

**In The
SUPREME COURT OF OHIO**

Industrial Energy Users-Ohio,

Appellant,

v.

**The Public Utilities Commission of
Ohio,**

Appellee.

: Case No. 2013-154
:
:
: On appeal from the Public Utilities
: Commission of Ohio, Case No. 12-
: 1046-EL-RDR, *In the Matter of the*
: *Application of Ohio Power Company to*
: *Update its Transmission Cost Recovery*
: *Rider Rates.*
:
:
:

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

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**MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE,
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INTRODUCTION

Electric Security Plan (ESP) cases are complex and the rates established under them can occasionally have unanticipated effects. The General Assembly has provided a tool for the Commission to use to avoid harm to the public from these unanticipated impacts. That tool is R.C. 4928.144.

That section allows the Commission to phase-in rate increases under an ESP plan where the increase would harm the public. The section prescribes the way that this must be done. In the case below the Commission identified just such a situation and followed the directives of R.C. 4928.144 to head off the harm to the public.

The Commission has followed the law and preserved the public interest. Its decisions should be affirmed.

STATEMENT OF THE FACTS AND CASE

In order to provide electricity, it is necessary to have several elements, the power itself, the local distribution to deliver the power to one's home, and the transmission to bring the power to the local distribution facilities. All of these must be paid for. This case is about paying for the transmission element.

In American Electric Power's (AEP)¹ first Electric Security Plan (ESP) case, the company sought, and the Commission approved, the creation of a Transmission Cost Recovery Rider (TCRR). *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO and *In the Matter of the Application of Ohio Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, *et al.* (hereinafter "*In re AEP Electric Security Plan*") (Opinion and Order at 49-50) (March 18, 2009), Appellee's Appendix at 2-3.² This rider was to be set annually in a case filed each year, that is to say customers would be charged a fixed amount over the course of the year to repay AEP the amounts that it would be charged by PJM for transmission. The TCRR was structured as a pass-through, ideally with AEP collecting as much as it was itself billed. Since the actual cost of transmission varies more frequently than annually, there was a possibility of a mismatch between what

¹ American Electric Power owned two electric distribution utilities in Ohio, the Columbus Southern Power Company and the Ohio Power Company. The two were merged on December 31, 2011 with the Ohio Power subsidiary being the surviving entity. For simplicity the term "AEP" will be used in this brief to refer to both entities.

² Hereinafter references to appellee's appendix attached hereto are denoted "App. at ____;" references to appellant's appendix are denoted "IEU App. at ____;" references to appellant's supplement are denoted "IEU Supp. at ____."

AEP was billed and what it, in turn, collected from its customers. To address this possibility, a true-up mechanism was provided for. In each year's case, the rate for the next year would be determined both with a view to collecting new charges as they accrued and to adjusting for any over or under recovery from the prior year. The charge was imposed on non-shopping customers as these were the customers for whom transmission service was provided. The term for such a charge is bypassable by which is meant that one who buys electricity from a provider other than AEP would not pay, hence bypass, the charge.

The original TCRR mechanism was tied to the term of the first ESP. When AEP filed its second ESP it sought a continuation of the TCRR mechanism. The Commission agreed and approved its continuation in AEP's second ESP case. *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 No. 11-346-EL-SSO, *et al.* (Opinion and Order at 63-64) (August 8, 2012), App. at 6-7. The only substantive change made was to combine what had been two separate TCRR rates, one for each AEP affiliate, into one rate for the single remaining company.

In the AEP TCRR case for the year immediately before the underlying case here, the rate was set at a level that did not collect as much transmission cost from customers as AEP was billed for that transmission service. Ultimately AEP was billed \$36 million more than it had collected from customers. This is the \$36 million at issue in this case.

The Commission first became aware of the magnitude of the shortfall in the TCRR collection through the application in the case below. *In the Matter of the Application of*

the Ohio Power Company to Update its Transmission Cost Recovery Rider, Case No. 12-1046-EL-RDR (Application) (June 15, 2012), IEU Supp. at 1-12. In the case below the Commission took comments from the various parties and determined that the shortfall should be collected through a non-bypassable charge (this is to say it should be charged to all customers whether they bought their electricity from AEP or from another provider). The Commission reasoned that the shortfall in collections was occasioned by a forecasting problem; many of the customers who had purchased their electricity through the standard service offer during the period that the shortfall arose had subsequently switched to an alternative supplier. Those customers who had switched after the period during which the shortfall arose, since they had received the service with which the shortfall was created, should bear a portion of the shortfall as well as the customers who remained with AEP. Both shoppers and non-shoppers should pay; hence a non-bypassable charge was imposed.

This appeal ensued.

ARGUMENT

Proposition of Law No. I:

“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.” R.C. 4928.05(A)(2) (in pertinent part), App. at 10.

State law permits the Commission to establish a reconcilable rider to collect transmission charges under Chapter 4928. R.C. 4928.05(A)(2), App. at 10. A reconcilable rider is one that is intended to collect a particular cost based on an estimate of what that cost will be and collected over a period. After the period passes, there is a proceeding to correct the amount collected and eliminate any over or under collection thus assuring that customers pay the correct amount of the cost, neither too much nor too little. This is the “reconciliation” mentioned in the statute.

