

Steven T. Nourse (Reg. No. 0046705)

(Counsel of Record)

Matthew J. Satterwhite (Reg. No. 0071972)

Yazen Alami (Reg. No. 0086371)

American Electric Power Service
Corporation

1 Riverside Plaza, 29th Floor

Columbus, Ohio 43215

Telephone: (614) 716-1608

Facsimile: (614) 716-2950

stnourse@aep.com

mjsatterwhite@aep.com

yalami@aep.com

**COUNSEL FOR APPELLEE,
OHIO POWER COMPANY**

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	2
II. ARGUMENT	5
A. IEU-Ohio’s appeal focuses on whether the Commission can retroactively transfer responsibility from non-shopping to shopping customers for AEP-Ohio’s previously unrecovered compensation from non-shopping customers. The Commission and AEP-Ohio ignore this, and focus on whether the Commission has retroactively authorized AEP-Ohio to increase its revenue.	5
B. Neither the Commission nor AEP-Ohio demonstrate that the TCRR is a rate or price authorized under R.C. 4928.141 to 4928.143, a prerequisite to establishing a non-bypassable phase-in rider pursuant to R.C. 4928.144.	8
C. The Commission and AEP-Ohio ignore the Court’s prior holding in the appeal involving AEP-Ohio’s first ESP, in which the Court held that rates established pursuant to an ESP may only be prospective.	9
D. Contrary to AEP-Ohio’s assertion, the Commission does not have discretion to authorize the collection of AEP-Ohio’s \$36 million under-recovery balance on a non-bypassable basis.	10
E. The Commission and AEP-Ohio fail to distinguish the Commission’s precedent, which requires that bypassable charges be trued-up on a bypassable basis.	11
F. The Commission’s and AEP-Ohio’s Briefs incorrectly argue that there is a record below to support the TCRR Order; the Commission did not conduct an evidentiary hearing and did not receive any evidence.	13
G. The Court should direct the Commission to use the reconciliation mechanism embedded in the TCRR, as authorized by R.C. 4928.05(A)(2), to refund the unlawful charges collected from shopping customers by AEP-Ohio.	14
III. CONCLUSION	14

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>Canton v. Pub. Util. Comm.</i> , 63 Ohio St.2d 76, 81 (1980)	12
<i>Columbus S. Power Co. v. Pub. Util. Comm.</i> , 67 Ohio St.3d 535 (1993)	10
<i>Consumers' Counsel v. Pub. Util. Comm.</i> , 67 Ohio St.2d 153 (1981)	10
<i>Dayton Communications Corp. v. Pub. Util. Comm.</i> , 64 Ohio St.2d 302 (1980)	10
<i>In re Columbus S. Power Co.</i> , 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 9-14	9, 10
<i>Lucas County Commrs v. Pub. Util. Comm.</i> , 80 Ohio St.3d 344, 348 (1997).....	6, 7
<i>Meyers v. Pub. Util. Comm.</i> , 64 Ohio St.2d 299, 302 (1992).....	12
<i>Nantahala Power & Light Co. v. Thornburg</i> , 476 U.S. 953, 956 (1986).....	3
<i>Pike Natural Gas Co. v. Pub. Util. Comm.</i> , 68 Ohio St.2d 181 (1981).....	10
<i>Re Florida Power & Light Co., Am. Iron & Steel Inst., Am. Paper Inst., Inc., Elec. Consumers Res. Council, Fl. Mun. Power Agency, Fl. Power Corp., Gulf Power Co., Metro. Dade Cty., nat'l Assoc. of Regulatory Util. Comm'rs, Int'l Minerals & Chem. Corp., W.R. Grace & Co., Fl. crushed Stone Co., Monsanto Co., U.S. Sugar Corp., State of Mi., Mi Pub. Serv. Comm., Il. Commerce Comm., Baltimore Gas & Elec Co., Potomac Elec. Power Co., Ohio Pub. Util. Comm.</i> , 40 FERC ¶ 61045, 61120 (July 20, 1987).....	3
<i>Tongren v. Pub. Util. Comm.</i> , 85 Ohio St.3d 87, 89 (1999).....	10
<u>Other Authorities</u>	
<i>In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approvals, Case Nos. 07-551-EL-AIR, et al.,</i> Entry on Rehearing (Feb. 2, 2011)	12
<i>In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets, Case Nos. 08-917-EL-SSO, et al.,</i> Opinion and Order (Mar. 18, 2009).....	9

