the Commission's

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<sup>18</sup> *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788 at ¶ 52 (internal citation omitted).

attention through IEU-Ohio's comments in this proceeding<sup>19</sup>). Further, as demonstrated herein, the Commission's deviation from its precedent is not substantively reasonable or lawful, and therefore the Commission's precedent must control the outcome of this proceeding.

In Duke Energy Ohio, Inc.'s ("Duke") recent Market Rate Offer ("MRO") proceeding, Duke requested authority to conduct a final true-up of two of its ESP riders that would terminate once Duke's proposed MRO began.<sup>20</sup> One of the two riders was avoidable, and the other was conditionally avoidable; the preponderance of the cost eligible for recovery and reconciliation through the riders to be reconciled was fully avoidable by shopping customers.<sup>21</sup>

Duke also requested authority to transform its proposed supplier cost reconciliation rider ("Rider SCR") from a bypassable to non-bypassable rider if the under-recovery reached a certain threshold. In support, Duke claimed that if the rider did not become non-bypassable it would "drive[] up the SSO price and encourage[] additional customer switching. In that case, ... there would be fewer customers and less load in succeeding billing periods to recover the SCR deferral balance."<sup>22</sup> Duke also suggested that this would more appropriately match the recovery of costs with those customers that caused them.<sup>23</sup>

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<sup>19</sup> Comments of IEU-Ohio at 4 (July 25, 2012); Supplemental Comments of IEU-Ohio in Response to Commission Staff's October 15, 2012 Review and Recommendation at 6 (Oct. 19, 2012).

<sup>20</sup> *In the Matter of 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 (Feb. 23, 2011) ("Duke MRO Order").

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 61.

<sup>23</sup> *Id.* at 61-62.

Staff opposed Duke's proposal to use a non-bypassable reconciliation mechanism to address the over/under-collection consequences of the final true-up of Duke's bypassable rider stating that "Duke's generation-related costs should not be attributed to customers not taking generation service from Duke."<sup>24</sup> Staff also opposed Duke's proposal to make the SCR non-bypassable if the under-recovery balance reached a certain threshold.<sup>25</sup>

The Commission adopted Staff's recommendations and held that neither of Duke's riders could not be approved as proposed.<sup>26</sup> The Commission held that true-ups of bypassable riders cannot be collected on a non-bypassable basis "under any circumstances" because it "would create an anticompetitive subsidy" in violation of Section 4928.02(H), Revised Code.<sup>27</sup> The Commission also held that Duke's costs associated with serving SSO customers "should not be borne by customers who do not take ... service from Duke."<sup>28</sup>

The Commission's rationale in the TCRR Order, however, is directly in conflict with its past precedent. The TCRR Order states that:

[the Commission] agree[s] with Staff and [AEP-Ohio] 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 [AEP-Ohio] 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 [AEP-Ohio] during the period in which the costs were

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 62.

<sup>26</sup> *Id.* at 57.

<sup>27</sup> *Id.* at 63.

<sup>28</sup> *Id.* at 57.

incurred, but have since decided to switch to an alternative generation supplier.<sup>29</sup>

Thus, the Commission authorized exactly what it held it could not and should not do in Duke's MRO proceeding. The Commission has authorized the collection of AEP-Ohio's costs incurred to serve SSO customers from customers not served by AEP-Ohio and has done so despite the obvious anticompetitive subsidy that will ensue in violation of Section 4928.02(H), Revised Code.

The TCRR Order is a radical departure from its decision in the Duke MRO case. Despite the Commission's prior determination that it could not and would not permit Duke to reconcile under- or over-recoveries generated from bypassable riders through a non-bypassable rider on the ground that to do so would unlawfully subsidize the SSO, the Commission in this case now authorizes that result for AEP-Ohio. Even if authorization of a non-bypassable rider could be authorized under the statutory and regulatory provisions of Ohio law (and it cannot), the Commission's unexplained deviation from precedent requires the Commission to grant rehearing and reverse its decision authorizing AEP-Ohio to collect its under-recovery balance on a non-bypassable rider basis.