There are two mechanisms under which the Commission may set rates in Chapter 4928, specifically Sections 4928.142 (Market Rate Option or MRO) or 4928.143 (Electric Security Plan or ESP). As is relevant here, the Commission established such a reconcilable transmission rider, the TCRR, for AEP in its first ESP proceeding. *In re AEP Electric Security Plan* (Opinion and Order at 49-50) (March 18, 2009), App. at 2-3.

The case below was the reconciliation filing after the last year of the ESP period established in 2009. Its purpose, as with all reconciliation filings, was to adjust the amounts paid by customers during the prior period, which had been based on cost estimates, to reflect the level of the actual costs. Circumstances can change and estimates are virtually always incorrect. The reconciliation process recognizes and addresses this reality.

This is rather analogous to reconciling a personal checkbook. One keeps a record of checks as they are written during the month to maintain an estimate of the balance in one's account. When the bank statement comes, one reconciles the bank's records³ (presumably accurate) to one's own. If one's own ledger shows too little money, an adjustment is made to raise the amount in our personal checkbook. If one's own ledger shows too much money, likewise an adjustment is made to lower the amount shown in our personal checkbook. In the context of the TCRR, or any other rider, the correction is made by either charging an additional amount to customers in the future, if there is a shortfall, or giving customers a credit in the future, if there had been an over-collection.

In the case below the facts revealed that there had been an under-collection of approximately \$36 million. This is to say that AEP had been charged \$36 million more in transmission costs than it had collected from customers for passing that transmission service on to the customers. This differential had arisen because the estimate on which the TCRR rate had been established was too low. Because of this, AEP collected \$36

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There is no dispute in this case that the level of transmission charges is correct.

million less from its customers than it paid for transmission. This is just the sort of deviation that the reconciliation mechanism was intended to correct.

The Commission implemented the reconciliation process just as it should have below. It determined the shortfall in collections and established a mechanism to collect that shortfall from customers. In short, nothing unusual or inappropriate occurred below. The Commission simply did its job.

Appellant argues that the above constitutes illegal retroactive ratemaking. Appellant is simply wrong. State law, consistent with good sense, simply authorizes the Commission to establish rates on a reconcilable basis for transmission costs. The statute 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.

R.C. 4928.05(A)(2), App. at 10.

This specific portion of R.C. 4928.05(A)(2) was enacted as part of S.B. 221 and became effective July 31, 2008. As this provision is rather new, this Court has not seen any case involving the provision. The section is, however, very straightforward. The Commission is permitted to establish reconcilable riders for transmission costs in the context of either an ESP or an MRO and without regard to the base rate setting pro-

cedures of Chapter 4909. Whether the use of a reconciliation rider in this context is deemed “retroactive ratemaking” or not, *it is simply authorized by statute*. Even if it were “retroactive ratemaking”⁴ it is legal.

Appellant cites two cases as support for its position. Neither is relevant.

The first case cited is *Lucas Cty. Commr's. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 1997-Ohio-112, 628 N.E.2d 501. In that case the Commission considered a complaint filed by the Lucas County Commissioners seeking to challenge a pilot natural gas pricing program that had been previously established by the Commission which had already ended by its own terms. This expired program had been established by the Commission using its ratemaking authority pursuant to Chapter 4909, Revised Code. Lucas County sought refunds of monies collected during the program. After discussing the ratemaking procedures under Chapter 4909, Revised Code the Court found “We conclude that none of the foregoing statutes authorizes the commission to order refunds or service credits to consumers based on expired rate programs.” *Lucas Cty. Commr's. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 347, 1997-Ohio-112, 628 N.E.2d 501. Plainly this has nothing to do with the current case. In this case the Commission was operating under R.C. 4928.05(A)(2) and by its terms nothing in Chapter 4909 applies. There is no expired program, no R.C. 4905.26 complaint, and no refund sought. Rather, in this situation we have a statute that specifically authorizes future rates to be set with a view toward

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The Commission does not believe this is retroactive ratemaking in any event. The TCRR was established with the reconciliation as a part of the process. Since the reconciliation was a part of the original construct, utilizing it is not retroactive in any meaningful sense.

collecting prior costs, precisely what the Commission did. *Lucas Cty. Commr's* is irrelevant.

The second case is *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. In this case the Commission was considering an ESP application filed by AEP which had asked that its application be approved by January 2009. The application was not approved until March 2009 and in its order approving the new rates the Commission set the level so as to earn AEP the same amount of money as though the Commission had approved the new rates in January. Essentially AEP would earn the same amount over the remaining 9 months of the year as it would have had the rates been in effect for the entire 12 month period. AEP would have been made whole for the lost revenue it would have enjoyed had the Commission acted in January rather than in March. The Court reasoned;

A rate increase making up for revenues lost due to regulatory delay is precisely the action that we found contrary to law in *Keco*. “[A] utility may not charge increased rates during proceedings before the commission seeking same [,] and losses sustained thereby” that is, while the case is pending “may not be recouped.” *Keco*, 166 Ohio St. at 259, 2 O.O.2d 85, 141 N.E.2d 465. Likewise, in *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 348, 1997 Ohio 112, 686 N.E.2d 501, we ruled that “utility ratemaking ... is prospective only” and that R.C. Title 49 “prohibit[s] utilities from charging increased rates during the pendency of commission proceedings and appeals.” *Id.* These cases make plain that present rates may not make up for dollars lost “during the pendency of commission proceedings.” *Id.* That is exactly what occurred here.