In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service, Case No. 10-2586-EL-SSO,
 Opinion and Order (Feb. 23, 2011) 11, 12, 13

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Case Nos. 11-346-EL-SSO, et al.,
 Opinion and Order (Aug. 8, 2012) 9, 12

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates, Case Nos. 11-351-EL-AIR, et al.,
 Entry on Rehearing (Feb. 14, 2012) 12

In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider, Case No. 11-2473-EL-RDR,
 Finding and Order (June 22, 2011)..... 3-4, 5, 8

In the Matter of the Application of Ohio Power Company to Update its Transmission Cost Recovery Rider Rates, Case No. 12-1046-EL-RDR,
 Finding & Order (Oct. 24, 2012)..... *passim*

Statutes

Ohio Revised Code

R.C. 4928.02(H) 11
 R.C. 4928.05(A)(2)..... 2, 3, 5, 8, 9, 14
 R.C. 4928.141 2, 8, 9, 10
 R.C. 4928.142 8, 9, 10
 R.C. 4928.143 8, 9, 10
 R.C. 4928.144 4, 8, 9, 11

Ohio Administrative Code

Ohio Adm.Code 4901:1-36-04(B)..... 5, 6

REPLY BRIEF OF APPELLANT, INDUSTRIAL ENERGY USERS-OHIO

Under Ohio law, generation, transmission and distribution service are unbundled; customers pay for each service separately. The cost of transmission service is set by federal regulation, and the Public Utilities Commission of Ohio (“Commission”) has authorized Ohio Power Company (“AEP-Ohio”) to collect from non-shopping customers its federally authorized transmission costs for service provided to non-shopping customers, *i.e.*, those customers that take generation service and transmission service from AEP-Ohio. Those non-shopping customers compensate AEP-Ohio for transmission service through a rider called the Transmission Cost Recovery Rider (“TCRR”). The Commission also authorized AEP-Ohio to seek annual reconciliation of the rider such that the revenue AEP-Ohio collects through the rider coincides with the wholesale costs AEP-Ohio is billed for serving its non-shopping customers. Shopping customers, those customers that contract for generation service and transmission service from competitive retail electric service (“CRES”) providers, pay for transmission service through their contracts with CRES providers.

In June 2011, the Commission approved a rider that resulted in a \$36 million under-collection of the revenue necessary for AEP-Ohio to cover the cost it incurred for the period of July 2011 through June 2012 to provide transmission service to non-shopping customers. In the case below, AEP-Ohio sought and the Commission approved an increase in TCRR charges to collect the \$36 million under-recovery. At AEP-Ohio’s urging, however, the Commission authorized AEP-Ohio to collect the \$36 million through an unavoidable or non-bypassable charge. By approving a non-bypassable charge, the Commission permitted AEP-Ohio to bill shopping customers to recover a portion of the \$36 million that went unrecovered from non-shopping customers, and did so despite the fact that shopping customers already fully paid for

and compensated their CRES provider for transmission service under their contracts with their CRES providers.

The question presented by this appeal asks whether it is lawful or reasonable for the Commission to authorize AEP-Ohio to transfer responsibility from non-shopping customers to shopping customers for previously unrecovered transmission service compensation. Because Ohio law and Commission precedent preclude the Commission from authorizing AEP-Ohio to impose such a requirement on shopping customers, the Court should reverse the Commission's October 24, 2012 Finding and Order ("TCRR Order") and direct the Commission to terminate the non-bypassable portion of AEP-Ohio's TCRR and transfer the collection of the \$36 million under-recovery to the bypassable portion of the TCRR. Additionally, to remedy the Commission's unlawful and unreasonable actions, the Court should direct the Commission to refund the unlawful charges imposed upon shopping customers through the non-bypassable TCRR charge through the reconciliation function of the TCRR as provided for by R.C. 4928.05(A)(2).