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<sup>29</sup> TCRR Order at 7-8.

- C. **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.**

The TCRR Order is unlawful and unreasonable to the extent the Commission has relied upon Section 4928.144, Revised Code, to authorize AEP-Ohio to collect its under-recovery balance on a non-bypassable basis.<sup>30</sup> Any use of the phase-in authority under Section 4928.144, Revised Code, must be done in the context of an SSO proceeding, *i.e.* under the Commission's authority in Sections 4928.141 to 4928.143, Revised Code. And the use of such phase-in authority may only be used prospectively and requires an identification of incurred costs.

Section 4928.144, Revised Code, provides that the Commission:

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.

By its terms, Section 4928.144, Revised Code, is only applicable to a "rate or price established under sections 4928.141 to 4928.143 of the Revised Code."<sup>31</sup> Although Section 4928.143(B)(2)(g), Revised Code, allows an ESP to include "[p]rovisions relating to transmission ... service," the Commission did not authorize the TCRR under this Section; instead, the Commission authorized AEP-Ohio's TCRR under Section

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<sup>30</sup> The Commission did not state that the TCRR Order relied upon Section 4928.144, Revised Code; however, it rejected IEU-Ohio's argument that the statute did not apply. TCRR Order at 7.

<sup>31</sup> Section 4928.144, Revised Code.

4928.05, Revised Code.<sup>32</sup> Thus, the Commission cannot rely upon its phase-in authority in Section 4928.144, Revised Code, to authorize the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.

Section 4928.144, Revised Code, further requires that a phase-in of "a rate or price established under sections 4928.141 to 4928.143 of the Revised Code" occur in the Commission's order authorizing the underlying rate or price. Neither of the Commission's orders in AEP-Ohio's first and second ESP proceedings, however, authorized a phase-in of AEP-Ohio's TCRR. The Commission cannot retroactively impose such a condition upon shopping customers.<sup>33</sup>

Section 4928.144, Revised Code, further requires the Commission to identify, as part of the phase-in accounting, the "incurred costs" that are equated to the revenue not collected. Neither AEP-Ohio nor the Commission have identified the "incurred cost" that must be specified to lawfully proceed with the phase-in authority in Section 4928.144, Revised Code, even if such authority could be used in the case of the TCRR. AEP-Ohio's only attempt to identify its incurred costs is a circular statement lacking any support in its reply comments: "'amounts not collected' as contemplated by the phase-in statute are the under-recovery dollars based on incurred costs that have already been

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<sup>32</sup> *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 Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 49 (Mar. 18, 2009) (authorizing AEP-Ohio to retain its TCRR as approved in Case No. 08-1202-EL-UNC which authorized AEP-Ohio to continue its TCRR as approved under AEP-Ohio's RSP in Case No. 04-169-EL-UNC before the enactment of Sections 4928.141 to 4928.143, Revised Code); *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 at 3 (June 22, 2011); *ESP II*, Opinion and Order at 63 (the Commission authorized AEP-Ohio's TCRR "[p]ursuant to Commission authority, as set forth in Section 4928.05(A)(2), Revised Code").

<sup>33</sup> See Section 4928.144, Revised Code; see also Section II.A. for a discussion of the prohibition on retroactive ratemaking.

accounted for in the Company's filing.<sup>34</sup> Clearly this statement is wrong: it confuses revenue with cost, and does not address the cost that must be identified for purposes of the statutory requirements of Section 4928.144, Revised Code.

