

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Ohio Edison) Case No. 2013-0513
Company, The Cleveland Electric Illuminating)
Company and The Toledo Edison Company for) On Appeal from the Public Utilities
Authority to Provide for a Standard Service Offer) Commission of Ohio
Pursuant to R.C. §4928.143 in the Form of an)
Electric Security Plan) PUCO Case No. 12-1230-EL-SSO

APPELLANT'S MERIT BRIEF
APPENDIX
VOLUME 2

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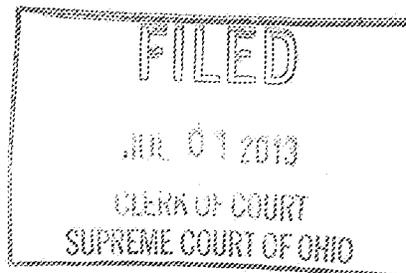
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OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

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ORC Ann. 1.49 (2013)

§ 1.49. Ambiguous statutes

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

HISTORY:

134 v H 607. Eff 1-3-72.

Case Notes

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TITLE 49. PUBLIC UTILITIES
CHAPTER 4903. PUBLIC UTILITIES COMMISSION -- HEARINGS

Go to the Ohio Code Archive Directory

ORC Ann. 4903.22 (2013)

§ 4903.22. Rules of practice

Except when otherwise provided by law, all processes in actions and proceedings in a court arising under Chapters 4901., 4903., 4905., 4906., 4907., 4909., 4921., 4923., and 4927. of the Revised Code shall be served, and the practice and rules of evidence in such actions and proceedings shall be the same, as in civil actions. A sheriff or other officer empowered to execute civil processes shall execute process issued under those chapters and receive compensation therefor as prescribed by law for like services.

HISTORY:

RS § 244-27; 98 v 352, § 17; GC § 552; Bureau of Code Revision, 10-1-53; 134 v S 397. Eff 10-23-72; 153 v S 162, § 1, eff. 9-13-10.

NOTES:

Section Notes

EFFECT OF AMENDMENTS

153 v S 162, effective September 13, 2010, corrected internal references and made stylistic changes.

Case Notes

OHIO RULES OF EVIDENCE.

The commission is not strictly bound by the Ohio Rules of Evidence: *Greater Cleveland Welfare Rights Org., Inc. v. P.U.C.*, 2 Ohio St. 3d 62, 442 N.E.2d 1288 (1982)



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TITLE 49. PUBLIC UTILITIES
CHAPTER 4909. PUBLIC UTILITIES COMMISSION -- FIXATION OF RATES

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ORC Ann. 4909.15 (2013)

§ 4909.15. Fixation of reasonable rat

(A) The public utilities commission, when fixing and determining just and reasonable rates, fares, tolls, rentals, and charges, shall determine:

(1) The valuation as of the date certain of the property of the public utility used and useful or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the public utility service for which rates are to be fixed and determined. The valuation so determined shall be the total value as set forth in division (C)(8) of *section 4909.05 of the Revised Code*, and a reasonable allowance for materials and supplies and cash working capital as determined by the commission.

The commission, in its discretion, may include in the valuation a reasonable allowance for construction work in progress but, in no event, may such an allowance be made by the commission until it has determined that the particular construction project is at least seventy-five per cent complete.

In determining the percentage completion of a particular construction project, the commission shall consider, among other relevant criteria, the per cent of time elapsed in construction; the per cent of construction funds, excluding allowance for funds used during construction, expended, or obligated to such construction funds budgeted where all such funds are adjusted to reflect current purchasing power; and any physical inspection performed by or on behalf of any party, including the commission's staff.

A reasonable allowance for construction work in progress shall not exceed ten per cent of the total valuation as stated in this division, not including such allowance for construction work in progress.

Where the commission permits an allowance for construction work in progress, the dollar value of the project or portion thereof included in the valuation as construction work in progress shall not be included in the valuation as plant

in service until such time as the total revenue effect of the construction work in progress allowance is offset by the total revenue effect of the plant in service exclusion. Carrying charges calculated in a manner similar to allowance for funds used during construction shall accrue on that portion of the project in service but not reflected in rates as plant in service, and such accrued carrying charges shall be included in the valuation of the property at the conclusion of the offset period for purposes of division (C)(8) of *section 4909.05 of the Revised Code*.

From and after April 10, 1985, no allowance for construction work in progress as it relates to a particular construction project shall be reflected in rates for a period exceeding forty-eight consecutive months commencing on the date the initial rates reflecting such allowance become effective, except as otherwise provided in this division.

The applicable maximum period in rates for an allowance for construction work in progress as it relates to a particular construction project shall be tolled if, and to the extent, a delay in the in-service date of the project is caused by the action or inaction of any federal, state, county, or municipal agency having jurisdiction, where such action or inaction relates to a change in a rule, standard, or approval of such agency, and where such action or inaction is not the result of the failure of the utility to reasonably endeavor to comply with any rule, standard, or approval prior to such change.

In the event that such period expires before the project goes into service, the commission shall exclude, from the date of expiration, the allowance for the project as construction work in progress from rates, except that the commission may extend the expiration date up to twelve months for good cause shown.

In the event that a utility has permanently canceled, abandoned, or terminated construction of a project for which it was previously permitted a construction work in progress allowance, the commission immediately shall exclude the allowance for the project from the valuation.

In the event that a construction work in progress project previously included in the valuation is removed from the valuation pursuant to this division, any revenues collected by the utility from its customers after April 10, 1985, that resulted from such prior inclusion shall be offset against future revenues over the same period of time as the project was included in the valuation as construction work in progress. The total revenue effect of such offset shall not exceed the total revenues previously collected.

In no event shall the total revenue effect of any offset or offsets provided under division (A)(1) of this section exceed the total revenue effect of any construction work in progress allowance.

(2) A fair and reasonable rate of return to the utility on the valuation as determined in division (A)(1) of this section;

(3) The dollar annual return to which the utility is entitled by applying the fair and reasonable rate of return as determined under division (A)(2) of this section to the valuation of the utility determined under division (A)(1) of this section;

(4) The cost to the utility of rendering the public utility service for the test period used for the determination under division (C)(1) of this section, less the total of any interest on cash or credit refunds paid, pursuant to *section 4909.42 of the Revised Code*, by the utility during the test period.

(a) Federal, state, and local taxes imposed on or measured by net income may, in the discretion of the commission, be computed by the normalization method of accounting, provided the utility maintains accounting reserves that reflect differences between taxes actually payable and taxes on a normalized basis, provided that no determination as to the treatment in the rate-making process of such taxes shall be made that will result in loss of any tax depreciation or other tax benefit to which the utility would otherwise be entitled, and further provided that such tax benefit as redounds to the utility as a result of such a computation may not be retained by the company, used to fund any dividend or distribution, or utilized for any purpose other than the defrayal of the operating expenses of the utility and

the defrayal of the expenses of the utility in connection with construction work.

(b) The amount of any tax credits granted to an electric light company under *section 5727.391 of the Revised Code* for Ohio coal burned prior to January 1, 2000, shall not be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the allowable operating expenses of the company and the defrayal of the allowable expenses of the company in connection with the installation, acquisition, construction, or use of a compliance facility. The amount of the tax credits granted to an electric light company under that section for Ohio coal burned prior to January 1, 2000, shall be returned to its customers within three years after initially claiming the credit through an offset to the company's rates or fuel component, as determined by the commission, as set forth in schedules filed by the company under *section 4905.30 of the Revised Code*. As used in division (A)(4)(b) of this section, "compliance facility" has the same meaning as in *section 5727.391 of the Revised Code*.

(B) The commission shall compute the gross annual revenues to which the utility is entitled by adding the dollar amount of return under division (A)(3) of this section to the cost, for the test period used for the determination under division (C)(1) of this section, of rendering the public utility service under division (A)(4) of this section.

