

ORIGINAL

IN THE SUPREME COURT OF OHIO

Industrial Energy Users-Ohio,

Appellant,

v.

Public Utilities Commission of Ohio,

Appellee.

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Case No. 2013-0154

**Appeal from the Public
Utilities Commission of Ohio**

Case No. 12-1046-EL-RDR

MERIT BRIEF OF APPELLEE OHIO POWER COMPANY

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MERIT BRIEF OF APPELLEE OHIO POWER COMPANY

I. INTRODUCTION

The Public Utilities Commission of Ohio (“Commission”) did not do anything unlawful or unreasonable in its October 24, 2012, Finding and Order in the proceeding below (“TCRR Order”). The TCRR Order merely authorizes the recovery — on a prospective basis — of costs incurred by Ohio Power Company (“AEP Ohio” or the “Company”) that were previously authorized for recovery in a prior ratemaking order. Contrary to Appellant’s claims, the TCRR Order does not constitute unlawful retroactive ratemaking but, instead, represents a lawful and reasonable exercise of the Commission’s discretion in the area of rate design, an area in which this Court has long afforded the Commission substantial discretion. Deference in this regard is particularly appropriate here given that the Commission’s decision to “phase-in” the customers’ payback of the under-recovery balance on a nonbypassable basis was authorized by statute. To the extent the TCRR Order is considered a departure from Commission precedent, the Commission is permitted to revisit its past decisions and to modify the course previously taken so long as it explains its reasons for doing so, like it did in the TCRR Order. All three propositions of law advanced by Appellant, Industrial Energy Users-Ohio (“IEU”) should be rejected and the Commission’s TCRR Order should be affirmed.

II. STANDARD OF REVIEW

The function and jurisdiction of this Court in an appeal from an order of the Commission is limited. Under R.C. 4903.13, the Court’s “task is to affirm an order of the Commission if it is not unreasonable or unlawful.” *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 46 Ohio St.2d 105, 108, 346 N.E.2d 778 (1976). The Court’s role “is not to weigh the evidence or to

choose between alternative, fairly debatable rate structures [as] [t]hat would be to interfere with the jurisdiction and competence of the commission and to assume powers which this court is not suited to exercise.” *Id.* Of particular importance in this case, the Court has also “long recognized limitations upon [its] review of commission orders that establish rates and rate-related classifications.” *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 127 Ohio St.3d 524, 2010-Ohio-6239, 941 N.E.2d 757, ¶ 13. In reviewing such orders on appeal, this Court’s “task is not to set rates; rather, it is only to ensure that the rates are not unlawful or unreasonable and that the rate-making process itself is lawfully carried out.” *Id.* Consequently, the Court has refused to intervene in this area, recognizing that rate design “is traditionally within the PUCO’s expertise.” *Id.* at ¶ 40.

III. STATEMENT OF THE FACTS AND CASE

In order to implement the retail choice provisions of Amended Substitute Senate Bill 3 (“S.B. 3”), which was passed by the General Assembly in 1999, the three major components of electric service — generation, transmission, and distribution — had to be unbundled. Before competition in electric generation services began under S.B. 3, customers received and paid for their electric service on a bundled basis. With the advent of customer choice under S.B. 3, electric distribution utilities were also required to transfer control of their transmission assets to a qualifying transmission entity. On October 1, 2004, AEP joined the PJM Interconnection, L.L.C., which is a qualifying regional transmission organization that now coordinates and directs the operation of AEP’s transmission network.

In this context, R.C. 4928.05(A)(2) grants 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 . . . imposed on or charged to the utility by . . . a

regional transmission organization” R.C. 4928.05(A)(2). (IEU App. at 56.)¹ Notably, the statute does not forbid recovery of such costs on a nonbypassable basis. The Commission’s rules similarly entitle a utility to recover all transmission and transmission-related costs incurred by the utility.