I. INTRODUCTION

Since Ohio restructured the regulation of electric utilities in 1999, transmission service has been a separate product (the other two products are generation and distribution service).¹ Non-shopping customers obtain unbundled and separate generation supply and transmission supply from AEP-Ohio as a consequence of AEP-Ohio's R.C. 4928.141 obligation to provide service to customers not served by a CRES provider. Since 2005, AEP-Ohio has obtained

¹ IEU-Ohio Merit Brief at 1-4.

compensation for transmission service provided to non-shopping customers from a charge, the TCRR, applicable only to non-shopping customers that benefited from the service.²

The role and structure of the TCRR is dictated by R.C. 4928.05(A)(2) which acknowledges that unbundled transmission service is a separate service that is purchased by AEP-Ohio to meet the needs of non-shopping customers in accordance with a tariff approved by the Federal Energy Regulatory Commission (“FERC”). Beyond the limited role provided for the Commission by R.C. 4928.05(A)(2), the Commission has no authority to regulate transmission service available to non-shopping or shopping customers since unbundled transmission service is subject to the exclusive jurisdiction of FERC.³

R.C. 4928.05(A)(2) also provides that the TCRR may include a reconciliation provision that causes the compensation provided by the TCRR to match the costs incurred by AEP-Ohio to provide transmission service to non-shopping customers. The TCRR has included a reconciliation mechanism since its inception. The reconciliation adjustment of the bypassable TCRR has taken place annually as part of the process associated with AEP-Ohio’s annual application to update its TCRR, and occurred in the Commission’s June 22, 2011 Finding and Order (“2011 TCRR Order”) that established the rates that ultimately led to the \$36 million under-recovery.⁴

² IEU-Ohio Merit Brief at 3-4, n.10.

³ See *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986); *Re Florida Power & Light Co., Am. Iron & Steel Inst., Am. Paper Inst., Inc., Elec. Consumers Res. Council, Fl. Mun. Power Agency, Fl. Power Corp., Gulf Power Co., Metro. Dade Cty., nat’l Assoc. of Regulatory Util. Comm’rs, Int’l Minerals & Chem. Corp., W.R. Grace & Co., Fl. crushed Stone Co., Monsanto Co., U.S. Sugar Corp., State of Mi., Mi Pub. Serv. Comm., Il. Commerce Comm., Baltimore Gas & Elec Co., Potomac Elec. Power Co., Ohio Pub. Util. Comm.*, 40 FERC ¶ 61045, 61120 (July 20, 1987).

⁴ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, Case No. 11-2473-EL-RDR, Finding and Order (June 22, 2011) (hereinafter, “2011 TCRR Order”), available at

In AEP-Ohio's territory, transmission service (along with generation service) has been and continues to be supplied to shopping customers through their CRES provider and shopping customers pay for these separate services in accordance with their agreements with their CRES providers. Prior to the Commission's TCRR Order in October 2012, a shopping customer paid its CRES provider for transmission service and had no responsibility for compensating AEP-Ohio for the transmission service rendered to non-shopping customers. In other words, AEP-Ohio's rates and charges for transmission service were completely avoidable, or bypassable, by shopping customers served by CRES providers including many of the members of the Industrial Energy Users-Ohio ("IEU-Ohio").

In the proceeding below, AEP-Ohio indicated that the compensation provided by the TCRR applicable to non-shopping customers, during the 12-month period ending June 30, 2012, was \$36 million less than the amount required to cover the costs incurred by AEP-Ohio to provide transmission service to non-shopping customers. Rather than adjust the bypassable TCRR charges applicable to non-shopping customers to collect the \$36 million prior period shortfall, the Commission authorized, in the TCRR Order, AEP-Ohio to collect the \$36 million under-recovery balance on a non-bypassable basis, thereby shifting responsibility for this prior period shortfall to residential, commercial and industrial shopping customers. As its source of authority to create this new charge applicable to both non-shopping and shopping customers, the Commission relied on R.C. 4928.144.

As IEU-Ohio identified in its Merit Brief, the Commission's actions below are unlawful and unreasonable because they violate the prohibition against retroactive ratemaking, violate Commission precedent, and cannot be approved under R.C. 4928.144. In response, the

<http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11F22B40533F44667>; TCRR Order, *in passim*.