(C) (1) Except as provided in division (D) of this section, the revenues and expenses of the utility shall be determined during a test period. The utility may propose a test period for this determination that is any twelve-month period beginning not more than six months prior to the date the application is filed and ending not more than nine months subsequent to that date. The test period for determining revenues and expenses of the utility shall be the test period proposed by the utility, unless otherwise ordered by the commission.

(2) The date certain shall be not later than the date of filing, except that it shall be, for a natural gas, water-works, or sewage disposal system company, not later than the end of the test period.

(D) A natural gas, water-works, or sewage disposal system company may propose adjustments to the revenues and expenses to be determined under division (C)(1) of this section for any changes that are, during the test period or the twelve-month period immediately following the test period, reasonably expected to occur. The natural gas, water-works, or sewage disposal system company shall identify and quantify, individually, any proposed adjustments. The commission shall incorporate the proposed adjustments into the determination if the adjustments are just and reasonable.

(E) When the commission is of the opinion, after hearing and after making the determinations under divisions (A) and (B) of this section, 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, or will be, unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, that the service is, or will be, inadequate, or that the maximum rates, charges, tolls, or rentals chargeable by any such public utility are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall:

(1) With due regard among other things to the value of all property of the public utility actually used and useful for the convenience of the public as determined under division (A)(1) of this section, excluding from such value the value of any franchise or right to own, operate, or enjoy the same in excess of the amount, exclusive of any tax or annual charge, actually paid to any political subdivision of the state or county, as the consideration for the grant of such franchise or right, and excluding any value added to such property by reason of a monopoly or merger, with due regard in determining the dollar annual return under division (A)(3) of this section to the necessity of making reservation out of the income for surplus, depreciation, and contingencies, and;

(2) With due regard to all such other matters as are proper, according to the facts in each case,

(a) Including a fair and reasonable rate of return determined by the commission with reference to a cost of debt equal to the actual embedded cost of debt of such public utility,

(b) But not including the portion of any periodic rental or use payments representing that cost of property that is included in the valuation report under divisions (C)(4) and (5) of *section 4909.05 of the Revised Code*, fix and determine the just and reasonable rate, fare, charge, toll, rental, or service to be rendered, charged, demanded, exacted, or collected for the performance or rendition of the service that will provide the public utility the allowable gross annual revenues under division (B) of this section, and order such just and reasonable rate, fare, charge, toll, rental, or service to be substituted for the existing one. After such determination and order no change in the rate, fare, toll, charge, rental, schedule, classification, or service shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited.

(F) Upon application of any person or any public utility, and after notice to the parties in interest and opportunity to be heard as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code for other hearings, has been given, the commission may rescind, alter, or amend an order fixing any rate, fare, toll, charge, rental, classification, or service, or any other order made by the commission. Certified copies of such orders shall be served and take effect as provided for original orders.

HISTORY:

GC § 614-23; 102 v 549, § 25; Bureau of Code Revision, 10-1-53; 136 v S 94 (Eff 9-1-76); 137 v H 230 (Eff 10-9-77); 138 v H 657 (Eff 9-24-79); 138 v H 736 (Eff 10-16-80); 139 v S 378 (Eff 1-11-83); 140 v H 250 (Eff 7-30-84); 140 v H 655 (Eff 6-8-84); 140 v S 27 (Eff 4-10-85); 141 v H 750 (Eff 4-5-86); 144 v S 143 (Eff 7-10-91); 148 v S 3 (Eff 1-1-2001; 1-1-2002*); 148 v H 384. Eff 11-24-99; 2011 HB 95, § 1, eff. Sept. 9, 2011; 2012 HB 379, § 1, eff. Mar. 27, 2013.

NOTES:

Section Notes

FOOTNOTE

* The provisions of § 5 of SB 3 (148 v --) read as follows:

** Division (A)(4)(c) was changed to division (A)(4)(b) in SB 3 (148 v --), to become effective 1-1-2002. See additional information in provisions of § 5 of SB 3, following the history for *RC § 4909.15*.

Editor's Notes

The provisions of § 2 of HB 384 (148 v --) read in part as follows:

SECTION. * * * and *section 4909.15 of the Revised Code* as amended by Am. Sub. S.B. 3 of the 123rd General Assembly are hereby repealed.

The provisions of §§ 4, 5, 6 of HB 384 (148 v --) read as follows:

SECTION 4. (A) The amendment by this act of *section 5727.391 of the Revised Code* increasing the per-ton credit for burning Ohio coal applies to Ohio coal burned on or after January 1, 2000, and on or before April 30, 2001. The tax credit claimed for the twelve-month period ending April 30, 2000, shall be adjusted so that the credit equals one dollar per ton for Ohio coal burned on or before December 31, 1999, of that twelve-month period, and three dollars per ton for Ohio coal burned on or after January 1, 2000.

(B) The amendment of *section 5727.391 of the Revised Code* and the repeal of the existing version of that section



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TITLE 49. PUBLIC UTILITIES
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE

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ORC Ann. 4928.02 (2013)

§ 4928.02. State electric services 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.

HISTORY:

148 v S 3, Eff 10-5-99; 152 v S 221, § 1, eff. 7-31-08; 2012 SB 315, § 101.01, eff. Sept. 10, 2012.

NOTES:

Section Notes

EFFECT OF AMENDMENTS

The 2012 amendment inserted "waste energy recovery systems, smart grid programs" in (D).

152 v S 221, effective July 31, 2008, inserted (F), (J) through (M), and the last paragraph, and redesignated the remaining subsections accordingly; in the introductory paragraph, deleted "beginning on the starting date of competitive retail electric service" from the end; added the inclusion to the end of (D) and present (H); and, in (E), added "and the development of ... written in plain language" to the end and made related changes.

Related Statutes & Rules

Cross-References to Related Statutes



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TITLE 49. PUBLIC UTILITIES
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE
STANDARD SERVICE OFFER

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ORC Ann. 4928.141 (2013)

§ 4928.141. Electric 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.

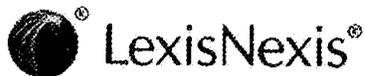
HISTORY:

152 v S 221, § 1, eff. 7-31-08.

Case Notes

RETROACTIVE RATE INCREASE.

Ohio Public Utilities Commission violated the caselaw and *R.C. 4928.141(A)* when it granted a utility a retroactive rate increase to make up for regulatory delay, but the retroactive rate increase was not refundable. *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 947 N.E.2d 655, 2011 Ohio LEXIS 957, 2011 Ohio 1788, (2011).



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TITLE 49. PUBLIC UTILITIES
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE
STANDARD SERVICE OFFER

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ORC Ann. 4928.142 (2013)

§ 4928.142. Competitive bidding process for market-rate offer; commission approval process; transitional provisions

(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 distribution 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*.

HISTORY:

152 v S 221, § 1, eff. 7-31-08; 152 v H 562, § 101.01, eff. 9-23-08.

NOTES:

Section Notes

EFFECT OF AMENDMENTS

152 v H 562, effective September 23, 2008, in the introductory language of (D), substituted "July 31, 2008" for "the effective date of this section" and "not more than twenty" for "and not less than twenty".



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TITLE 49. PUBLIC UTILITIES
CHAPTER 4928. COMPETITIVE RETAIL ELECTRIC SERVICE
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ORC Ann. 4928.143 (2013)

§ 4928.143. Application for approval of electric security plan

(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.

HISTORY:

152 v S 221, § 1, eff. 7-31-08; 2011 HB 364, § 1, eff. Mar. 22, 2012.

NOTES:

Section Notes

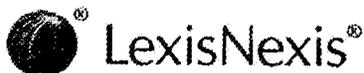
EFFECT OF AMENDMENTS

The 2011 amendment added the introductory language of (B)(2)(f); added the (B)(2)(f)(i) and (B)(2)(f)(ii) designations; and made stylistic changes.