The only references to "incurred costs" in the TCRR Order are the Commission's summary of IEU-Ohio's argument and the following statement:

The Commission finds no merit in IEU-Ohio's argument that Section 4928.144, Revised Code, is inapplicable, or that [AEP-Ohio] has not sufficiently identified its incurred costs. [AEP-Ohio]'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.<sup>35</sup>

This statement, however, fails to identify what incurred costs were not collected as a result of a phase-in under Section 4928.144, Revised Code. Absent the required identification of "incurred costs," there is no means proposed by AEP-Ohio to ensure that the deferral, *i.e.* the under-recovery balance, was necessary to compensate AEP-Ohio for "incurred costs" not collected as a result of a phase-in. This point takes on added significance since transmission rates which are the foundation for the TCRR are subject to the jurisdiction of FERC and are generally set based on a "formula rate" methodology. Because neither the Commission nor AEP-Ohio identified the "incurred costs" that were being phased-in (even if the history described above could be considered a lawful exercise of such phase-in authority), the Commission cannot rely upon its authority in Section 4928.144, Revised Code, to authorize AEP-Ohio to collect its under-recovery balance on a non-bypassable basis.

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<sup>34</sup> Reply of Ohio Power Company to the Comments of Industrial Energy Users-Ohio at 2 (Aug. 1, 2012).

<sup>35</sup> TCRR Order at 7.

In summary, Section 4928.144, Revised Code, cannot be made applicable in this proceeding. The Commission's phase-in authority under that Section may only be invoked in a proceeding to establish SSO rates, may only be invoked to phase-in a rate established under Sections 4928.141 to 4928.143 Revised Code, may only be invoked in a prospective manner, and the "incurred costs" that are being deferred for future collection must be identified before that phase-in authority may be invoked. Because these conditions have not, and cannot, be satisfied, the Commission must grant rehearing and terminate the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.

### III. CONCLUSION

For the foregoing reasons, the TCRR Order is unlawful and unreasonable and the Commission should grant rehearing, and terminate any authority that allows AEP-Ohio to collect its under-recovery balance on a non-bypassable basis.

Respectfully submitted,

/s/ Matthew R. Pritchard

Samuel C. Randazzo (Counsel of Record)

Frank P. Darr

Joseph E. O liker

Matthew R. Pritchard

MCNEES WALLACE & NURICK LLC

21 East State Street, 17<sup>TH</sup> Floor

Columbus, OH 43215

sam@mwnmch.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

**Attorneys for Industrial Energy Users-Ohio**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing and Memorandum in Support* was served upon the following parties of record this 21<sup>st</sup> day of November 2012, via hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

/s/ Matthew R. Pritchard

MATTHEW R. PRITCHARD

Steven T. Nourse  
Yazen Alami  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, Ohio 43215-2373  
stnourse@aep.com  
yalami@aep.com

**COUNSEL FOR OHIO POWER COMPANY**

Sarah Parrot  
Jon Tauber  
Attorney Examiner  
Public Utilities Commission of Ohio  
180 East Broad Street, 12<sup>th</sup> Floor  
Columbus, OH 43215  
sarah.parrot@puc.state.oh.us  
jonathan.tauber@puc.state.oh.us

**ATTORNEY EXAMINERS**

Terry L. Etter, Counsel of Record  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
etter@occ.state.oh.us

**COUNSEL FOR THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

William Wright  
Chief, Public Utilities Section  
Thomas McNamee  
Assistant Attorney General  
180 E. Broad Street, 6<sup>th</sup> Floor  
Columbus, OH 43215-3793  
william.wright@puc.state.oh.us  
thomas.mcnamee@puc.state.oh.us

**COUNSEL FOR THE STAFF OF THE PUBLIC  
UTILITIES COMMISSION OF OHIO**

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**Summary: App for Rehearing of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio**

**00000052**

## **4901:1-36-03 Application.**

(A) Each electric utility which seeks recovery of transmission and transmission-related costs shall file an application with the commission for a transmission cost recovery rider. The initial application shall include all information set forth in the appendix to this rule.

(B) Each electric utility with an approved transmission cost recovery rider shall update the rider on an annual basis pursuant to a schedule set forth by commission order. Each application to update the transmission cost recovery rider shall include all information set forth in the appendix to this rule.

(C) The commission may order that consultants be hired, with the costs billed to the electric utility and recoverable through the rider, to conduct prudence and/or financial reviews of the costs incurred and recovered through the transmission cost recovery rider.