Commission's and AEP-Ohio's Merit Briefs argue that the Court should affirm because the Commission's actions were lawful. As discussed below, the arguments of the Commission and AEP-Ohio are meritless.

II. ARGUMENT

A. **IEU-Ohio's appeal focuses on whether the Commission can retroactively transfer responsibility from non-shopping to shopping customers for AEP-Ohio's previously unrecovered compensation from non-shopping customers. The Commission and AEP-Ohio ignore this, and focus on whether the Commission has retroactively authorized AEP-Ohio to increase its revenue.**

The Commission and AEP-Ohio misconstrue IEU-Ohio's arguments on retroactive ratemaking: AEP-Ohio and the Commission focus on the total authorized revenue instead of whether the Commission may shift revenue responsibility for the \$36 million under-recovery balance from strictly non-shopping customers to both non-shopping and shopping customers.⁵ Because the Commission's 2011 TCRR Order, which authorized the TCRR rates that produced the \$36 million under-recovery, did not include any mechanism to shift revenue responsibility to shopping customers, the Commission violated the prohibition on retroactive ratemaking.

In June 2011, the Commission authorized AEP-Ohio's TCRR rates for the period of July 2011 through June 2012 pursuant to R.C. 4928.05(A)(2).⁶ The Commission held these rates were "consistent" with its rules in "Chapter 4901:1-36, O.A.C."⁷ Ohio Adm.Code 4901:1-36-04(B) requires AEP-Ohio's TCRR to be "fully avoidable," *i.e.*, bypassable, by shopping customers.⁸ The Commission and AEP-Ohio concede that the TCRR rates authorized by the

⁵ Commission Merit Brief at 9-12; AEP-Ohio Merit Brief at 6-11.

⁶ 2011 TCRR Order at 1, 3, available at <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11F22B40533F44667>.

⁷ *Id.*

⁸ Furthermore, over the prior period of the TCRR, Ohio Adm.Code 4901:1-36-04(B) was in full effect. Again, this rule requires that each electric distribution utility ("EDU") in Ohio implement

Commission in June 2011 were fully bypassable.⁹ Thus, the Commission's June 2011 TCRR Order did not include any mechanism to shift cost responsibility to shopping customers. Subsequently, in the Commission's next order adjusting TCRR rates, the TCRR Order, the Commission shifted some of the recovery of the \$36 million under-recovery balance to shopping customers. The effect of the TCRR Order is to increase the charge collected from shopping customers (from zero) to make up for under-collections from non-shopping customers in the prior year.¹⁰ This is the essence of retroactive ratemaking.¹¹

The Commission and AEP-Ohio attempt to circumvent the Commission's obvious and conceded retroactive increase of the charges assessed to shopping customers by focusing on AEP-Ohio's total authorized revenue. AEP-Ohio argues that "[t]his 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."¹² The Commission similarly argues that this case is about the transmission-related compensation

their TCRRs on a fully bypassable basis, *i.e.*, the rider does not apply to shopping customers. It was not until the Commission issued the TCRR Order that the Commission, *sua sponte*, waived Ohio Adm.Code 4901:1-36-04(B). Thus, by making shopping customers liable for a portion of the under-recovery balance associated with the prior period, the Commission retroactively waived Ohio Adm.Code 4901:1-36-04(B).

⁹ Commission Merit Brief at 3; AEP-Ohio Merit Brief at

¹⁰ IEU-Ohio Merit Brief at 6; AEP-Ohio Compliance Tariffs at Schedule C-3 page 1 of 2 (Oct. 26, 2012) (Supp. at 8).

¹¹ IEU-Ohio Merit Brief at 10-15.

¹² AEP-Ohio Merit Brief at 7 (*citing Lucas Cty. Commrs. V. Pub Util Comm.*, 80 Ohio St.3d 344, 348 (1997)).

that AEP-Ohio was entitled to receive and the Commission's duty to "ensure that the correct amount was collected."¹³

By attempting to focus on the total revenue that AEP-Ohio was ultimately authorized to collect, both the Commission and AEP-Ohio ignore the Commission's retroactive imposition of revenue responsibility upon shopping customers for the prior under-collection from non-shopping customers. Neither the Commission nor AEP-Ohio discuss the fact that the Commission's 2011 TCRR Order placed the entire revenue responsibility upon non-shopping customers to compensate AEP-Ohio for the costs AEP-Ohio incurred to serve those non-shopping customers, whereas the TCRR Order has now shifted the revenue responsibility for AEP-Ohio's prior under-collection to both non-shopping and shopping customers.