Under the Commission’s rule, a utility seeking to recover such costs shall file an application with the Commission for a transmission cost recovery rider. Once approved, a utility must update its transmission cost recovery rider rates on an annual basis. Ohio Adm.Code 4901:1-36-03. (IEU App. at 53.) A utility’s transmission cost recovery rider is generally avoidable by those customers for whom the utility no longer bears the responsibility of providing generation and transmission services. Ohio Adm.Code 4901:1-36-04. (IEU App. at 55.) Finally, and of particular importance here, the Commission may waive any requirement of Ohio Adm.Code 4901:1-36 for good cause shown. Ohio Adm.Code 4901:1-36-02. (App. at 1.)

AEP Ohio recovers the costs it incurs for securing transmission and transmission-related services through the Company’s transmission cost recovery rider (“TCRR”). In its current form, AEP Ohio’s TCRR was approved by the Commission as part of the Company’s first electric security plan and again as part of its current electric security plan. *See, In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case No. 08-917-EL-SSO and *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*,

¹ References to Appellant’s appendix are denoted “IEU App.,” references to Appellant’s supplement are denoted “IEU Supp.,” references to Appellee The Public Utilities Commission of Ohio’s appendix are denoted “PUCO App.,” references to Appellee Ohio Power Company’s appendix attached hereto are denoted “App.,” and references to Appellee Ohio Power Company’s supplement are denoted “Supp.”

Case No. 08-918-EL-SSO, Opinion and Order at 49-50 (March 18, 2009) (“ESP I Order”) (PUCO App. at 2-3); *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) (“ESP II Order”) (PUCO App. at 6-7). *See, also*, TCRR Order at ¶14 (IEU App. at 12); *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 ¶17 (December 12, 2012) (“Entry on Rehearing”) (IEU App. at 22). On an annual basis, AEP Ohio files an application with the Commission to update the rates charged under the TCRR and to reconcile any over- or under- recoveries existing from the prior period. On June 15, 2012, the Company filed its 2012 application to update the rates charged under its TCRR. The Company’s 2012 TCRR application reflected an under-recovery balance of approximately \$36 million (the “under-recovery balance”) for costs incurred by AEP Ohio during the prior period. The under-recovery balance was caused primarily by two related factors: 1) 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, and 2) a substantial increase (from less than 10 percent to nearly 40 percent) in the number of customers in AEP Ohio’s service territory shopping for electric service.

Because the under-recovery balance is substantial and because of the significant level of customer shopping in AEP Ohio’s service territory during the past year, the Company included with its application two alternatives for the Commission to consider in an effort to mitigate the rate impact of recovering the entire under-recovery balance over the subsequent twelve months, as would normally be done. AEP Ohio proposed to collect the under-recovery balance, plus

carrying charges, over a three-year period, rather than over the next year. Given the diminished level of non-shopping customers AEP Ohio also observed that, if the Commission should find it necessary to further mitigate the rate impact of recovering the entire under-recovery balance only from AEP Ohio's non-shopping customers, it could adopt a plan to phase-in collection of the under-recovery balance over the three-year period on a nonbypassable basis, pursuant to its authority under R.C. 4928.144.

On October 15, 2012, the Staff of the Commission filed its Review and Recommendation regarding the Company's 2012 TCRR application. The Staff agreed with the Company's proposal to spread collection of the under-recovery balance over a three-year period and also recommended that the Company recover the under-recovery balance from all customers by way of a separate nonbypassable charge, in order to minimize the rate impact that would otherwise occur. (Supp. at 3.) In the TCRR Order, the Commission adopted the Staff's recommendations and stated "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. . . ." TCRR Order at ¶14. (IEU App. at 12-13.) After noting that the level of customers shopping for electric service increased in AEP Ohio's service territory from less than 10 percent to approximately 40 percent during the past year, the Commission stated that a "nonbypassable rate is appropriate under the particular circumstances of this case," and that "[i]t 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." *Id.*

On November 21, 2012, IEU filed an application for rehearing of the TCRR Order, raising the same three arguments it asserts on appeal here. The Commission correctly rejected each of IEU's arguments in its Entry on Rehearing below. First, the Commission correctly found "no merit in IEU-Ohio's argument that the TCRR Order constitutes retroactive ratemaking" as the TCRR Order is consistent "with the Commission's authority under Section 4928.144, Revised Code" and with this Court's precedent, "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." Entry on Rehearing at ¶11. (IEU App. at 18-19.) Second, the Commission correctly concluded that R.C. 4928.144 "is applicable under the circumstances [and that] its conditions have been met. . . ." Entry on Rehearing at ¶17. (IEU App. at 22.) Third, the Commission correctly found in its Entry on Rehearing that in the Commission precedent relied upon by IEU "the Commission did not conclude, as a general matter, that an under-recovery of costs that were originally avoidable may not be collected through a nonbypassable charge." Entry on Rehearing at ¶14. (IEU App. at 20-21.)