In re Application of Columbus Southern Power Co., 128 Ohio St.3d 512, 515, 2011-Ohio-1788, 947 N.E.2d 655 (parentheses and ellipsis in original). While Appellant cor-

rectly states the law, it entirely misconstrues its application. Despite Appellant's claims, there was no regulatory delay and the Commission was not establishing rates to make up for non-existent regulatory delay. Rather, as a factual matter, the Commission found that the shortfall in collections was created due to a simple variation from the forecasting estimate. As the Commission stated:

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.

In the Matter of the Application of the Ohio Power Company to Update its Transmission Cost Recovery Rider, Case No. 12-1046-EL-RDR (Entry on Rehearing at 5) (December 12, 2012), IEU App. at 19. Simply, the TCRR rate was based on an estimate and that estimate turned out to be wrong by \$36 million. Estimates are essentially always wrong to some extent and the TCRR was designed from the outset for the express purpose of correcting the deviations that are to be expected between estimates and actuals. There simply was no regulatory delay and, thus, the case cited has no application here.

Rather than violating this Court's precedent, the Commission has complied with it. This Court has already considered whether the ban on retroactive ratemaking applies in a situation where the Commission has specifically found that a utility was entitled to

recovery of certain amounts but did not authorize that recovery. In *Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 620 N.E.2d 835 (1993), the Commission considered a rate increase application and found that the company was entitled to a certain amount of rate increase but did not award that full increase immediately, rather the Commission “phased in” the increase over time. This Court found that the Commission did not have the authority to order a “phase in” and directed that the Commission set new rates for the company which would recover the full amount and, significantly for our purposes here, found the ban on retroactive ratemaking did not apply where the Commission had determined that the company was entitled to certain revenues but had not received them. This Court directed the Commission to provide a mechanism by which the company could not only get the full amount to which the Commission had determined it was entitled going forward but also the amounts that it should have gotten during the pendency of the appeal, the bar on retroactive ratemaking did not apply. *Columbus Southern Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 541-2, 620 N.E.2d 835 (1993). This Court reasoned:

In *Keco*, a consumer brought an action for restitution after this court’s reversal of a PUCO order resulted in lower rates being set on remand. We held that such action would not lie because a “utility must collect the rates set by the commission.” *Id.*, 166 Ohio St. at 257, 2 O.O.2d at 86-87, 141 N.E.2d at 468. *See* R.C. 4905.32. Here, Industrial Electric Consumers et al. seek to extend that holding to situations where reversal results in higher rates being set, in order to prevent utilities from recovering revenues not collected during the pendency of an appeal. This argument ignores that the PUCO’s initial order in this proceeding specifically authorized recovery of the deferred revenues in question and, thus, those revenues constitute a portion of the rates to which

CSP is entitled. *Keco* is clearly not controlling. Further, CSP's recovery of the deferred revenues, having been authorized by the PUCO's initial order, would not violate the proscription against retroactive ratemaking. See *Ohio Edison Co. v. Pub. Util. Comm.* (1978), 56 Ohio St.2d 419, 424-425, 10 O.O.3d 523, 526-527, 384 N.E.2d 283, 286.

Id.

In the case currently before the Court, the Commission had already found that AEP was entitled to the recovery of its costs of transmission service, and the only issue facing the Commission was to ensure that the correct amount was collected. The Columbus Southern case shows that, far from being illegal retroactive ratemaking, recovery is *required*. The Commission noted this in its Entry on Rehearing stating:

The TCRR Order is also consistent with the Ohio Supreme Court precedent relied upon by IEU-Ohio, which provides that a utility's recovery of deferred revenues, having been authorized by an initial order of the Commission, does not violate the proscription against retroactive ratemaking. 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.

In the Matter of the Application of the Ohio Power Company to Update its Transmission Cost Recovery Rider, Case No. 12-1046-EL-RDR (Entry on Rehearing at 4-5) (December 12, 2012), IEU App. at 18-19. The Commission, having previously found that AEP was entitled to recover its transmission costs, was obligated to ensure recovery of the correct level of such costs. That is what the rider did.

In sum, R.C. 4928.05 permits the use of reconciliation mechanisms for recovery of transmission costs. The Commission created such a mechanism and implemented it. The

bar to retroactive ratemaking has no application in such a circumstance. The Commission's orders should be affirmed.

Proposition of Law No. II:

“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.” R.C. 4928.144, App. at 20.

The Commission is authorized to phase-in rates established in an ESP. When it does so, it must provide for a carrying charge for the amounts not collected and create a non-bypassable charge to collect the amount. R.C. 4928.144, App. at 20. This is what happened in the case below.