As the Court previously stated, the Commission's authority to reconcile a rate for a past under- or over-recovery must be incorporated in the initial rate approved by the Commission.¹⁴ The Commission and AEP-Ohio both concede that the initial rate approved by the Commission in the 2011 TCRR Order was fully bypassable, *i.e.*, the 2011 TCRR Order did not contain a mechanism to reconcile an under-recovery by assessing the collection of the under-recovery to all customers on a non-bypassable basis.¹⁵ Thus, the Commission has unlawfully engaged in retroactive ratemaking. Accordingly, the Court should reverse the Commission's decision and instruct the Commission to order AEP-Ohio to eliminate the non-bypassable portion of the TCRR.

¹³ Commission Merit Brief at 12.

¹⁴ *Lucas County Commrs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997).

¹⁵ AEP-Ohio Merit Brief at 13 (prior to the TCRR Order, AEP-Ohio's TCRR was avoidable).

B. Neither the Commission nor AEP-Ohio demonstrate that the TCRR is a rate or price authorized under R.C. 4928.141 to 4928.143, a prerequisite to establishing a non-bypassable phase-in rider pursuant to R.C. 4928.144.

As IEU-Ohio identified in its Merit Brief, the TCRR was not authorized pursuant to R.C. 4928.141 to 4928.143 and instead was authorized pursuant to R.C. 4928.05.¹⁶ Neither the Commission nor AEP-Ohio disputes this. Instead, in an attempt to satisfy the prerequisite of R.C. 4928.144, the Commission and AEP-Ohio claim that the TCRR was authorized in an electric security plan (“ESP”) proceeding and R.C. 4928.143(B)(2)(g) allows for the inclusion of transmission charges as part of an ESP.¹⁷ Neither claim, however, satisfies the statutory requirement that the TCRR be approved pursuant to R.C. 4928.141 to 4928.144.

The Commission misstates the prerequisites for authorizing a phase-in under R.C. 4928.144. The Commission argues that the rate to be phased-in must be “established in an ESP.”¹⁸ The Commission then claims that it satisfied the requirements of R.C. 4928.144 by authorizing the TCRR in AEP-Ohio’s first ESP proceeding in 2009, and reauthorizing the TCRR in AEP-Ohio’s second ESP proceeding in 2012.

R.C. 4928.144, however, requires that the rate to be phased-in be a “rate or price established under sections 4928.141 to 4928.143 of the Revised Code.”¹⁹ This distinction is important because although the Commission has addressed AEP-Ohio’s TCRR in AEP-Ohio’s two ESP proceedings, the Commission did not authorize the TCRR under R.C. 4928.143(B)(2)(g) in either case. In AEP-Ohio’s first ESP proceeding, the Commission authorized AEP-Ohio to retain its TCRR as previously authorized in Case No. 08-1202-EL-

¹⁶ 2011 TCRR Order at 1, 3, available at <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11F22B40533F44667>.

¹⁷ Commission Merit Brief at 13; AEP-Ohio Merit Brief at 12.

¹⁸ Commission Merit Brief at 13.

¹⁹ R.C. 4928.144 (Appx. at 59).

UNC.²⁰ In AEP-Ohio's second ESP proceeding, the Commission explicitly authorized AEP-Ohio to maintain its TCRR "[p]ursuant to Commission authority, as set forth in Section 4928.05(A)(2), Revised Code."²¹ As the Commission's orders demonstrate, the Commission did not invoke R.C. 4928.143(B)(2)(g) in either AEP-Ohio's first or second ESP proceeding to authorize the TCRR.

The TCRR is not a "rate or price established under sections 4928.141 to 4928.143 of the Revised Code," and, accordingly, the Commission lacked the authority to create the non-bypassable portion of the TCRR pursuant to R.C. 4928.144.²²

C. The Commission and AEP-Ohio ignore the Court's prior holding in the appeal involving AEP-Ohio's first ESP, in which the Court held that rates established pursuant to an ESP may only be prospective.