Case Notes

ANALYSIS Constitutionality Application Electric service plans Excessive earnings determinations Factors Jurisdiction Rate setting

CONSTITUTIONALITY.



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4901 Public Utilities Commission (PUCO) - Administration and Director
Chapter 4901-1 Administrative Provisions and Procedure

OAC Ann. 4901-1-16 (2013)

4901-1-16. General provisions and scope of discovery.

(A) The purpose of rules 4901-1-16 to 4901-1-24 of the *Administrative Code* is to encourage the prompt and expeditious use of prehearing discovery in order to facilitate thorough and adequate preparation for participation in commission proceedings. These rules are also intended to minimize commission intervention in the discovery process.

(B) Except as otherwise provided in paragraphs (G) and (I) of this rule, any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may be obtained through interrogatories, requests for the production of documents and things or permission to enter upon land or other property, depositions, and requests for admission. The frequency of using these discovery methods is not limited unless the commission orders otherwise under rule 4901-1-24 of the *Administrative Code*.

(C) Any party may, through interrogatories, require any other party to identify each expert witness expected to testify at the hearing and to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or other party facts or data known or opinions held by the expert which are relevant to the stated subject matter. A party who has retained or specially employed an expert may, with the approval of the commission, require the party conducting discovery to pay the expert a reasonable fee for the time spent responding to discovery requests.

(D) Discovery responses which are complete when made need not be supplemented with subsequently acquired information except in the following situations:

(1) The response identified each expert witness expected to testify at the hearing or stated the subject matter upon which each expert was expected to testify.

(2) The responding party later learned that the response was incorrect or otherwise materially deficient.

(3) The response indicated that the information sought was unknown or nonexistent and such information subsequently became known or existent.

(4) An order of the commission or agreement of the parties provides for the supplementation of responses.

(5) Requests for the supplementation of responses are submitted prior to the commencement of the hearing.

(6) The response addressed the identity and location of persons having knowledge of discoverable matters.

(E) The supplementation of responses required under paragraphs (D)(1) to (D)(3) and (D)(6) of this rule shall be provided within five business days of discovery of the new information.

OAC Ann. 4901-1-16

(F) Nothing in rules 4901-1-16 to 4901-1-24 of the *Administrative Code* precludes parties from conducting informal discovery by mutually agreeable methods or by stipulation.

(G) A discovery request under rules 4901-1-19 to 4901-1-22 of the *Administrative Code* may not seek information from any party which is available in prefiled testimony, prehearing data submissions, or other documents which that party has filed with the commission in the pending proceeding. Before serving any discovery request, a party must first make a reasonable effort to determine whether the information sought is available from such sources.

(H) For purposes of rules 4901-1-16 to 4901-1-24 of the *Administrative Code*, the term "party" includes any person who has filed a motion to intervene which is pending at the time a discovery request or motion is to be served or filed.

(I) Rules 4901-1-16 to 4901-1-24 of the *Administrative Code* do not apply to the commission staff.

History:Effective: 05/07/2007.

Rule promulgated under: *RC 111.15*.

Rule authorized by: *RC 4901.13*.

Rule amplifies: *RC 4901.13, 4903.082, R.C. 119.032* Review date: 02/20/2007 and 09/30/2010. Prior Effective Dates: 3/1/81, 4/20/01.

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4901 Public Utilities Commission (PUCO) - Administration and Director
Chapter 4901-1 Administrative Provisions and Procedure

OAC Ann. 4901-1-25 (2013)

4901-1-25. Subpoenas.

(A) The commission, any commissioner, the legal director, the deputy legal director, or an attorney examiner may issue subpoenas, upon their own motion or upon motion of any party. A subpoena shall command the person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command such person to produce the books, papers, documents, or other tangible things described therein. A copy of the motion for a subpoena and the subpoena itself should first be submitted to the attorney examiner assigned to the case, or to the legal director or deputy legal director, for signature of the subpoena. After the subpoena is signed, a copy of the motion for a subpoena and a copy of the signed subpoena shall then be docketed and served upon the parties to the case. The person seeking the subpoena shall retain the original signed subpoena and make arrangements for its service.

(B) Arranging for service of a signed subpoena is the responsibility of the person requesting the subpoena. A subpoena may be served by a sheriff, deputy sheriff, or any other person who is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy to such person, or by reading it to him or her in person, or by leaving a copy at his or her place of residence. A subpoena may be served at any place within this state. The person serving the subpoena shall file a return thereof with the docketing division.

(C) The commission, the legal director, the deputy legal director, or an attorney examiner may, upon their own motion or upon motion of any party, quash a subpoena if it is unreasonable or oppressive, or condition the denial of such a motion upon the advancement by the party on whose behalf the subpoena was issued of the reasonable costs of producing the books, papers, documents, or other tangible things described therein.

(D) A subpoena may require a person, other than a member of the commission staff, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the *Administrative Code*. Such a subpoena is subject to the provisions of rule 4901-1-24 of the *Administrative Code* as well as paragraph (C) of this rule.

(E) Unless otherwise ordered for good cause shown, all motions for subpoenas requiring the attendance of witnesses at a hearing must be filed with the commission no later than five days prior to the commencement of the hearing.

(F) Any persons subpoenaed to appear at a commission hearing, other than a party or an officer, agent, or employee of a party, shall receive the same witness fees and mileage expenses provided in civil actions in courts of record. For purposes of this paragraph, the term "employee" includes consultants and other persons retained or specially employed by a party for purposes of the proceeding. If the witness is subpoenaed at the request of one or more parties, the witness fees and mileage expenses shall be paid by such party or parties. If the witness is subpoenaed upon motion of the commission, a commissioner, the legal director, the deputy legal director, or an attorney examiner, the witness fees and mileage expenses shall be paid by the state, in accordance with *section 4903.05 of the Revised Code*. Unless otherwise ordered, a motion for a subpoena requiring the attendance of a witness at a hearing shall be accompanied by a deposit in

the form of a check made payable to the person subpoenaed sufficient to cover the required witness fees and mileage expenses for one day's attendance. A separate deposit shall be required for each witness. The deposit shall be tendered to the fiscal officer of the commission, who shall retain it until the hearing is completed, at which time the officer shall tender the check to the witness. The fiscal officer shall attempt to resolve any payment controversies between the parties. The fiscal officer shall bring any unresolved controversies to the attention of the commission, the legal director, the deputy legal director, or the attorney examiner for resolution.

(G) If any person fails to obey a subpoena issued by the commission, a commissioner, the legal director, the deputy legal director, or an attorney examiner, the commission may seek appropriate judicial relief against such person under *section 4903.02 or 4903.04 of the Revised Code*.

(H) A sample subpoena is provided in the appendix to this rule.

History:Effective: 05/07/2007.

Rule promulgated under: *RC 111.15*.

Rule authorized by: *RC 4901.13*.

Rule amplifies: *RC 4901.13, 4901.18, R.C. 119.032* Review date: 02/20/2007 and 09/30/2010. Prior Effective Dates: 3/1/81, 6/1/83, 12/25/87, 4/20/01.



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4901:1 Utilities
Chapter 4901:1-35 Electric Distribution Utility (EDU)

OAC Ann. 4901:1-35-03 (2013)

4901:1-35-03. Filing and contents of applications.

Each electric utility in this state filing an application for a standard service offer (SSO) in the form of an electric security plan (ESP), a market-rate offer (MRO), or both, shall comply with the requirements set forth in this rule.

(A) SSO applications shall be case captioned as (XX-XXX-EL-SSO). Twenty copies plus an original of the application shall be filed. The application must include a complete set of direct testimony of the electric utility personnel or other expert witnesses. This testimony shall be in question and answer format and shall be in support of the electric utility's proposed application. This testimony shall fully support all schedules and significant issues identified by the electric utility.