As has been noted previously, the Commission established the TCRR rate mechanism in AEP's first ESP case. *In re AEP Electric Security Plan* (Opinion and Order at 49-50) (March 18, 2009), App. at 2-3. When, in the case at bar, the Commission recognized that the shortfall in the collection of this rate would impose an excessive burden on customers, it ordered a phase-in of the shortfall amount as permitted under the statute.

The Commission reasoned:

We also find 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 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.

In the Matter of the Application of the Ohio Power Company to Update its Transmission Cost Recovery Rider, Case No. 12-1046-EL-RDR (Finding and Order at 6-7)

(October 24, 2012), IEU App. at 11-12. Thus, the Commission simply applied the straightforward words of the statute.⁵ It recognized that a rate established in an ESP order would impose an undue burden on customers and decided to phase-in that rate. It did so with carrying charges and pursuant to a non-bypassable charge. This is what the law requires and this is exactly what the Commission did.

Appellant advocates a different and an incorrect reading of the statute. It claims that a phase-in must be created in the ESP order itself. Appellant's reading finds no support in the statutory language:

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

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Appellant claims that the Commission did not indicate it was using its authority under R.C. 4928.144. The claim is nonsense. The Commission stated: "In the TCRR Order, we expressly disagreed with IEU-Ohio's contention that Section 4928.144, Revised Code, is inapplicable." *In the Matter of the Application of the Ohio Power Company to Update its Transmission Cost Recovery Rider*, Case No. 12-1046-EL-RDR (Entry on Rehearing at 8) (December 12, 2012), IEU App. at 22.

commission considers necessary to ensure rate or price stability for consumers.

R.C. 4928.144, App. at 20.

The phase-in ordered by the Commission is not tied to the ESP. Rather the *rate* must have been established in the ESP. So long as the rate to be phased-in was established in the ESP, the order creating the phase-in could occur at any time. This flexibility that the General Assembly has provided to the Commission is practical, logical, and very important as shown in this case. It provides the tools for the Commission to protect rate-payers from the rate shock that would have occurred had the statute been written as Appellant would have it. If Appellant were right and the statute actually read: the public utilities commission (by order under R.C. 4928.141 to 4928.143 of the Revised Code) may authorize any just and reasonable phase-in of any electric distribution utility rate, the Commission would have been hamstrung. It would have had no means to avoid this very harm. The General Assembly was not so foolish. It provided exactly the flexibility that the situation in the case below required. The Commission exercised this flexibility entirely within the framework established.

Appellant further complains that the use of a non-bypassable charge is unfair because, it claims, customers will be required to pay twice. This turns the actual situation on its head. First it must be noted that the use of a non-bypassable charge is mandated by statute. The statutory language creates no choice in the matter. However, independent of the statutory mandate, the use of the non-bypassable charge is reasonable for other reasons.

By virtue of the shortfall being collected through a non-bypassable charge an unfairness is actually *avoided*. Specifically the Commission found:

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 the costs were incurred, but have since decided to switch to an alternative generation supplier.

In the Matter of the Application of the Ohio Power Company to Update its Transmission Cost Recovery Rider, Case No. 12-1046-EL-RDR (Finding and Order at 7-8)

(October 24, 2012), IEU App. at 12-13. The shortfall in collections occurred during a period when many more customers were receiving their electricity through the standard service offer. If the collection of the shortfall were avoidable, these customers who didn't pay enough during the period to cover the actual transmission costs would not pay for the shortfall that they created, they would bypass it. Instead these costs would be collected from the customers who did remain on the standard service offer. The non-bypassable charge avoids this unfairness. It requires the newly shopping customers, who benefitted from the shortfall, to pay for it. This is only fair.

Further, there is no double recovery. As the Commission explained:

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 underrecovery 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 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. These costs are distinct from the transmission costs that shopping customers will pay to their CRES providers on a going forward basis.

In the Matter of the Application of the Ohio Power Company to Update its Transmission 12, 2012), IEU App. at 19-20 (emphasis added). Appellant is simply wrong.

In sum, the statute allows the Commission to phase-in an increase of a rate established in an ESP at any time where the Commission, in its judgment, determines that a phase-in is necessary to ensure price stability for customers. When it does so it must identify the amount of the deferral, provide carrying costs, and create a non-bypassable charge for collection. The Commission did each of these things in the case below. The Commission complied with the statute and its orders should be affirmed.

Proposition of Law No. III:

The Public Utilities Commission must make its decisions based on the record before it and it did. R.C. 4903.09, App. at 9; *Industrial Energy User-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195; *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 90, 706 N.E.2d 1255, 1999-Ohio-206, quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163, 166, 1996-Ohio-296, 666 N.E.2d 1372.