As IEU-Ohio argued in its Merit Brief, even if R.C. 4928.144 was applicable, the Commission could only use its phase-in authority under the statute prospectively.²³ In the appeal regarding AEP-Ohio's first ESP, the Court confirmed that the Commission may only apply its authority to regulate an EDU's standard service offer ("SSO") rates on a prospective basis.²⁴ In that case, the Commission had authorized AEP-Ohio to retroactively increase its rates.²⁵ On appeal, the Court held that R.C. 4928.141 required ESP rates to be prospective in nature and

²⁰ *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 49 (Mar. 18, 2009) (PUCO Appx. at 2.).

²¹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 63-64 (Aug. 8, 2012) (hereinafter, "ESP II Case") (PUCO Appx. at 6-7).

²² R.C. 4928.144 (Appx. at 59).

²³ IEU-Ohio Merit Brief at 15, 17.

²⁴ *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 9-14.

²⁵ *Id.*

concluded that under either case law (as discussed in Section II.A above) or under R.C. 4928.141, the Commission was prohibited from engaging in retroactive ratemaking in the context of an ESP proceeding.²⁶

If, as the Commission argues, the TCRR satisfies the requirement that it be a rate or price established under R.C. 4928.141 to 4928.143, the Commission is still limited to exercising its phase-in authority on a prospective basis only. To be a prospective phase-in, the Commission would have had to have previously authorized the non-bypassable recovery mechanism. The Commission, however, did not invoke its phase-in authority until after the under-recovery had occurred. Thus, even if the Court concludes that the TCRR is a rate or price established under R.C. 4928.141 to 4928.143, the Commission's exercise of its phase-in authority was retroactive and unlawful.

D. Contrary to AEP-Ohio's assertion, the Commission does not have discretion to authorize the collection of AEP-Ohio's \$36 million under-recovery balance on a non-bypassable basis.

AEP-Ohio asserts in its Merit Brief that the Commission has considerable discretion in the area of rate design and asserts that the Commission's decision to phase-in AEP-Ohio's \$36 million under-recovery balance falls within the Commission's discretion.²⁷ While the Commission might have considerable discretion in rate design, its exercise of discretion is bounded by the authority conferred upon the Commission by the General Assembly.²⁸ As

²⁶ *Id.* at ¶ 13-14.

²⁷ AEP-Ohio Merit Brief at 14-17.

²⁸ *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 89 (1999); *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d 535 (1993); *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181 (1981); *Consumers' Counsel v. Pub. Util. Comm.*, 67 Ohio St.2d 153, 166 (1981); *Dayton Communications Corp. v. Pub. Util. Comm.*, 64 Ohio St.2d 302 (1980).

discussed above, the Commission did not have any authority to invoke its phase-in authority under R.C. 4928.144, and thus has no discretion in designing non-bypassable rates.

E. The Commission and AEP-Ohio fail to distinguish the Commission's precedent, which requires that bypassable charges be trued-up on a bypassable basis.

Previously, the Commission held that generation-related costs should not be recovered from customers not receiving generation service from the EDU and also held that a true-up of a bypassable rider cannot occur on a non-bypassable basis "under any circumstances" without creating an anticompetitive subsidy in violation of R.C. 4928.02(H).²⁹ The Commission and AEP-Ohio fail to offer any reasonable grounds to distinguish the Commission's prior precedent from the TCRR Order.

The Commission attempts to distinguish its prior holding by claiming that previously the Commission was considering generation costs (specifically capacity and fuel costs), "not transmission costs as was the case below."³⁰ The Commission's attempt to distinguish its prior holding, however, ignores the rationale the Commission identified to deny the transfer of revenue responsibility from non-shopping to shopping customers when reconciling a rider for a previous under-recovery. The Commission's rationale supporting its prior order in Duke Energy Ohio, Inc.'s ("Duke") market rate offer ("MRO") proceeding is quite clear: EDUs should seek

²⁹ *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 57, 63 (Feb. 23, 2011) (hereinafter, "Duke MRO Order") (emphasis added), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11B23B23737C09965>.