(B) An SSO application that contains a proposal for an MRO shall comply with the requirements set forth below.

(1) The following electric utility requirements are to be demonstrated in a separate section of the standard service offer SSO application proposing a market-rate offer MRO:

(a) The electric utility shall establish one of the following: that it, or its transmission affiliate, belongs to at least one regional transmission organization (RTO) that has been approved by the federal energy regulatory commission; or, if the electric utility or its transmission affiliate does not belong to an RTO, then the electric utility shall demonstrate that alternative conditions exist with regard to the transmission system, which include non-pancaked rates, open access by generation suppliers, and full interconnection with the distribution grid.

(b) The electric utility shall establish one of the following: its RTO retains an independent market-monitor function and has the ability to identify any potential for a market participant or the electric utility to exercise market power in any energy, capacity, and/or ancillary service markets by virtue of access to the RTO and the market participant's data and personnel and has the ability to effectively mitigate the conduct of the market participants so as to prevent or preclude the exercise of such market power by any market participant or the electric utility; or the electric utility shall demonstrate that an equivalent function exists which can monitor, identify, and mitigate conduct associated with the exercise of such market power.

(c) The electric utility shall demonstrate that an independent and reliable source of electricity pricing information for any energy product or service necessary for a winning bidder to fulfill the contractual obligations resulting from the competitive bidding process (CBP) is publicly available. The information may be offered through a pay subscription service, but the pay subscription service shall be available under standard pricing, terms, and conditions to any person requesting a subscription. The published information shall be representative of prices and changes in prices in the electric utility's electricity market, and shall identify pricing of on-peak and off-peak energy products that represent contracts for delivery, encompassing a time frame beginning at least two years from the date of the publication. The published information shall be updated on at least a monthly basis.

(2) Prior to establishing an MRO under division (A) of *section 4928.142 of the Revised Code*, an electric utility shall file a plan for a CBP with the commission. The electric utility shall provide justification of its proposed CBP plan, considering alternative possible methods of procurement. Each CBP plan that is to be used to establish an MRO shall include the following:

(a) A complete description of the CBP plan and testimony explaining and supporting each aspect of the CBP plan. The description shall include a discussion of any relationship between the wholesale procurement process and the retail rate design that may be proposed in the CBP plan. The description shall include a discussion of alternative methods of procurement that were considered and the rationale for selection of the CBP plan being presented. The description shall also include an explanation of every proposed non-avoidable charge, if any, and why the charge is proposed to be non-avoidable.

(b) Pro forma financial projections of the effect of the CBP plan's implementation, including implementation of division (D) of *section 4928.142 of the Revised Code*, upon generation, transmission, and distribution of the electric utility, for the duration of the CBP plan.

(c) Projected generation, transmission, and distribution rate impacts by customer class and rate schedules for the duration of the CBP plan. The electric utility shall clearly indicate how projected bid clearing prices used for this purpose were derived.

(d) Detailed descriptions of how the CBP plan ensures an open, fair, and transparent competitive solicitation that is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of *section 4928.02 of the Revised Code*.

(e) Detailed descriptions of the customer load(s) to be served by the winning bidder(s), and any known factors that may affect such customer loads. The descriptions shall include, but not be limited to, load subdivisions defined for bidding purposes, load and rate class descriptions, customer load profiles that include historical hourly load data for each load and rate class for at least the two most recent years, applicable tariffs, historical shopping data, and plans for meeting targets pertaining to load reductions, energy efficiency, renewable energy, advanced energy, and advanced energy technologies. If customers will be served pursuant to time-differentiated or dynamic pricing, the descriptions shall include a summary of available data regarding the price elasticity of the load. Any fixed load provides to be served by winning bidder(s) shall be described.

(f) Detailed descriptions of the generation and related services that are to be provided by the winning bidder(s). The descriptions shall include, at a minimum, capacity, energy, transmission, ancillary and resource adequacy services, and the term during which generation and related services are to be provided. The descriptions shall clearly indicate which services are to be provided by the winning bidder(s) and which services are to be provided by the electric utility.

(g) Draft copies of all forms, contracts, or agreements that must be executed during or upon completion of the CBP.

(h) A clear description of the proposed methodology by which all bids would be evaluated, in sufficient detail so that bidders and other observers can ascertain the evaluated result of any bids or potential bids.

(i) The CBP plan shall include a discussion of time-differentiated pricing, dynamic retail pricing, and other alternative retail rate options that were considered in the development of the CBP plan. A clear description of the rate structure ultimately chosen by the electric utility, the electric utility's rationale for selection of the chosen rate structure, and the methodology by which the electric utility proposes to convert the winning bid(s) to retail rates of the electric utility shall be included in the CBP plan.

(j) The first application for a market rate offer by an electric utility that, as of July 31, 2008, directly owned, in whole or in part, operating electric generation facilities that had been used and useful in this state shall include a description of the electric utility's proposed blending of the CBP rates for the first five years of the market rate offer pursuant to division (D) of *section 4928.142 of the Revised Code*. The proposed blending shall show the generation service price(s) that will be blended with the CBP determined rates, and any descriptions, formulas, and/or tables necessary to show how the blending will be accomplished. The proposed blending shall show all adjustments, to be made on a quarterly basis, included in the generation service price(s) that the electric utility proposes for changes in costs of fuel, purchased power, portfolio requirements, and environmental compliance incurred during the blending period. The electric utility shall provide its best current estimate of anticipated adjustment amounts for the duration of the blending period, and compare the projected adjusted generation service prices under the CBP plan to the projected adjusted generation service prices under its proposed electric security plan.

(k) The electric utility's application to establish a CBP shall include such information as necessary to demonstrate whether or not, as of July 31, 2008, the electric utility directly owned, in whole or in part, operating electric generation facilities that had been used and useful in the state of Ohio.

(l) The CBP plan shall provide for funding of a consultant that may be selected by the commission to assess and report to the commission on the design of the solicitation, the oversight of the bidding process, the clarity of the product definition, the fairness, openness, and transparency of the solicitation and bidding process, the market factors that could affect the solicitation, and other relevant criteria as directed by the commission. Recovery of the cost of such consultant(s) may be included by the electric utility in its CBP plan.

(m) The CBP plan shall include a discussion of generation service procurement options that were considered in development of the CBP plan, including but not limited to, portfolio approaches, staggered procurement, forward procurement, electric utility participation in day-ahead and/or real-time balancing markets, and spot market purchases and sales. The CBP plan shall also include the rationale for selection of any or all of the procurement options.

(n) The electric utility shall show, as a part of its CBP plan, any relationship between the CBP plan and the electric utility's plans to comply with alternative energy portfolio requirements of *section 4928.64 of the Revised Code*, and energy efficiency requirements and peak demand reduction requirements of *section 4928.66 of the Revised Code*. The initial filing of a CBP plan shall include a detailed account of how the plan is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of *section 4928.02 of the Revised Code*. Following the initial filing, subsequent filings shall include a discussion of how the state policy continues to be advanced by the plan.

(o) An explanation of known and anticipated obstacles that may create difficulties or barriers for the adoption of the proposed bidding process.

(3) The electric utility shall provide a description of its corporate separation plan, adopted pursuant to *section 4928.17 of the Revised Code*, including but not limited to, the current status of the corporate separation plan, a detailed list of all waivers previously issued by the commission to the electric utility regarding its corporate separation plan, and a timeline of any anticipated revisions or amendments to its current corporate separation plan on file with the commission pursuant to *Chapter 4901:1-37 of the Administrative Code*.

(4) A description of how the electric utility proposes to address governmental aggregation programs and implementation of divisions (I) and (K) of *section 4928.20 of the Revised Code*.