It is axiomatic that the Public Utilities Commission must base its decisions on the record before it. This is required by statute. R.C. 4903.09, App. at 9. The observation has been made by this Court frequently. *Industrial Energy User-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008-Ohio-990, 885 N.E.2d 195; *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 90, 1999-Ohio-206, 706 N.E.2d 1255, quoting *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163, 166, 1996-Ohio-296, 666 N.E.2d

1372. The Commission did exactly this in the case below. When it reviewed the facts presented, the Commission found a large under-recovery of a charge established under an ESP. The magnitude of this under-recovery was such that, in the Commission's judgment, its collection would impose an undue burden on customers. *In the Matter of the Application of the Ohio Power Company to Update its Transmission Cost Recovery Rider*, Case No. 12-1046-EL-RDR (Finding and Order at 6-7) (October 24, 2012), IEU App. at 11-12. Worse, its collection through a bypassable charge would impose that undue burden on the wrong customers. *In the Matter of the Application of the Ohio Power Company to Update its Transmission Cost Recovery Rider*, Case No. 12-1046-EL-RDR (Entry on Rehearing at 5-6) (December 12, 2012), IEU App. at 19-20. A bypassable charge would have allowed those customers who had benefitted from the shortfall⁶ to occur to avoid paying for it. The law anticipates such a situation and it gives the Commission a tool to address it. Where "the commission considers [it] necessary to ensure rate or price stability for consumers", the Commission may phase-in the increase by establishing a non-bypassable charge with carrying costs. R.C. 4928.144, App. at 20. The Commission made such a determination and it ordered a phase-in as contemplated under the statute.

⁶

It should be noted that it is only the shortfall that is collected through the non-bypassable charge. The on-going TCRR is still bypassable by shopping customers.

Appellant tries to muddy this situation by drawing a false analogy. Appellant claims⁷ that the Commission has acted inconsistently with its treatment of different riders in different cases. There is no inconsistency. In the Duke case Appellant references, the Commission was considering riders that collected capacity costs (SRA-SRT) and fuel costs (PTC-FPP) not transmission costs as was the case below. That different components are treated differently is not surprising nor should it be controversial. Importantly, unlike here, the Commission in the Duke case made no factual findings that the collection of shortfalls under those different riders would cause undue harm to customers when collected or that the wrong customers would be paying for the collection of those shortfalls. In the Duke case, there was no basis for such findings and the Commission did not make them. Having not made those findings, the Commission could not act under R.C. 4928.144 and it did not. The Commission acted correctly in the Duke case, a case quite different than the case below.

In the final analysis the Commission did exactly what it is charged to do, it decided each case before it on that case's record. There is no inconsistency, this is what the law requires. The Commission's orders should be affirmed.

⁷ Appellant also seems to argue that the Commission's order was anti-competitive. If this is Appellant's intent, the issue is not properly before this Court and it cannot be considered because it was not included in Appellant's notice of appeal. *Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 528, 2010-Ohio-6239, 941 N.E.2d 757.

CONCLUSION

The Commission has done its job. It recognized that the collection of a shortfall in a rate established under AEP's ESP would have an undue impact on ratepayers and result in the collection of that shortfall being imposed, in part, on the wrong customers. It utilized its express statutory authority under such circumstances to establish a non-bypassable charge to collect that shortfall thus assuring that the money would be collected and collected from the correct customers. The Commission's orders are lawful and should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 7th day of May, 2013.



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APPENDIX

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus)
 Southern Power Company for Approval of)
 an Electric Security Plan; an Amendment to) Case No. 08-917-EL-SSO
 its Corporate Separation Plan; and the Sale or)
 Transfer of Certain Generating Assets.)

In the Matter of the Application of Ohio)
 Power Company for Approval of its Electric) Case No. 08-918-EL-SSO
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 Corporate Separation Plan.)

OPINION AND ORDER

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Staff testified that distribution-related issues and costs, such as those related to line extensions, be examined in the context of a distribution rate case (Staff Ex. 13 at 4). IEU concurred with Staff's position (IEU Br. at 25). OCC also agreed and added that AEP-Ohio should be required to demonstrate in that rate proceeding that its costs related to line extensions have substantially increased, thereby justifying AEP-Ohio's proposed increase to the up-front residential line extension charges (OCEA Br. at 87).

Per SB 221, the Commission is required to adopt uniform, statewide line extension rules for nonresidential customers within six months of the effective date of the law. The Commission adopted such rules for nonresidential and residential customers on November 5, 2008.²⁸ Applications for rehearing were filed, which the Commission is still considering. Accordingly, the new line extension rules are not yet effective.

The Commission finds that AEP-Ohio has not demonstrated that its proposal to continue, in its ESP, its existing line extension policies regarding up-front payments, with modifications, is consistent with SB 221 or advances the policy of the state. Therefore, in light of the SB 221 mandate that the Commission adopt statewide line extension rules that will apply to AEP-Ohio, we do not believe that it makes sense to adopt a unique policy for AEP-Ohio at this time. As such, the Companies' ESP should be modified to eliminate the provision regarding line extensions, which would have the effect of also eliminating the alternative construction option as requested by the Companies. AEP-Ohio is, however, directed to account for all line extension expenditures, excluding premium services, in plant in service until the new line extension rules become effective, where the recovery of such will be reviewed in the context of a distribution rate case. The Companies may continue to charge customers for premium services pursuant to their existing practices.