(D) Each annual application to update the transmission cost recovery rider should be made not less than seventy-five days prior to the proposed effective date of the updated rider.

(E) If at anytime during the period between annual update filings, the electric utility or staff determines that costs are or will be substantially different than the amounts authorized as the result of the electric utility's previous application, the electric utility should file, on its own initiative or by order of the commission, an interim application to adjust the transmission cost recovery rider in order to avoid excessive carrying costs and to minimize rate impacts for the following update filing.

(F) Affected parties may file a motion to intervene and detailed comments on any issues concerning any application filed under this rule within forty days of the date of the filing of the application.

### **Appendix to Rule 4901:1-36-03**

#### **Schedule I.D. Schedule Name and Required Data**

##### **A-1 Copy of proposed tariff schedules**

##### **A-2 Copy of redlined current tariff schedules**

##### **B-1 Summary of Total Projected Transmission Costs/Revenues**

Provide the total forecasted cost/revenue for each cost component.

Include all costs and related revenues, network integration transmission service, ancillary service, regional transmission organization related, and reconciliation adjustment.

Indicate whether each component is energy or demand related

##### **B-2 Summary of Current verses Proposed Transmission Revenues**

Provide table that includes billing determinants for each class applied to current transmission cost recovery rider rates and proposed transmission cost recovery rider rates, including current and proposed class revenues, and the dollar and percentage difference

##### **B-3 Summary of Current and Proposed Rates**

For each rate class provide the current transmission cost recovery rider rate and proposed transmission cost recovery rider rate, the dollar difference and percentage change.

**B-4 Graphs**

For each cost/revenue component provide a bar graph of quarterly actual transmission cost recovery rider costs for the most recent two-year period.

Also include the original projected cost for each quarter.

Also include the next period projections on the graph.

**B-5 Typical Bill Comparisons**

Provide a typical bill comparison for each rate schedule affected by the proposed adjustments to the transmission cost recovery rider.

**C-1 Projected Transmission Cost Recovery Rider Costs**

For each cost/revenue component include the monthly projected transmission cost recovery rider costs/revenues.

**C-2 For each rate schedule provide the monthly projected cost.****C-3 Provide the projected transmission cost recovery rider rate calculations.**

Provide all necessary support for the rate calculations, including support for demand and energy allocators.

**D-1 Reconciliation Adjustment**

Provide actual transmission cost recovery rider costs for each component used to calculate reconciliation adjustment.

**D-2 Provide monthly revenues collected from each rate schedule.****D-3 Provide monthly over and under recovery.**

D-3a...z Include all additional and necessary schedules for support, including, but not limited to:

**Carrying cost calculation.**

Reconciliation of throughput to Company financial records.

\*Reconciliation of one month's bill from RTO to Financial Records of the company

Effective: 04/02/2009

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

Promulgated Under: 111.15

Statutory Authority: 4928.06, 4928.141

Rule Amplifies: 4928.143

## 4901:1-36-04 Limitations.

(A) The transmission cost recovery rider costs are reconcilable on an annual basis, with carrying charges to be applied to both over- and under-recovery of costs.

(B) The transmission cost recovery rider shall be avoidable by all customers who choose alternative generation suppliers and the electric utility no longer bears the responsibility of providing generation and transmission service to the customers.

(C) The transmission cost recovery rider shall include transmission and transmission-related costs and off-setting revenues, including ancillary and congestion-related costs and revenues, charged or credited to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission to the extent such costs and revenues are not included in any other schedule or rider in the electric utility's tariff on file with the commission.

Effective: 04/02/2009

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

Promulgated Under: 111.15

Statutory Authority: 4928.06, 4928.141

Rule Amplifies: 4928.143

## 4928.05 Extent of exemptions.

(A)

(1) On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject by the supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4905.10 and 4905.31, division (B) of section 4905.33, and sections 4905.35 and 4933.81 to 4933.90 ; except sections 4905.06, 4935.03, 4963.40, and 4963.41 of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections 4928.141 to 4928.144 of the Revised Code. On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections 4928.01 to 4928.10 and 4928.16 of the Revised Code.