This Court should affirm the Commission's TCRR Order as being lawful and reasonable.

IV. LAW AND ARGUMENT

A. *Proposition of Law No. 1: The TCRR Order merely authorizes the recovery — on a prospective basis — of costs incurred by Ohio Power Company that were previously authorized for recovery in a prior order of the Commission; the TCRR Order does not, therefore, constitute retroactive ratemaking.*

For its first proposition of law, IEU asserts that "[b]y authorizing AEP Ohio to collect the under-recovery balance from shopping customers, the Commission engaged in retroactive ratemaking" in violation of this Court's precedent. (IEU Brief at 10-12.) IEU argues (at 13) that the Commission also engaged in retroactive ratemaking when it authorized recovery of the

under-recovery balance “through a new non-bypassable charge that was not previously authorized.” IEU’s arguments reflect a lack of understanding of this Court’s precedent and a disregard for the Commission’s considerable discretion in the area of rate design. As discussed below, IEU’s first proposition of law should be rejected.

The TCRR Order does not constitute retroactive ratemaking. This Court has held that when an initial order of the Commission specifically establishes the recovery of deferred revenues, a subsequent order authorizing the recovery of those revenues, having been authorized by the Commission’s initial order, does not violate the prohibition against retroactive ratemaking. *Lucas Cty. Commrs. v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997); *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535, 541, 620 N.E.2d 835 (1993). Under those circumstances, this Court’s decision in *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957) is not controlling because the deferred revenues constitute a portion of the rates to which the utility is already entitled and not revenues lost due to regulatory delay. *Columbus S. Power Co.* at 541 (“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.”).

In *Keco*, a customer brought an action for restitution against the utility after this Court’s reversal of a Commission order resulted in lower rates being set on remand. *Keco* at paragraph two of the syllabus. In reaching its conclusion that such an action was not available to the customer, the Court stated, “a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a

consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates.” *Keco* at 259 (quoting the trial court)(internal quotations omitted). Thus was born the now axiomatic retroactive ratemaking rule: the Commission can not authorize a rate increase to make up for revenues lost prior to the time of the ratemaking decision. This general rule was reinforced by the Court in *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655. In that case, after summarizing its prior retroactive ratemaking decisions under *Keco* and its progeny, this Court stated that “[t]hese cases make plain that present rates may not make up for dollars lost during the pendency of commission proceedings.” *Id.* at ¶ 11.

The TCRR Order does not compensate AEP Ohio for revenues lost during the pendency of Commission proceedings; it does not, therefore, constitute retroactive ratemaking under *Keco*. As approved by the Commission in the Company’s ESP I proceeding and again as part of the Company’s ESP II proceeding, AEP Ohio’s TCRR includes an annual true-up process and authorization for the Company to implement over- and under-recovery accounting for any differences between the revenues collected and the actual costs recorded. ESP I Order at 49-50 (“[A]s contemplated by our prior order in the TCRR Case, any overrecovery of transmission loss-related costs, which has 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.”) (PUCO App. at 2-3.); ESP II Order at 63-64 (“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 underrecovery is accounted for in the next semi-annual review of the TCRR mechanism.”) (PUCO App. at 6-7.) As the under-recovery balance 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, it constitutes a portion of the TCRR rates to which AEP Ohio is already entitled. Thus, *Keco* is clearly not controlling here. Instead, the TCRR Order is consistent with this Court's decision in *Columbus S. Power Co.* in that it authorizes the recovery of deferred revenues (*i.e.*, the under-recovery balance) that were previously authorized for recovery by an initial Commission order (*i.e.*, the Commission's ESP I and ESP II orders).