V. TRANSMISSION

In its ESP, the Companies requested to retain the current TCRR, except the marginal loss fuel credit will now be reflected in the FAC instead of the TCRR. We concur with the Companies' request. We find the Companies' request to be consistent with our determination in the Companies' recent TCRR Case,²⁹ and thus, approve the TCRR rider as proposed by the Companies. Additionally, as contemplated by our prior order in the TCRR Case, any overrecovery of transmission loss-related costs, which has

²⁸ See *In the Matter of the Commission's Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, and 4901:1-25 of the Ohio Administrative Code*, Case No. 06-653-EL-ORD, Finding and Order (November 5, 2008), Entry on Rehearing (December 17, 2008) (06-653 Case).

²⁹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust Each Company's Transmission Cost Recovery Rider*, Case No. 08-1202-EL-UNC, Finding and Order (December 17, 2008) (TCRR Case).

occurred due to the timing of our approval of the Companies' ESP and proposed FAC, shall be reconciled in the over/underrecovery process in the Companies' next TCRR rider update filing.

VI. OTHER ISSUES

A. Corporate Separation

1. Functional Separation

In its ESP application, AEP-Ohio requested to remain functionally separated for the term of the ESP, as was previously authorized by the Commission in the Companies' rate stabilization plan proceeding,³⁰ pursuant to Section 4928.17(C), Revised Code (Cos. App. at 14; Cos. Br. at 86). The Companies also requested to modify their corporate separation plan to allow each company to retain its distribution and, for now, transmission assets and that, upon the expiration of functional separation, the Companies would sell or transfer their generation assets to an affiliate (Id.).

Staff testified that the Companies' generating assets have not been structurally separated from the operating companies (Staff Ex. 7 at 2-3). Staff also recommended that, in accordance with the recently adopted corporate separation rules issued by the Commission in the SSO Rules Case,³¹ the Companies should file for approval of their corporate separations plan within 60 days after the rules become effective. Furthermore, Staff proposes that the Companies' corporate separation plan should be audited by an independent auditor within the first year of approval of the ESP, the audit should be funded by the Companies, but managed by Staff, and the audit should cover compliance with the Commission's rules on corporate separation (Staff Ex. 7 at 3-4). No party opposed AEP-Ohio's request to remain functionally separate.

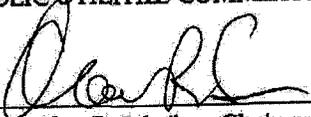
Accordingly, the Commission finds that, while the ESP may move forward for approval, as noted by Staff, in accordance with our recently adopted rules in the SSO Rules Case, the Companies must file for approval of their corporate separation plan within 60 days after the rules become effective.

³⁰ *In re Columbus Southern Power Company and Ohio Power Company*, Case No. 04-169-EL-UNC, Opinion and Order at 35 (January 26, 2005).

³¹ *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 No. 221, Case No. 08-777-EL-ORD, Finding and Order (September 17, 2008), and Entry on Rehearing (February 11, 2009) (SSO Rules Case).*

ORDERED, That a copy of this opinion and order be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

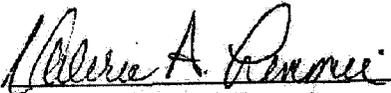


Alan R. Schriber, Chairman

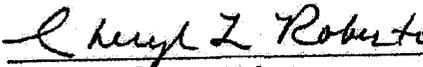


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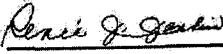


Cheryl L. Roberto

KWB/GNS:vrn/ct

Entered in the Journal

MAR 18 2009



Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company and)
Ohio Power Company for Authority to) Case No. 11-346-EL-SSO
Establish a Standard Service Offer Pursuant) Case No. 11-348-EL-SSO
to Section 4928.143, Revised Code, in the)
Form of an Electric Security Plan.)

In the Matter of the Application of)
Columbus Southern Power Company and) Case No. 11-349-EL-AAM
Ohio Power Company for Approval of) Case No. 11-350-EL-AAM
Certain Accounting Authority.)

OPINION AND ORDER

could be sought, and a dollar limitation.²⁷ Any gridSMART investment beyond the Phase 1 pilot, which is not subject to recovery through the DIR mechanism, should be recovered through a mechanism other than the current gridSMART rider, for example, through a gridSMART Phase 2 rider. The current gridSMART rider allows for recovery on an "as spent" basis, with audits directed toward true-up expenditures with collections through the rider rate. Keeping subsequent non-DIR, gridSMART expenditures in a new separate recovery mechanism facilitates enforcement and a Commission determination that recovery of gridSMART investment occur only after the equipment is installed, tested, and is in-service. With these clarifications, the Commission approves the Company's request to continue, as a part of this modified ESP, the current gridSMART rider mechanism, subject to annual true-up and reconciliation based on the Company's prudently incurred costs, and to extend the rate to include OP as well as CSP customers.