³⁰ Commission Merit Brief at 19.

to recover their costs from those customers that cause the EDU to incur the costs.³¹ This cost-causation principle is not new and relates to all costs, not only generation-related costs.³²

AEP-Ohio also attempts to distinguish the Commission's prior order on grounds that it experienced increased shopping between July 2011 and October 2012 and that it would be unfair to require the remaining SSO customers to pay for an under-recovery partially caused by the customers that decided to shop over the prior period.³³ AEP-Ohio's offered rationale fails for two reasons. First, there is no evidence in the record as to what caused the under-recovery balance because the Commission found that a hearing was not necessary.³⁴ As a result, there is no record to support AEP-Ohio's factual claim, and its assertion that shopping caused the under-recovery balance is mere speculation.³⁵ Second, in Duke's MRO proceeding, the Commission

³¹ Duke MRO Order at 57, 63.

³² *Meyers v. Pub. Util. Comm.*, 64 Ohio St.2d 299, 302 (1992); *Canton v. Pub. Util. Comm.*, 63 Ohio St.2d 76, 81 (1980); *ESP II Case*, Opinion and Order at 55 (Aug. 8, 2012) (holding that "[t]he PIRR balance was incurred primarily by OP customers, and according to cost causation principles, the recovery of the balance should be from OP customers."), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12H08B40046F08138> (emphasis added); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company, Individually and, if Their Proposed Merger is Approved, as a Merged Company (collectively, AEP Ohio) for an Increase in Electric Distribution Rates*, Case Nos. 11-351-EL-AIR, et al., Entry on Rehearing at 8 (Feb. 14, 2012) (the Commission modified a stipulation because it "better reflected cost causation principles"), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A12B14B63340G91022>; *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices and for Tariff Approvals*, Case Nos. 07-551-EL-AIR, et al., Entry on Rehearing at 10 (Feb. 2, 2011) (applying cost-causation principles to an EDU's recovery of pension expenses), available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11B02B41403F29576>.

³³ AEP-Ohio Merit Brief at 17-18.

³⁴ TCRR Order at 6 (Appx. at 11).

³⁵ As IEU-Ohio noted in its application for rehearing, as customers leave AEP-Ohio's SSO, PJM Interconnection, L.L.C. ("PJM") adjusts AEP-Ohio's billing determinants and instead begins to bill the CRES provider who now provides the shopping customer with transmission service. IEU-Ohio's Application for Rehearing and Memorandum in Support at 4 (Appx. at 37).

rejected Duke's argument that increases in shopping could justify collecting SSO-related costs from shopping customers.³⁶

Finally, while AEP-Ohio asserts it would be unfair to require the remaining SSO customers to pay for the entire \$36 million under-recovery balance on the assumption that some customers who are now shopping caused a portion of the under-recovery, AEP-Ohio ignores the fact that there were already customers shopping before the prior period started in July 2011.³⁷ According to the Commission and AEP-Ohio, ten percent of customers in AEP-Ohio's territory were shopping when the prior TCRR period began.³⁸ These shopping customers, who already paid for their transmission service through their contracts with their CRES providers, are now being required to pay for transmission service provided to SSO customers from mid-2011 to mid-2012. AEP-Ohio's assumption, therefore, is incorrect as to a significant portion of shopping customers who were already shopping before the prior period started and does not address the legal requirements that prohibit retroactive ratemaking.

F. The Commission's and AEP-Ohio's Briefs incorrectly argue that there is a record below to support the TCRR Order; the Commission did not conduct an evidentiary hearing and did not receive any evidence.

As an additional matter, throughout both of the Commission's Merit Brief and AEP-Ohio's Merit Brief, each party respectively claims that the Commission's TCRR Order is supported by the record in the proceeding below.³⁹ As identified in IEU-Ohio's Merit Brief, the Commission did not conduct an evidentiary hearing and therefore there is no evidence to support

³⁶ Duke MRO Order at 61, 63, available at: <http://dis.puc.state.oh.us/ViewImage.aspx?CMID=A1001001A11B23B23737C09965>.

³⁷ TCRR Order at 7 (Appx. at 12).

³⁸ *Id.* (Appx. at 12).