Nor does the TCRR Order constitute retroactive ratemaking under *Lucas County*. IEU argues that the Commission also engaged in retroactive ratemaking when it authorized recovery of the under-recovery balance "through a new non-bypassable charge that was not previously authorized." (IEU Brief at 13.) IEU cites to this Court's decision in *Lucas County* for support. Once again, however, the precedent cited by IEU is not controlling here. The appellants in *Lucas County* filed a complaint with the Commission seeking a refund or credit of the amounts collected by the utility under an expired, Commission-approved pilot program. *Lucas Cty.*, 80 Ohio St.3d at syllabus, 686 N.E.2d 501. In upholding the Commission's dismissal of the complaint, the Court determined that "[n]o mechanism for rate adjustment of the [pilot program] had been incorporated in the initial rate stipulation approved by the commission." *Id.*, 80 Ohio St.3d at 348, 686 N.E.2d 501. Consequently, "were the commission to order either a refund or a credit, the commission would . . . thereby be engaging in retroactive ratemaking, prohibited by *Keco*." *Id.*, 80 Ohio St.3d at 348-349, 686 N.E.2d 501.

As demonstrated above, the authority to prospectively adjust the rates charged under the Company's TCRR in order to reconcile revenue collections to the actual costs incurred by the Company was established in the initial TCRR as approved by the Commission in the Company's ESP I proceeding and again as part of the Company's ESP II proceeding. Thus, unlike the rate

mechanism in *Lucas County*, annual rate adjustments of the TCRR were incorporated in the initial rate as approved by the Commission. Like many of the reconcilable riders approved by the Commission, the TCRR is designed to ensure complete recovery by the Company of the transmission and transmission-related costs it incurs by allowing for the true-up, on a prospective basis, of any under-recoveries existing from the prior period. Similarly, if more revenues were collected than the amount of actual costs incurred, customers would be refunded the full over-recovery under the TCRR mechanism. Following IEU's interpretation of the Court's *Lucas County* decision to its logical conclusion would necessarily invalidate many if not all of the riders established by the Commission. Such an absurd result should not be permitted.

Contrary to IEU's assertions, the TCRR Order does not constitute retroactive ratemaking under *Keco* or *Lucas County*. As approved by the Commission in the Company's ESP I proceeding and again as part of the Company's ESP II proceeding, AEP Ohio's TCRR included an annual mechanism to prospectively reconcile any over- or under- recoveries resulting from the prior period. As the Commission correctly found below, the under-recovery balance is attributable to the difference between the level of forecasted costs in the Company's most recent TCRR update (and thus the level of revenues collected by the Company under the TCRR during the prior period) and the actual costs incurred by the Company over the prior period. TCRR Order at ¶2 (IEU App. at 6.); Entry on Rehearing at ¶2 (IEU App. at 15.) As such, the under-recovery balance constitutes a portion of the revenues to which AEP Ohio is already entitled — not revenues lost due to regulatory delay. Indeed, the Court has previously held that rider rate mechanisms that reconcile rates to costs incurred in prior time periods do not constitute unlawful retroactive ratemaking when the Commission approves the true-up feature as part of its original decision approving the rate mechanism. *E.g., River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d

509, 513-514, 433 N.E.2d 568 (1982). Consistent with this Court's decision in *Columbus S. Power Co.*, the TCRR Order merely authorizes the prospective recovery of the under-recovery balance which was previously authorized for recovery by the Commission's orders in the Company's ESP I and ESP II proceedings. For the foregoing reasons, IEU's first proposition of law should be rejected.

The Commission decision that IEU attacks — authorizing the recovery of the under-recovery balance on a nonbypassable basis — is a discretionary one. As discussed in the following section, this Court has afforded the Commission considerable discretion in matters of rate design. Deference in this regard is particularly appropriate here given that the Commission's decision to phase-in the under-recovery balance on a nonbypassable basis was authorized by statute.