We note that the gridSMART Phase 1 rider was last evaluated for prudence of expenditures, reconciled for over- and under-recoveries and the rate mechanism adjusted in Case No. 11-1353-EL-RDR, with the rate effective beginning September, 1, 2011. Despite the Commission's February 23, 2012 rejection of the application in this ESP 2 proceeding, the recovery of the gridSMART rate mechanism continued consistent with the Entry issued March 7, 2012. Accordingly, the gridSMART rider rate mechanism approved in Case No. 11-1353-EL-RDR shall continue at the current rate until revised by the Commission. We also note that in Case No. 11-1353-EL-RDR, the Commission deducted an amount from the Company's claim for the loss on the disposal of electro-mechanical meters. The Commission notes, as we stated in the Order issued August 4, 2011, that we will address the meter issue in the Company's pending gridSMART rider application, Case No. 12-509-EL-RDR, and nothing in this Order on the modified ESP should be interpreted to the contrary.

15. Transmission Cost Recovery Rider

Pursuant to Commission authority, as set forth in Section 4928.05(A)(2), Revised Code, and the rules in Chapter 4901:1-36, O.A.C., electric utilities may seek recovery of transmission and transmission-related costs. Through this modified ESP, AEP-Ohio proposes only that the transmission cost recovery rider (TCRR) mechanisms of the CSP and OP rate zones be combined. The Company proposes no other changes to the TCRR mechanism as a part of this ESP. (AEP-Ohio Ex. 111 at 6-7; AEP-Ohio Ex. 107 at 8.)

The Commission notes that the current TCRR process has been in place since 2009, and operates appropriately. As structured, with the TCRR mechanism any over- or under-recovery is accounted for in the next semi-annual review of the TCRR mechanism. For this reason, we do not expect any adverse rate impact for customers with the combining of the CSP and OP TCRR rate mechanisms. Given the merger of CSP into OP, effective as of

²⁷ ESP 1 Order at 37-38; ESP 1 Entry on Rehearing at 18-24 (July 23, 2009).

December 31, 2011, the Commission finds AEP-Ohio's request to combine the TCRR mechanism to be reasonable. The Commission directs that any over-recovery of transmission or transmission-related costs, as a result of combining the TCRR mechanisms, be reconciled in the over and under-recovery component of the Company's next TCRR rider update.

16. Enhanced Service Reliability Rider

As part of AEP-Ohio's ESP 1 case, AEP-Ohio proposed an enhanced service reliability rider (ESRR) program which included four components, of which only the transition to a cycle-based vegetation management program was approved by the Commission. In this modified ESP, AEP-Ohio requests continuation of the ESRR and the Company's transition to a four-year, cycle-based trimming program. Further, the Company proposes the unification of the ESRR rates for each rate zone into a single rate, adjusted for anticipated cost increases over the term of the ESP, with carrying cost on capital assets and annual reconciliation. AEP-Ohio admits that before the initiation of the transitional vegetation management program, the number of tree-related circuit outages had gradually increased. However, the Company states that with the initiation of the new vegetation management program, the number of tree-caused outages has been reduced and service reliability has improved. AEP-Ohio proposes to complete the transition from a performance-based program to a four-year, cycle-based trimming program for all of the Company's distribution circuits as approved by the Commission in the prior ESP. However, the Company notes that the vegetation management plan was implemented as a five-year transition program and, as a result of the delay in adopting a second ESP and increases in the expected costs to complete implementation of the cycle-based trimming program, it is now necessary to extend the implementation period to include an additional year into 2014. AEP-Ohio requests incremental funding for 2014 for both the completion of the transition to a cycle-based vegetation management program of \$16 million and an incremental increase of \$18 million annually to maintain the cycle-based program. (AEP-Ohio Ex. 107 at 8; AEP-Ohio Ex. 110 at 5-9.)

Staff supports the continuance of the ESRR through 2014 but not any cost incurred thereafter. Staff reasons that after 2014, the Company's transition to a four-year, cycle-based vegetation management program will be complete and regular maintenance pursuant to the program will be part of the Company's normal operations, the cost of which should be recovered through base rates not through the ESRR. Further, Staff argues that the ESRR funding level for the period 2012 through 2014 is overstated due to the increased ESRR baseline reflected in the Company's recent distribution rate case.²⁸ According to Staff, to reach the rate base in the Stipulation in the distribution rate case, Staff agreed to an increase in the revenue requirement for CSP and OP which incorporated an annual increase in vegetation management operation and maintenance expense of \$17.8

²⁸ *In re AEP-Ohio, Opinion and Order*, Case No. 11-351-EL-AIR, et al. (December 14, 2011).

ORDERED, That a copy of this opinion and order be served on all parties of record.