³⁹ *See, e.g.*, Commission Merit Brief at 17-18; AEP-Ohio Brief at 16 ("... the record provides ample support ...").

any factual claims made by the Commission or AEP-Ohio.⁴⁰ However, because the Commission's actions are specifically barred by Ohio law, there is no need to remand the case back to the Commission to conduct an evidentiary hearing.

G. The Court should direct the Commission to use the reconciliation mechanism embedded in the TCRR, as authorized by R.C. 4928.05(A)(2), to refund the unlawful charges collected from shopping customers by AEP-Ohio.

As discussed above, the Commission was without any authority to shift revenue responsibility for AEP-Ohio's prior under-collection of revenue from non-shopping to shopping customers. To remedy the Commission's unlawful and unreasonable actions, the Court should direct the Commission to refund the unlawful charges imposed upon shopping customers through the non-bypassable TCRR charge through the reconciliation function of the TCRR as provided for by R.C. 4928.05(A)(2).

III. CONCLUSION

For the reasons described herein and in IEU-Ohio's Merit Brief, the Court should reverse the Commission's decision below, direct the Commission to order AEP-Ohio to terminate the non-bypassable portion of the TCRR, and direct the Commission to order AEP-Ohio to refund to shopping customers the unlawful amounts collected from shopping customers through the non-bypassable TCRR.

⁴⁰ TCRR Order at 6 (Appx. at 11).

Respectfully submitted,

Matt Pritchard

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

Frank P. Darr (Reg. No. 0025469)

Joseph E. Olikier (Reg. No. 0086088)

Matthew R. Pritchard (Reg. 0088070)

McNees Wallace & Nurick
21 East State Street, 17th Floor
Columbus, OH 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

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

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of
Ohio Power Company to Update its
Transmission Cost Recovery Rider Rates

Industrial Energy Users-Ohio,

Appellant,

v.

Public Utilities Commission of Ohio,

Appellee.

: Case No. 2013-0154
:
: Appeal from the Public Utilities
: Commission of Ohio
:
: Public Utilities Commission of Ohio
: Case No. 12-1046-EL-RDR
:
:
:
:
:
:

SECOND APPENDIX OF APPELLANT,
INDUSTRIAL ENERGY USERS-OHIO

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

Frank P. Darr (Reg. No. 0025469)

Joseph E. Olikier (Reg. No. 0086088)

Matthew R. Pritchard (Reg. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17th Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Facsimile: (614) 469-4653

sam@mwncmh.com

fdarr@mwncmh.com

joliker@mwncmh.com

mpritchard@mwncmh.com

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

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

William L. Wright (Reg. No. 0018010)

Section Chief, Public Utilities Section

Thomas McNamee (Reg. No. 0017352)

Assistant Attorneys General

Public Utilities Commission of Ohio

180 East Broad Street, 6th Floor

Columbus, OH 43215

Telephone: (614) 466-4397

Facsimile: (614) 644-8764

william.wright@puc.state.oh.us

thomas.McNamee@puc.state.oh.us

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

Steven T. Nourse (Reg. No. 0046705)

(Counsel of Record)

Matthew J. Satterwhite (Reg. No. 0071972)

Yazen Alami (Reg. No. 0086371)

American Electric Power Service
Corporation

1 Riverside Plaza, 29th Floor

Columbus, Ohio 43215

Telephone: (614) 716-1608

Facsimile: (614) 716-2950

stnourse@aep.com

mjsatterwhite@aep.com

yalami@aep.com

**COUNSEL FOR APPELLEE,
OHIO POWER COMPANY**

SECOND APPENDIX
TABLE OF CONTENTS

APP. PAGE

STATUTES

R.C. 4928.02(H) 1

4928.02 State policy.

It is the policy of this state to do the following throughout this state:

- (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;
- (D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;
- (E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;
- (F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;
- (G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;
- (H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;
- (I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;
- (J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;
- (K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;
- (L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

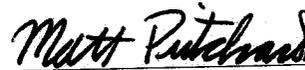
In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

Amended by 129th General Assembly File No. 125, SB 315, §101.01, eff. 9/10/2012.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply Brief and Second Appendix of Appellant, Industrial Energy Users-Ohio* was served upon the parties of record this 28th day of May 2013, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.


Matthew R. Pritchard

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

**COUNSEL FOR APPELLEE,
OHIO POWER COMPANY**

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

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

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