B. *Proposition of Law No. 2: The Commission appropriately and lawfully relied on R.C. 4928.144 to phase-in the under-recovery balance through a separate nonbypassable surcharge.*

For its second proposition of law, IEU contends that the Commission cannot rely on R.C. 4928.144 "to authorize AEP-Ohio to collect its under-recovery balance on a non-bypassable basis." (IEU Brief at 15.) Contrary to IEU's assertions, the Commission's reliance on R.C. 4928.144 to phase-in the under-recovery balance through a separate nonbypassable surcharge was appropriate and lawful. Accordingly, IEU's second proposition of law should be rejected.

The Commission's authority to phase-in rates comes from R.C. 4928.144 which 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.

(Emphasis added.) R.C. 4928.144. (IEU App. at 59.) While any phase-in must be “just and reasonable,” the emphasized language entrusts the details of any phase-in to the Commission's discretion. Importantly, if the Commission does exercise its discretion under the statute, the use of the word “shall” in the last sentence mandates that the deferrals created by the phase-in be collected through a nonbypassable surcharge.

The requirement in R.C. 4928.144 that the rate to be phased-in be established under R.C. sections 4928.141 to 4928.143 is met here. In its current form, the Company's TCRR was established by the Commission as part of the Company's ESP I proceeding and again as part of the Company's ESP II proceeding, “consistent with Section 4928.143(B)(2)(g), Revised Code, as well as [the Commission's] authority under Section R.C. 4928.05(A)(2), Revised Code.” TCRR Order at ¶14. (IEU App. at 12-13.) In addition, in the TCRR Order, the Commission explained why it considers a phase-in necessary in this case. The Commission found “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. . . .” *Id.* The Commission also found that a “nonbypassable rate is appropriate under the particular circumstances of this case, specifically where the under-recovery occurred during a period of limited customer shopping.” *Id.* The Commission went on to state, “[i]t 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.” *Id.* Contrary to IEU’s unsupported assertion, R.C. 4928.144 does not contain any language limiting the Commission’s use of the statute in only standard service offer (“SSO”) proceedings. The conditions of the statute have been met and the statute is applicable under the circumstances of this case. Accordingly, the Commission’s reliance on R.C. 4928.144 was appropriate and lawful.

While the TCRR Order authorizes the separate recovery of the under-recovery balance on a nonbypassable basis, it is important to recognize that the Company’s TCRR remains avoidable by shopping customers. As a result of the TCRR Order, AEP Ohio now has two separate rate mechanisms for collecting transmission and transmission-related costs. The original TCRR continues in the same, avoidable manner as it did prior to the TCRR Order, recovering the transmission and transmission-related costs incurred by the Company for serving its retail customers. In addition, the Commission below authorized AEP Ohio to establish a new separate nonbypassable rate mechanism (called the Transmission Under Recovery Rider), in order to recover the \$36 million under-recovery over a period of three years from all customers.² Once the Company has recovered the full amount of the under-recovery balance as authorized, the Transmission Under Recovery Rider will cease to exist, and only the original, avoidable TCRR will remain. The Transmission Under Recovery Rider is the separate nonbypassable surcharge adopted in order to mitigate rate impacts that would have otherwise occurred under the TCRR. While IEU disagrees with the nonbypassable feature of the Transmission Under Recovery Rider,

² The TCRR and the new Transmission Under Recovery Rider are separate rate mechanisms that are contained in two distinct tariff sheets. (Supp. at 4.)

the Commission is authorized to adopt the charge under R.C. 4928.144 and relied upon that statute in its decision below. Entry on Rehearing at ¶17 (the Commission finds that R.C. 4928.144 “is applicable under the circumstances, its conditions have been met, and, accordingly IEU’s third ground for rehearing should be denied.”) (IEU App. at 22.)

C. Proposition of Law No. 3: The Commission’s decision to phase-in the under-recovery balance through a nonbypassable surcharge was a lawful and reasonable exercise of the Commission’s discretion in the area of rate design.