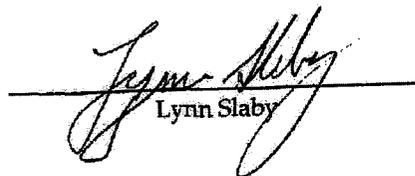
THE PUBLIC UTILITIES COMMISSION OF OHIO


Todd A. Snitchler, Chairman


Steven D. Lesser

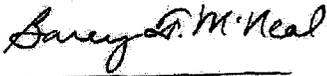

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Entered in the Journal
AUG 08 2012



Barcy F. McNeal
Secretary

4903.09 Written opinions filed by commission in all contested cases.

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

4905.26 Complaints as to service.

Upon complaint in writing against any public utility by any person, firm, or corporation, or upon the initiative or complaint of the public utilities commission, that any rate, fare, charge, toll, rental, schedule, classification, or service, or any joint rate, fare, charge, toll, rental, schedule, classification, or service rendered, charged, demanded, exacted, or proposed to be rendered, charged, demanded, or exacted, is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by the public utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, or that any service is, or will be, inadequate or cannot be obtained, and, upon complaint of a public utility as to any matter affecting its own product or service, if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof. The notice shall be served not less than fifteen days before hearing and shall state the matters complained of. The commission may adjourn such hearing from time to time.

The parties to the complaint shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses.

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 to 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.

4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric

service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.

4928.142 Standard generation service offer price - competitive bidding.

(A) For the purpose of complying with section 4928.141 of the Revised Code and subject to division (D) of this section and, as applicable, subject to the rate plan requirement of division (A) of section 4928.141 of the Revised Code, an electric distribution utility may establish a standard service offer price for retail electric generation service that is delivered to the utility under a market-rate offer.

(1) The market-rate offer shall be determined through a competitive bidding process that provides for all of the following:

- (a) Open, fair, and transparent competitive solicitation;
- (b) Clear product definition;
- (c) Standardized bid evaluation criteria;

(d) Oversight by an independent third party that shall design the solicitation, administer the bidding, and ensure that the criteria specified in division (A)(1)(a) to (c) of this section are met;

(e) Evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners. No generation supplier shall be prohibited from participating in the bidding process.

(2) The public utilities commission shall modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of bidders, which rules shall foster supplier participation in the bidding process and shall be consistent with the requirements of division (A)(1) of this section.

(B) Prior to initiating a competitive bidding process for a market-rate offer under division (A) of this section, the electric distribution utility shall file an application with the commission. An electric distribution utility may file its application with the commission prior to the effective date of the commission rules required under division (A)(2) of this section, and, as the commission determines necessary, the utility shall immediately conform its filing to the rules upon their taking effect. An application under this division shall detail the electric distribution utility's proposed compliance with the requirements of division (A)(1) of this section and with commission rules under division (A)(2) of this section and demonstrate that all of the following requirements are met:

(1) The electric distribution utility or its transmission service affiliate belongs to at least one regional transmission organization that has been approved by the federal energy regulatory commission; or there otherwise is comparable and nondiscriminatory access to the electric transmission grid.

(2) Any such regional transmission organization has a market-monitor function and the ability to take actions to identify and mitigate market power or the electric distribution utility's market conduct; or a similar market monitoring function exists with commensurate ability to identify and monitor market conditions and mitigate conduct associated with the exercise of market power.

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis. The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric dis-

tribution utility shall withdraw the application. However, if such remedy is made and the subsequent finding is positive and also if the electric distribution utility made a simultaneous filing under this section and section 4928.143 of the Revised Code, the utility shall not initiate its competitive bid until at least one hundred fifty days after the filing date of those applications.

(C) Upon the completion of the competitive bidding process authorized by divisions (A) and (B) of this section, including for the purpose of division (D) of this section, the commission shall select the least-cost bid winner or winners of that process, and such selected bid or bids, as prescribed as retail rates by the commission, shall be the electric distribution utility's standard service offer unless the commission, by order issued before the third calendar day following the conclusion of the competitive bidding process for the market rate offer, determines that one or more of the following criteria were not met:

(1) Each portion of the bidding process was oversubscribed, such that the amount of supply bid upon was greater than the amount of the load bid out.

(2) There were four or more bidders.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility. All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

(D) The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five. The standard service offer price for retail electric generation service under this first application shall be a proportionate blend of the bid price and the generation service price for the remaining standard service offer load, which latter price shall be equal to the electric distribution utility's most recent standard service offer price, adjusted upward or downward as the commission determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of any one or more of the following costs as reflected in that most recent standard service offer price:

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

(2) Its prudently incurred purchased power costs;

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

(4) Its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. Additionally, the commission may adjust the electric distribution utility's most recent standard service offer price by such just and reasonable amount that the commission determines necessary to address any emergency that threatens the utility's financial integrity or to ensure that the resulting revenue available to the utility for providing the standard service offer is not so inadequate as to result, directly or indirectly, in a taking of property without compensation pursuant to Section 19 of Article I, Ohio Constitution. The electric distribution utility has the burden of demonstrating that any adjustment to its most recent standard service offer price is proper in accordance with this division.

(E) Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the commission shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to

approve the market rate offer, cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division.

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

4928.143 Application for approval of electric security plan - testing.

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

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

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

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

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

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any

such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

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

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

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

(f) Consistent with sections 4928.23 to 4928.2318 of the Revised Code, both of the following:

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

(ii) Provisions for the recovery of the utility's cost of securitization.

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

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

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

(C)

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

(2)

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

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

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

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital

structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

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

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.