(2) On and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility shall be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter, to the extent that authority is not preempted by federal law. The commission's authority to enforce those provisions with respect to a noncompetitive retail electric service shall be the authority provided under those chapters and this chapter, to the extent the authority is not preempted by federal law. Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission. The commission shall exercise its jurisdiction with respect to the delivery of electricity by an electric utility in this state on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity by the utility to consumers in this state that consists of a noncompetitive retail electric service is unregulated. On and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections 4933.81 to 4933.90 and 4935.03 of the Revised Code. The commission's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative shall be such authority as is provided for their enforcement under Chapters 4933. and 4935. of the Revised Code.

(B) Nothing in this chapter affects the authority of the commission under Title XLIX of the Revised Code to regulate an electric light company in this state or an electric service supplied in this state prior to the starting date of competitive retail electric service.

Effective Date: 10-05-1999; 2008 SB221 07-31-2008

## 4928.12 Qualifying transmission entities.

(A) Except as otherwise provided in sections 4928.31 to 4928.40 of the Revised Code, no entity shall own or control transmission facilities as defined under federal law and located in this state on or after the starting date of competitive retail electric service unless that entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities, as described in division (B) of this section, that are operational.

(B) An entity that owns or controls transmission facilities located in this state complies with division (A) of this section if each transmission entity of which it is a member meets all of the following specifications:

(1) The transmission entity is approved by the federal energy regulatory commission.

(2) The transmission entity effects separate control of transmission facilities from control of generation facilities.

(3) The transmission entity implements, to the extent reasonably possible, policies and procedures designed to minimize pancaked transmission rates within this state.

(4) The transmission entity improves service reliability within this state.

(5) The transmission entity achieves the objectives of an open and competitive electric generation marketplace, elimination of barriers to market entry, and preclusion of control of bottleneck electric transmission facilities in the provision of retail electric service.

(6) The transmission entity is of sufficient scope or otherwise operates to substantially increase economical supply options for consumers.

(7) The governance structure or control of the transmission entity is independent of the users of the transmission facilities, and no member of its board of directors has an affiliation, with such a user or with an affiliate of a user during the member's tenure on the board, such as to unduly affect the transmission entity's performance. For the purpose of division (B)(7) of this section, a "user" is any entity or affiliate of that entity that buys or sells electric energy in the transmission entity's region or in a neighboring region.

(8) The transmission entity operates under policies that promote positive performance designed to satisfy the electricity requirements of customers.

(9) The transmission entity is capable of maintaining real-time reliability of the electric transmission system, ensuring comparable and nondiscriminatory transmission access and necessary services, minimizing system congestion, and further addressing real or potential transmission constraints.

(C) To the extent that a transmission entity under division (A) of this section is authorized to build transmission facilities, that transmission entity has the powers provided in and is subject to sections 1723.01 to 1723.08 of the Revised Code.

(D) For the purpose of forming or participating in a regional regulatory oversight body or mechanism developed for any transmission entity under division (A) of this section that is of regional scope and operates within this state:

(1) The commission shall make joint investigations, hold joint hearings, within or outside this state, and

issue joint or concurrent orders in conjunction or concurrence with any official or agency of any state or of the United States, whether in the holding of those investigations or hearings, or in the making of those orders, the commission is functioning under agreements or compacts between states, under the concurrent power of states to regulate interstate commerce, as an agency of the United States, or otherwise.

(2) The commission shall negotiate and enter into agreements or compacts with agencies of other states for cooperative regulatory efforts and for the enforcement of the respective state laws regarding the transmission entity.

(E) If a qualifying transmission entity is not operational as contemplated in division (A) of this section, division (A)(13) of section 4928.34 of the Revised Code, or division (G) of section 4928.35 of the Revised Code, the commission by rule or order shall take such measures or impose such requirements on all for-profit entities that own or control electric transmission facilities located in this state as the commission determines necessary and proper to achieve independent, nondiscriminatory operation of, and separate ownership and control of, such electric transmission facilities on or after the starting date of competitive retail electric service.