The manner in which the under-recovery balance is to be collected is a discretionary matter of rate design. And as this Court has consistently stated: “We have afforded the commission considerable discretion in matters of rate design, and will not reverse a determination based on its judgment absent a showing that it is against the manifest weight of the evidence, and is so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty.” *Gen. Motors Corp. v. Pub. Util. Comm.*, 47 Ohio St.2d 58, 66, 351 N.E.2d 183 (1976) (“Clearly, the commission has considerable discretion in setting rate structures, when the commission approves schedules representing its own judgment based on evidence before it and an exercise of its sound discretion, the commission has exercised proper judgment”); *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 117 Ohio St.3d 289, 2008-Ohio-860, 883 N.E.2d 1025, ¶ 10 (“[T]his court consistently defers to the commission's judgment in matters that require the commission to apply its special expertise and discretion with regard to factual matters.”); *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, ¶ 11 (“Discretionary decisions receive deferential review.”). IEU has not demonstrated (or even alleged) that the Commission has abused its discretion in this regard. Rather, IEU simply disagrees with the Commission’s exercise of discretion.

The Commission lawfully and reasonably exercised its discretion when it authorized AEP Ohio to recover the under-recovery balance on a nonbypassable basis. Initially, while Ohio Adm.Code 4901:1-36-04(B) generally requires that the Company's TCRR be avoidable by shopping customers, the Commission expressly reserved — at the same time it promulgated the general rule — the right to waive any requirement of Ohio Adm.Code 4901:1-36 for good cause shown other than a requirement mandated by statute. Ohio Adm.Code 4901:1-36-02(B). (App at 1.) Significantly, R.C. 4928.05 does not mandate recovery of transmission-related costs on a bypassable basis. And, the record provides ample support for the Commission's decision to waive its rule in this instance and to authorize the recovery of the under-recovery balance on a nonbypassable basis.

For example, the level of customer shopping in the Company's service territory had dramatically increased, from less than 10 percent to approximately 40 percent, during the period between the Company's last TCRR update and the instant one. Consequently, when it came time to true-up the under-recovery balance existing from the prior period, there were significantly fewer non-shopping customers to spread the costs among. This realization led the Commission to conclude "that a 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. . . ." TCRR Order at ¶14. (IEU App. at 12.) In addition, given that the majority of costs comprising the under-recovery balance 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 shop for electric generation service, the Commission's conclusion that "[i]t would be unreasonable to require non-shopping customers to shoulder the entire burden of the under-collection" is reasonable and appropriate. *Id.*

IEU's assertion that the TCRR Order results in shopping customers being billed twice for transmission service is a red herring. In addition to ignoring the operation of the phase-in statute, R.C. 4928.144, as designed by the General Assembly, IEU's criticism fails to acknowledge that there are two different time periods involved: the period in which the shopping customer pays its alternative generation provider for transmission service is different from the period when the under-recovery balance was incurred. During the latter period, transmission costs were incurred by AEP Ohio for serving customers who subsequently went on to shop. As the Commission stated in its Entry on Rehearing, "[t]hese costs are distinct from the transmission costs that shopping customers will pay to their [alternative generation provider] on a going-forward basis." Entry on Rehearing at ¶11. (IEU App. at 20.) The Commission appropriately recognized that it is not unfair to require shopping customers to pay for the under-recovery balance; on the contrary, it would be unfair for non-shopping customers to be left with the entire tab caused in large part by previously-non-shopping customers who went on to shop before the under-recovery balance was collected.

This Court has consistently refused to substitute its judgment for that of the Commission when the Commission approves rates representing its own judgment based upon evidence before it and in the exercise of its sound discretion. *Gen. Motors Corp.*, 47 Ohio St.2d at 66, 351 N.E.2d 183; *Ohio Consumers' Counsel*, 117 Ohio St.3d 289, 2008-Ohio-860, 883 N.E.2d 1025, ¶ 10; *In re Application of Columbus S. Power Co.*, 129 Ohio St.3d 568, 2011-Ohio-4129, 954 N.E.2d 1183, ¶ 11. As previously established, the record provides ample support for the Commission's exercise of discretion in this case, demonstrating that the decision was reasonable and appropriate. IEU's disagreement with the Commission's judgment in this regard is not a

sufficient basis for this Court to disturb the Commission's findings. IEU's second proposition of law should, therefore, be rejected.

D. Proposition of Law No. 4: To the extent the TCRR Order is considered a departure from precedent, the Commission appropriately distinguished the Commission precedent cited by IEU and sufficiently explained its reasoning in reaching its decision in this case.