(C) An SSO application that contains a proposal for an ESP shall comply with the requirements set forth below.

(1) A complete description of the ESP and testimony explaining and supporting each aspect of the ESP.

(2) Pro forma financial projections of the effect of the ESP's implementation upon the electric utility for the duration of the ESP, together with testimony and work papers sufficient to provide an understanding of the assumptions made and methodologies used in deriving the pro forma projections.

(3) Projected rate impacts by customer class/rate schedules for the duration of the ESP, including post-ESP impacts of deferrals, if any.

(4) The electric utility shall provide a description of its corporate separation plan, adopted pursuant to *section 4928.17 of the Revised Code*, including, but not limited to, the current status of the corporate separation plan, a detailed list of all waivers previously issued by the commission to the electric utility regarding its corporate separation plan, and a timeline of any anticipated revisions or amendments to its current corporate separation plan on file with the commission pursuant to *Chapter 4901:1-37 of the Administrative Code*.

(5) Division (A)(3) of *section 4928.31 of the Revised Code* required each electric utility to file an operational support plan as a part of its electric transition plan. Each electric utility shall provide a statement as to whether its operational support plan has been implemented and whether there are any outstanding problems with the implementation.

(6) A description of how the electric utility proposes to address governmental aggregation programs and implementation of divisions (I), (J), and (K) of *section 4928.20 of the Revised Code*.

(7) A description of the effect on large-scale governmental aggregation of any unavoidable generation charge proposed to be established in the ESP.

(8) The initial filing for an ESP shall include a detailed account of how the ESP is consistent with and advances the policy of this state as delineated in divisions (A) to (N) of *section 4928.02 of the Revised Code*. Following the initial filing, subsequent filings shall include how the state policy is advanced by the ESP.

(9) Specific information

Division (B)(2) of *Section 4928.143 of the Revised Code* authorizes the provision or inclusion in an ESP of a number of features or mechanisms. To the extent that an electric utility includes any of these features in its ESP, it shall file the corresponding information in its application.

(a) Division (B)(2)(a) of *section 4928.143 of the Revised Code* authorizes an electric utility to include provisions for the automatic recovery of fuel, purchased power, and certain other specified costs. An application including such provisions shall include, at a minimum, the information described below:

(i) The type of cost the electric utility is seeking recovery for under division (B)(2) of *section 4928.143 of the Revised Code* including a summary and detailed description of such cost. The description shall include the plant(s) that the cost pertains to as well as a narrative pertaining to the electric utility's procurement policies and procedures regarding such cost.

(ii) The electric utility shall include in the application any benefits available to the electric utility as a result of or in connection with such costs including but not limited to profits from emission allowance sales and profits from resold coal contracts.

(iii) The specific means by which these costs will be recovered by the electric utility. In this specification, the electric utility must clearly distinguish whether these costs are to be recovered from all distribution customers or only from the customers taking service under the ESP.

(iv) A complete set of work papers supporting the cost must be filed with the application. Work papers must include, but are not limited to, all pertinent documents prepared by the electric utility for the application and a narrative and other support of assumptions made in completing the work papers.

(b) Divisions (B)(2)(b) and (B)(2)(c) of *section 4928.143 of the Revised Code*, authorize an electric utility to include unavoidable surcharges for construction, generation, or environmental expenditures for electric generation facilities owned or operated by the electric utility. Any plan which seeks to impose surcharge under these provisions shall include the following sections, as appropriate:

(i) The application must include a description of the projected costs of the proposed facility. The need for the proposed facility must have already been reviewed and determined by the commission through an integrated resource planning process filed pursuant to rule *4901:5-5-05 of the Administrative Code*.

(ii) The application must also include a proposed process, subject to modification and approval by the commission, for the competitive bidding of the construction of the facility unless the commission has previously approved a process for competitive bidding, which would be applicable to that specific facility.

(iii) An application which provides for the recovery of a reasonable allowance for construction work in progress shall include a detailed description of the actual costs as of a date certain for which the applicant seeks recovery, a detailed description of the impact upon rates of the proposed surcharge, and a demonstration that such a construction work in progress allowance is consistent with the applicable limitations of division (A) of *section 4909.15 of the Revised Code*.

(iv) An application which provides recovery of a surcharge for an electric generation facility shall include a detailed description of the actual costs, as of a date certain, for which the applicant seeks recovery and a detailed description of the impact upon rates of the proposed surcharge.

(v) An application which provides for recovery of a surcharge for an electric generation facility shall include the proposed terms for the capacity, energy, and associated rates for the life of the facility.

(c) Division (B)(2)(d) of *section 4928.143 of the Revised Code* authorizes an electric utility to include terms, conditions, or charges related to retail shopping by customers. Any application which includes such terms, conditions or charges, shall include, at a minimum, the following information:

(i) A listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service. Such components would include, but are not limited to, terms and conditions relating to shopping or to returning to the standard service offer and any unavoidable charges. For each such component, an explanation of the component and a descriptive rationale and, to the extent possible, a quantitative justification shall be provided.

(ii) A description and quantification or estimation of any charges, other than those associated with generation expansion or environmental investment under divisions (B)(2)(b) and (B)(2)(c) of *section 4928.143 of the Revised*

Code, which will be deferred for future recovery, together with the carrying costs, amortization periods, and avoidability of such charges.

(iii) A listing, description, and quantitative justification of any unavoidable charges for standby, back-up, or supplemental power.

(d) Division (B)(2)(e) of *section 4928.143 of the Revised Code* authorizes an electric utility to include provisions for automatic increases or decreases in any component of the standard service offer price. Pursuant to this authority, if the ESP proposes automatic increases or decreases to be implemented during the life of the plan for any component of the standard service offer, other than those covered by division (B)(2)(a) of *section 4928.143 of the Revised Code*, the electric utility must provide in its application a description of the component, the proposed means for changing the component, and the proposed means for verifying the reasonableness of the change.

(e) Division (B)(2)(f) of *section 4928.143 of the Revised Code* authorizes an electric utility to include provisions for the securitization of authorized phase-in recovery of the standard service offer price. If a phase-in deferred asset is proposed to be securitized, the electric utility shall provide, at the time of an application for securitization, a description of the securitization instrument and an accounting of that securitization, including the deferred cash flow due to the phase-in, carrying charges, and the incremental cost of the securitization. The electric utility will also describe any efforts to minimize the incremental cost of the securitization. The electric utility shall provide all documentation associated with securitization, including but not limited to, a summary sheet of terms and conditions. The electric utility shall also provide a comparison of costs associated with securitization with the costs associated with other forms of financing to demonstrate that securitization is the least cost strategy.

(f) Division (B)(2)(g) of *section 4928.143 of the Revised Code* authorizes an electric utility to include provisions relating to transmission and other specified related services. Moreover, division (A)(2) of *section 4928.05 of the Revised Code* states that, 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 (net of transmission related revenues), including ancillary and net 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.

Any utility which seeks to create or modify its transmission cost recovery rider in its ESP shall file the rider in accordance with the requirements delineated in *Chapter 4901:1-36 of the Administrative Code*.

(g) Division (B)(2)(h) of *section 4928.143 of the Revised Code* authorizes an electric utility to include provisions for alternative regulation mechanisms or programs, including infrastructure and modernization incentives, relating to distribution service as part of an ESP. While a number of mechanisms may be combined within a plan, for each specific mechanism or program, the electric utility shall provide a detailed description, with supporting data and information, to allow appropriate evaluation of each proposal, including how the proposal addresses any cost savings to the electric utility, avoids duplicative cost recovery, and aligns electric utility and consumer interests. In general, and to the extent applicable, the electric utility shall also include, for each separate mechanism or program, quantification of the estimated impact on rates over the term of any proposed modernization plan. Any application for an infrastructure modernization plan shall include the following specific requirements:

(i) A description of the infrastructure modernization plan, including but not limited to, the electric utility's existing infrastructure, its existing asset management system and related capabilities, the type of technology and reason chosen, the portion of service territory affected, the percentage of customers directly impacted (non-rate impact), and the implementation schedule by geographic location and/or type of activity. A description of any communication infrastructure included in the infrastructure modernization plan and any metering, distribution automation, or other applications that may be supported by this communication infrastructure also shall be included.