Effective Date: 10-05-1999

## **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.

Effective Date: 2008 SB221 07-31-2008

## 4928.34 Determinations for approval or prescribing of plan.

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

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

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

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

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

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

(6) Subject to division (A)(5) of this section, the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period, except as specifically provided in this chapter, the total of all rates and charges in effect under the applicable bundled schedule of the electric utility pursuant to section 4905.30 of the Revised Code in effect on the day before the effective date of this section, including the transition charge determined under section 4928.40 of the Revised Code, adjusted for any changes in the taxation of electric utilities and retail electric service under Sub. S.B. No. 3 of the 123rd General Assembly, the universal service rider authorized by section 4928.51 of the Revised Code, and the temporary rider authorized by section 4928.61 of the Revised Code. For the purpose of this division, the rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the commission under section 4905.31 of the Revised Code is, for the term of the arrangement, the total of all rates and charges in effect under the arrangement. For any rate schedule filed pursuant to section 4905.30 of the Revised Code or any arrangement subject to approval pursuant to section 4905.31 of the Revised Code, the

initial tax-related adjustment to the rate cap required by this division shall be equal to the rate of taxation specified in section 5727.81 of the Revised Code and applicable to the schedule or arrangement. To the extent such total annual amount of the tax-related adjustment is greater than or less than the comparable amount of the total annual tax reduction experienced by the electric utility as a result of the provisions of Sub. S.B. No. 3 of the 123rd general assembly, such difference shall be addressed by the commission through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the electric utility or its shareholders. Any adjustments in the rate of taxation specified in 5727.81 of the Revised Code section shall not occur without a corresponding adjustment to the rate cap for each such rate schedule or arrangement. The department of taxation shall advise the commission and self-assessors under section 5727.81 of the Revised Code prior to the effective date of any change in the rate of taxation specified under that section, and the commission shall modify the rate cap to reflect that adjustment so that the rate cap adjustment is effective as of the effective date of the change in the rate of taxation. This division shall be applied, to the extent possible, to eliminate any increase in the price of electricity for customers that otherwise may occur as a result of establishing the taxes contemplated in section 5727.81 of the Revised Code.

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

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

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

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

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

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

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

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

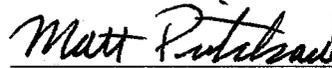
(15) All unbundled components in the rate unbundling plan have been adjusted to reflect the elimination of the tax on gross receipts imposed by section 5727.30 of the Revised Code. In addition, a transition plan approved by the commission under section 4928.33 of the Revised Code but not containing an approved independent transmission plan shall contain the express conditions that the utility will comply with an order issued under division (G) of section 4928.35 of the Revised Code.

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

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the *Merit Brief and Appendix of Appellant, Industrial Energy Users-Ohio* was served upon the parties of record this 8<sup>th</sup> day of April 2013, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.



Matthew R. Pritchard

Steven T. Nourse (Reg. No. 0046705)  
(Counsel of Record)  
Matthew J. Satterwhite (Reg. No. 0071972)  
Yazen Alami (Reg. No. 0086371)  
American Electric Power Service  
Corporation  
1 Riverside Plaza, 29<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 716-1608  
Facsimile: (614) 716-2950  
stnourse@aep.com  
mjsatterwhite@aep.com  
yalami@aep.com

**COUNSEL FOR APPELLEE,  
OHIO POWER COMPANY**

Michael DeWine (Reg. No. 0009181)  
Attorney General of Ohio  
William L. Wright (Reg. No. 0018010)  
Section Chief, Public Utilities Section  
Thomas McNamee (Reg. No. 0017352)  
Assistant Attorneys General  
Public Utilities Commission of Ohio  
180 East Broad Street, 6<sup>th</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 466-4397  
Facsimile: (614) 644-8764  
william.wright@puc.state.oh.us  
thomas.McNamee@puc.state.oh.us

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