For its third and final proposition of law, IEU cites to the Commission's decision in Duke Energy Ohio Inc.'s prior SSO proceeding for the proposition that it is not permissible for the Commission to authorize the collection of an under-recovery of costs that were originally avoidable through a nonbypassable charge. (IEU Brief at 17-21.) That decision is not controlling here, but even if it were, the Commission sufficiently distinguished that case from the circumstances before it in this case. Like its first two, IEU's third proposition of law should be rejected.

The Commission expressly rejected this argument in the TCRR Order: “[n]either do we find merit in IEU-Ohio’s contention that Commission precedent precludes the separate nonbypassable rate proposed in this proceeding.” TCRR Order at ¶14. (IEU App. at 12). *See, also*, Entry on Rehearing at ¶14. (IEU App. at 20-21.) This is because the Commission did not make a generic policy or general legal conclusion in the Duke case that it is unlawful to collect an under-recovery of costs that would have originally been avoidable through a nonbypassable charge. Rather, the Commission determined in its discretion that the circumstances presented in the Duke case did not result in a situation requiring Commission action under the phase-in statute.

Even assuming *arguendo* that the Commission precedent cited by IEU is controlling here, this Court has repeatedly stated that its instructions for the Commission to respect its own

precedent do not mean “that the [C]ommission may never revisit a particular decision, only that if it does change course, it must explain why.” *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52; *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18; *Office of Consumers' Counsel v. Pub. Util. Comm.*, 16 Ohio St.3d 21, 21-22, 475 N.E.2d 786 (1985) (“A few simple sentences in the commission's order in this case would have sufficed” to explain why a previous order had been overruled). Further, that an order is inconsistent with earlier Commission rulings does not make that order unlawful. *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 44. To the extent the TCRR Order is considered a change of course on the issue, the Commission explained, in more than a few sentences, its reasoning in reaching its decision in this case.

The Commission specifically discussed how the significant increase in shopping levels in the Company's service territory made the status quo (*i.e.*, bypassable recovery of the under-recovery balance) inequitable for the Company's non-shopping customers. Based on the “particular circumstances of this case,” the Commission concluded that 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.” TCRR Order at ¶14. (IEU App. at 12-13.) Accordingly, the Commission appropriately distinguished the Duke Case, and provided more than sufficient justification for its decision to authorize the recovery of the under-recovery balance on a nonbypassable basis based on the circumstances in this case. Just because IEU

disagrees with the Commission's explanation, that does not render the decision below unlawful or unreasonable. IEU's third proposition of law should, therefore, be rejected.

V. CONCLUSION

The TCRR Order does not constitute retroactive ratemaking. It merely authorizes the recovery — on a prospective basis — of costs incurred by AEP Ohio that were previously authorized for recovery by an initial Commission order. This Court has held that such an order of the Commission does not violate the proscription against retroactive ratemaking. The Commission's reliance on R.C. 4928.144 to phase-in the under-recovery balance through a separate nonbypassable surcharge was lawful and appropriate under the circumstances of this case. In addition, the Commission's decision in this regard was well within its considerable discretion in the area of rate design, as recognized by this Court. Finally, to the extent the TCRR Order is considered a departure from the Commission precedent relied upon by IEU, the Commission appropriately distinguished its precedent and provided more than sufficient justification for its decision in this case. For the foregoing reasons, each of IEU's propositions of law should be rejected and the Commission's TCRR Order should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this Merit Brief was served via electronic mail upon the following counsel of record this 8th day of May, 2013.

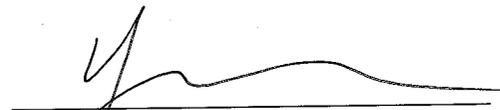
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APPENDIX

Ohio Adm.Code 4901:1-36-02

(A) This chapter authorizes an electric utility to recover, through a reconcilable rider on the electric utility's distribution rates, all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility, net of financial transmission rights and other transmission-related revenues credited to the electric 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.

(B) The commission may, upon an application or a motion filed by a party, waive any requirement of this chapter, other than a requirement mandated by statute, for good cause shown.