(ii) A description of the benefits of the infrastructure modernization plan (in total and by activity or type), including but not limited to the following as they may apply to the plan: the impacts on current reliability, the number of circuits impacted, the number of customers impacted, the timing of impacts, whether the impact is on the frequency or duration of outages, whether the infrastructure modernization plan addresses primary outage causes, what problems are addressed by the infrastructure modernization plan, the resulting dollar savings and additional costs, the activities affected and related accounts, the timing of savings, other customer benefits, and societal benefits. Through metrics and milestones, the infrastructure modernization plan shall include a description of how the performance and outcomes of the plan will be measured.

(iii) A detailed description of the costs of the infrastructure modernization plan, including a breakdown of capital costs and operating and maintenance expenses net of any related savings, the revenue requirement, including recovery of stranded investment related to replacement of un-depreciated plant with new technology, the impact on customer bills, service disruptions associated with plan implementation, and description of (and dollar value of) equipment being made obsolescent by the plan and reason for early plant retirement. The infrastructure modernization plan shall also include a description of efforts made to mitigate such stranded investment.

(iv) A detailed description of any proposed cost recovery mechanism, including the components of any regulatory asset created by the infrastructure modernization plan, the reporting structure and schedule, and the proposed process for approval of cost recovery and increase in rates.

(v) A detailed explanation of how the infrastructure modernization plan aligns customer and electric utility reliability and power quality expectations by customer class.

(h) Division (B)(2)(i) of *section 4928.143 of the Revised Code* authorizes an electric utility to include provisions for economic development, job retention, and energy efficiency programs. Pursuant to this section, the electric utility shall provide a complete description of the proposal, together with cost-benefit analysis or other quantitative justification, and quantification of the program's projected impact on rates.

(10) Additional required information

Divisions (E) and (F) of *section 4928.143 of the Revised Code* provide for tests of the ESP with respect to significantly excessive earnings. Division (E) of *section 4928.143 of the Revised Code* is applicable only if an ESP has a term exceeding three years, and would require an earnings determination to be made in the fourth year. Division (F) of *section 4928.143 of the Revised Code* applies to any ESP and examines earnings after each year. In each case, the burden of proof for demonstrating that the return on equity is not significantly excessive is borne by the electric utility.

(a) For the annual review pursuant to division (F) of *section 4928.143 of the Revised Code*, the electric utility shall provide testimony and analysis demonstrating the return on equity that was earned during the year and the returns on equity earned during the same period by publicly traded companies that face comparable business and financial risks as the electric utility. In addition, the electric utility shall provide the following information:

(i) The federal energy regulatory commission form 1 (FERC form 1) in its entirety for the annual period under review. The electric utility may seek protection of any confidential or proprietary data if necessary. If the FERC form 1 is not available, the electric utility shall provide balance sheet and income statement information of at least the level of detail as required by FERC form 1.

(ii) The latest securities and exchange commission form 10-K in its entirety. The electric utility may seek protection of any confidential or proprietary data if necessary.

(iii) Capital budget requirements for future committed investments in Ohio for each annual period remaining in the ESP.

(b) For demonstration under division (E) of *section 4928.143 of the Revised Code*, the electric utility shall also provide, in addition to the requirements under division (F) of *section 4928.143 of the Revised Code*, calculations of its projected return on equity for each remaining year of the ESP. The electric utility shall support these calculations by providing projected balance sheet and income statement information for the remainder of the ESP, together with testimony and work papers detailing the methodologies, adjustments, and assumptions used in making these projections.

(D) The first application for an SSO filed after the effective date of *section 4928.141 of the Revised Code* by each electric utility shall include an ESP and shall be filed at least one hundred fifty days before the electric utility proposes to have such SSO in effect. The first application may also include a proposal for an MRO. First applications that are filed with the commission prior to the initial effective date of this rule and that are determined by the commission to be not in substantive compliance with this rule shall be amended or refiled at the direction of the commission. The commission shall endeavor to make a determination on an amended or refiled ESP application, which substantively conforms to the requirements of this rule, within one hundred fifty days of the filing of the amended or refiled application.

(E) Subsequent applications for an SSO may include an ESP and/or MRO; however, an ESP may not be proposed once the electric utility has implemented an MRO approved by the commission.

(F) The SSO application shall include a section demonstrating that its current corporate separation plan is in compliance with *section 4928.17 of the Revised Code, Chapter 4901:1-37 of the Administrative Code*, and consistent

with the policy of the state as delineated in divisions (A) to (N) of *section 4928.02 of the Revised Code*. If any waivers of the corporate separation plan have been granted and are to be continued, the applicant shall justify the continued need for those waivers.

(G) A complete set of work papers must be filed with the application. Work papers must include, but are not limited to, all pertinent documents prepared by the electric utility for the application and a narrative or other support of assumptions made in the work papers. Work papers shall be marked, organized, and indexed according to schedules to which they relate. Data contained in the work papers should be footnoted so as to identify the source document used.

(H) All schedules, tariff sheets, and work papers prepared by, or at the direction of, the electric utility for the application and included in the application must be available in spreadsheet, word processing, or an electronic non-image-based format, with formulas intact, compatible with personal computers. The electronic form does not have to be filed with the application but must be made available within two business days to staff and any intervening party that requests it.

History:Replaces: 4901:1-35-03.

Effective: 05/07/2009.

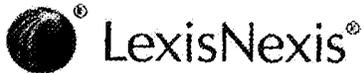
R.C. 119.032 review dates: 09/30/2013.

Promulgated Under: 111.15.

Statutory Authority: 4928.06, 4928.141.

Rule Amplifies: 4928.14, 4928.141, 4928.142, 4928.143.

Prior Effective Dates: 5/27/04.



1 of 1 DOCUMENT

OHIO RULES OF COURT SERVICE
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*** Rules current through rule amendments received through June 1, 2013 ***
*** Annotations current through April 8, 2013 ***

Ohio Rules Of Evidence
Article II. Judicial notice

Ohio Evid. R. 201 (2013)

Review Court Orders which may amend this Rule.

Rule 201. Judicial notice of adjudicative facts

(A) Scope of rule.

This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.

(B) Kinds of facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(C) When discretionary.

A court may take judicial notice, whether requested or not.

(D) When mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

(E) Opportunity to be heard.

A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(F) Time of taking notice.

Judicial notice may be taken at any stage of the proceeding.

(G) Instructing jury.

In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

NOTES:

Staff Notes

Rule 201, in its entirety, reflects existing Ohio practice and, except for the added clarifying language to subdivision (A) which is not intended to result in contrary construction, is identical to *Federal Evidence Rule 201*.

RULE 201(A) SCOPE OF RULE.

The addition of the phrase "i.e., the facts of the case " to subdivision (A) is intended as a clarification of the phrase "adjudicative fact " which was not considered as sufficiently self-descriptive. While the "adjudicative fact " phrase has great merit, its history is one of innovation by Prof. K.C. Davis (see McCormick § 328 (2d ed. 1972)) and does not necessarily carry with it an immediately discernible judicial meaning. It is not intended that the Federal Advisory Committee comments describing the term and its implication be any less relevant. See Advisory Committee's Note to *Federal Evidence Rule 201(a)*.

Subdivision (A) limits the operation of the rule to adjudicative facts and does not apply to "legislative facts, " i.e., those facts which have relevance to rules of decision or legislative construction and not to the facts necessary to the determination of events in a particular case. An example of "legislative facts " would be the effect of segregation upon children of minority races in determining constitutionality of segregated schools, *Brown v. Board of Education (1954)*, 347 US 483, 98 LEd 873, 74 Sct 686. Subdivision (A) limits the operation of the rule to adjudicative facts and does not apply to "legislative facts, " i.e., those facts which have relevance to rules of decision or legislative construction and not to the facts necessary to the determination of events in a particular case. An example of "legislative facts " would be the effect of segregation upon children of minority races in determining constitutionality of segregated schools, *Brown v. Board of Education (1954)*, 347 US 483, 98 LEd 873, 74 Sct 686.

Given the limitation of application of the rule to adjudicative facts, no amendments or modifications were necessary respecting *Civ.R. 44.1* or *Crim.R. 27* adopting by reference the provisions of *Civ.R. 44.1*, relating to notice of foreign law. The rule does not in any way limit the power of a court to take notice of the law of its or another jurisdiction. If a court cannot take judicial notice of relevant law pursuant to *Civ.R. 44.1*, the rule does not alter that circumstance and the law will be subject to proof in the ordinary course. Likewise, if a law is subject to notice under *Civ.R. 44.1*, it is not limited in any way by the evidence rule.

RULE 201(B) KINDS OF FACTS.

Subdivision (B) delineates the kind of facts which may be judicially noticed. The formulation in the rule reflects the common law development of the type of facts which may be judicially noticed including prior Ohio law. *Riss & Company v. Bowers (1961)*, 114 OApp 429, 19 OO2d 451, 183 NE2d 786.

There are two categories of facts subject to judicial notice. Rule 201(B)(1) applies to adjudicative facts generally known within the territorial jurisdiction. This category relates to the type of fact that any person would reasonably know or ought to know without prompting within the jurisdiction of the court and includes an infinite variety of data from location of towns within a county to the fact that lawyers as a group enjoy a good reputation in the community. 21 O Jur2d Evidence §§ 16, 18.

A second class of facts subject to judicial notice is provided by Rule 201(B)(2). These are facts capable of accurate and ready determination. There is no need that such facts are also generally known in the community, each of the two classifications being independent of the other. The type of fact contemplated by 201(B)(2) includes scientific, historical and statistical data which can be verified and is beyond reasonable dispute. Such has been the law in Ohio and, again, there is an infinite variety of facts of scientific or historical nature that have been judicially noticed, thereby avoiding the necessity of proof on such issues. See 21 O Jur2d Evidence §§ 51, 63 and 68 for a compendium of such cases in Ohio.

The rule reflects prior Ohio law.

RULE 201(G) INSTRUCTING JURY.

While this subdivision essentially reflects prior Ohio law, attention is invited to the unique problems of judicial notice of matters going to an element of an offense in criminal cases. In *State v. Bridgeman (1977)*, 51 OApp2d 105, 5 OO3d 275, 366 NE2d 1378, the court, in dealing with the necessity to charge on the elements of a crime, whether or not contested by the defendant, established the right of a defendant to have all elements of the case subject to an explicit finding by the jury. The principle would clearly apply to matters subject to judicial notice that go to an element of the defense and the rule does not alter the requirement that the jury find defendant guilty beyond a reasonable doubt as to each element of the offense including any matters of which judicial notice was taken.

Moreover, in *Bridgeman* the court held that such error is plain error and need not be objected to by counsel under *Crim.R. 30* and *Crim.R. 52(B)*.

Ohio Evid. R. 201

Cross-References to Related Statutes

Judicial notice of classification of municipal corporations, *RC § 703.23*.

Notice of law relating to organization and power of corporations of other states in cases by or against foreign corporation, *RC § 1703.21*.

Ohio Rules

Judicial notice, proof of official record, *Civ.R. 44.1; Crim.R. 27*.

As Introduced

**127th General Assembly
Regular Session
2007-2008**

S. B. No. 221

Senator Schuler (By Request)

—

A BILL

To amend sections 122.41, 122.451, 3706.01, 3706.02, 1
3706.03, 3706.04, 3706.041, 3706.05, 3706.06, 2
3706.07, 3706.08, 3706.09, 3706.10, 3706.11, 3
3706.12, 3706.13, 3706.14, 3706.15, 3706.16, 4
3706.17, 3706.18, 4905.31, 4905.40, 4928.02, 5
4928.05, 4928.14, and 4928.17 and to enact 6
sections 1551.41, 4928.111, 4928.141, 4928.142, 7
4928.64, 4928.68, and 4928.69 of the Revised Code 8
to revise state energy policy to address electric 9
service price regulation, new bonding authority 10
for advanced energy projects, advanced (including 11
renewable) energy portfolio standards, energy 12
efficiency standards, and greenhouse gas emission 13
reporting and carbon control planning 14
requirements. 15

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 122.41, 122.451, 3706.01, 3706.02, 16
3706.03, 3706.04, 3706.041, 3706.05, 3706.06, 3706.07, 3706.08, 17
3706.09, 3706.10, 3706.11, 3706.12, 3706.13, 3706.14, 3706.15, 18
3706.16, 3706.17, 3706.18, 4905.31, 4905.40, 4928.02, 4928.05, 19
4928.14, and 4928.17 be amended and sections 1551.41, 4928.111, 20
4928.141, 4928.142, 4928.64, 4928.68, and 4928.69 of the Revised 21
Code be enacted to read as follows: 22

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infrastructure and generating facilities. The plan shall be filed 1470
under an application under section 4909.18 of the Revised Code. 1471

~~Sec. 4928.14. (A) After its market development period, an~~ 1472
~~An~~ 1473
~~electric distribution utility in this state shall provide~~ 1473
~~consumers, on a comparable and nondiscriminatory basis within its~~ 1474
~~certified territory, a market-based standard service offer of all~~ 1475
~~competitive retail electric services necessary to maintain~~ 1476
~~essential electric service to consumers, including a firm supply~~ 1477
~~of electric generation service. Such offer shall be filed with the~~ 1478
~~public utilities commission under section 4909.18 of the Revised~~ 1479
~~Code.~~ 1480

~~(B) After that market development period, each electric~~ 1481
~~distribution utility also shall offer customers within its~~ 1482
~~certified territory an option to purchase competitive retail~~ 1483
~~electric service the price of which is determined through a~~ 1484
~~competitive bidding process. Prior to January 1, 2004, the~~ 1485
~~commission shall adopt rules concerning the conduct of the~~ 1486
~~competitive bidding process, including the information~~ 1487
~~requirements necessary for customers to choose this option and the~~ 1488
~~requirements to evaluate qualified bidders. The commission may~~ 1489
~~require that the competitive bidding process be reviewed by an~~ 1490
~~independent third party. No generation supplier shall be~~ 1491
~~prohibited from participating in the bidding process, provided~~ 1492
~~that any winning bidder shall be considered a certified supplier~~ 1493
~~for purposes of obligations to customers. At the election of the~~ 1494
~~electric distribution utility, and approval of the commission, the~~ 1495
~~competitive bidding option under this division may be used as the~~ 1496
~~market-based standard offer required by division (A) of this~~ 1497
~~section. The commission may determine at any time that a~~ 1498
~~competitive bidding process is not required, if other means to~~ 1499
~~accomplish generally the same option for customers is readily~~ 1500

~~available in the market and a reasonable means for customer participation is developed.~~ 1501
1502

~~(C) After the market development period, the~~ The offer is 1503
subject to approval or modification and approval by the public 1504
utilities commission, following an application that shall be filed 1505
with the commission, initially not later than six months after the 1506
effective date of the amendment of this section by _____ of the 1507
127th general assembly. The application shall be subject to such 1508
filing and procedural requirements as the commission shall 1509
prescribe by rule or order. The rules may include transition rules 1510
necessary for the initial implementation of this section as so 1511
amended. 1512

(B) The standard service offer shall provide for either of 1513
the following: 1514

(1) An offer, known as an electric security plan, which shall 1515
include the basis of the valuation of the specific generating 1516
facilities to be used in providing retail electric generation 1517
service and the basis of the cost of rendering generation service 1518
using those facilities, as those bases shall be defined by the 1519
commission by rule or order. Valuation of facilities under the 1520
rule or order shall factor in the extent to which the utility 1521
received transition revenues under section 4928.40 of the Revised 1522
Code and the extent to which the facilities have been depreciated 1523
over time. Further, prices under the plan may include amounts for 1524
specified costs, including, but not limited to, either or both of 1525
the following: 1526

(a) Environmental compliance costs associated with those 1527
facilities as determined by the commission: 1528

(b) Costs incurred by the utility on or after January 1, 1529
2009, in the construction of any generating facility that is 1530
located in this state and that, notwithstanding Chapter 4906, of 1531

the Revised Code to the contrary, the commission determines and 1532
certificates the need for on the basis of resource planning 1533
projections developed in accordance with policies and procedures 1534
the commission shall prescribe by rule. 1535

(2) An offer, known as a market rate option, under which the 1536
utility's standard service offer prices periodically are 1537
determined through an open, competitive bidding process. 1538

(C) (1) Nothing in this section precludes a utility for which 1539
an application under division (B) (1) of this section has been 1540
approved by the commission from later filing an application under 1541
division (B) (2) of this section, or vice versa. 1542

(2) If the commission disapproves a standard service offer 1543
filed in an initial application under division (B) (2) of this 1544
section, the utility shall then immediately file an application 1545
under division (B) (1) of this section. 1546

(D) (1) Subject to division (D) (2) of this section, the 1547
commission by order may approve or modify and approve the standard 1548
service offer contained in any application if it finds both of the 1549
following: 1550

(a) The offer and the prices it establishes are just and 1551
reasonable and in furtherance of the state policy specified in 1552
section 4928.02 of the Revised Code. 1553

(b) The utility is in compliance with section 4928.141 of the 1554
Revised Code. 1555

In its order, the commission shall prescribe any requirements 1556
for the utility as it considers necessary to implement the state 1557
policy and shall provide the term of the offer and a schedule and 1558
the procedural and substantive terms and conditions for periodic 1559
commission review of the approved offer. In the case of an offer 1560
consisting of a market rate option under division (B) (2) of this 1561
section, such review shall provide for reconciliation of the 1562

standard service offer prices to ensure that they are just and 1563
reasonable and in furtherance of the state policy specified in 1564
section 4928.02 of the Revised Code. 1565

(2) Regarding a standard service offer consisting of a market 1566
rate option under division (B)(2) of this section, the commission 1567
shall not approve the offer unless the utility additionally 1568
demonstrates all of the following: 1569

(a) The relevant markets are subject to effective 1570
competition. For that purpose the commission shall consider the 1571
factors prescribed in division (D) of section 4928.06 of the 1572
Revised Code. 1573

(b) The utility does not impose unreasonable or 1574
discriminatory costs or undue burdens on generation service 1575
competition within its generation service territory. 1576

(c) The offer will not impose undue price increases on 1577
consumers. 1578

(d) The offer is reasonable on both a short- and long-term 1579
basis. 1580

(e) Power purchases supporting the offer are prudent and 1581
reasonable. 1582

(3) Regarding any standard service offer consisting of an 1583
electric security plan in an application filed by an utility that 1584
transferred all or part of its generation facilities to an 1585
affiliate of the utility and to the extent authorized by federal 1586
law, the commission also may consider power supply or generation 1587
service contracts or agreements between the utility and any of its 1588
affiliates or between the utility and the holding company owning 1589
or controlling the utility. 1590

(E) A utility's initial standard service offer approved under 1591
this section as amended by _____ of the 127th general assembly 1592

shall take effect on the date the commission shall specify in that 1593
order and, on that date, shall supersede any prior authority 1594
granted by any law of this state under which the utility provided 1595
services described in division (A) of this section to consumers. 1596
Nothing in this section precludes commission approval under this 1597
section of a standard service offer similar to that in effect 1598
under such prior authority. 1599

(F) The failure of a supplier to provide retail electric 1600
generation service to customers within the certified territory of 1601
the electric distribution utility shall result in the supplier's 1602
customers, after reasonable notice, defaulting to the utility's 1603
standard service offer filed under division (A) of this section 1604
until the customer chooses an alternative supplier. A supplier is 1605
deemed under this division to have failed to provide such service 1606
if the commission finds, after reasonable notice and opportunity 1607
for hearing, that any of the following conditions are met: 1608

(1) The supplier has defaulted on its contracts with 1609
customers, is in receivership, or has filed for bankruptcy. 1610

(2) The supplier is no longer capable of providing the 1611
service. 1612

(3) The supplier is unable to provide delivery to 1613
transmission or distribution facilities for such period of time as 1614
may be reasonably specified by commission rule adopted under 1615
division (A) of section 4928.06 of the Revised Code. 1616

(4) The supplier's certification has been suspended, 1617
conditionally rescinded, or rescinded under division (D) of 1618
section 4928.08 of the Revised Code. 1619

(G) Nothing in this section limits an electric distribution 1620
utility providing competitive retail electric service to electric 1621
load centers within the certified territory of another such 1622
utility. 1623

As Passed by the Senate

127th General Assembly

Regular Session

2007-2008

Sub. S. B. No. 221

**Senators Schuler (By Request), Jacobson, Harris, Fedor, Bocchieri, Miller,
R., Morano, Mumper, Niehaus, Padgett, Roberts, Wilson, Spada**

A BILL

To amend sections 122.41, 122.451, 3706.01, 3706.02, 1
3706.03, 3706.04, 3706.041, 3706.05, 3706.06, 2
3706.07, 3706.08, 3706.09, 3706.10, 3706.11, 3
3706.12, 3706.13, 3706.14, 3706.15, 3706.16, 4
3706.17, 3706.18, 4905.31, 4905.40, 4909.161, 5
4928.01, 4928.02, 4928.05, 4928.06, 4928.12, 6
4928.14, 4928.15, 4928.16, 4928.17, 4928.18, 7
4928.20, and 4928.21, to enact sections 1551.41, 8
4928.111, 4928.141, 4928.142, 4928.64, 4928.68, 9
and 4928.69, and to repeal sections 4928.31, 10
4928.32, 4928.33, 4928.34, 4928.35, 4928.36, 11
4928.37, 4928.38, 4928.39, 4928.40, 4928.41, 12
4928.42, 4928.431, and 4928.44 of the Revised Code 13
to revise state energy policy to address electric 14
service price regulation and to provide for new 15
bonding authority for advanced energy projects, 16
advanced (including sustainable resource) energy 17
portfolio standards, energy efficiency standards, 18
and greenhouse gas emission reporting and carbon 19
control planning requirements. 20
21

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

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holding of those investigations or hearings, or in the making of 1901
those orders, the commission is functioning under agreements or 1902
compacts between states, under the concurrent power of states to 1903
regulate interstate commerce, as an agency of the United States, 1904
or otherwise. 1905

(2) The commission shall negotiate and enter into agreements 1906
or compacts with agencies of other states for cooperative 1907
regulatory efforts and for the enforcement of the respective state 1908
laws regarding the transmission entity. 1909

(E) If a qualifying transmission entity is not operational as 1910
contemplated in division (A) of this section, division (A)(13) of 1911
section 4928.34 of the Revised Code, or division (G) of section 1912
4928.35 of the Revised Code, the commission by rule or order shall 1913
take such measures or impose such requirements on all for-profit 1914
entities that own or control electric transmission facilities 1915
located in this state as the commission determines necessary and 1916
proper to achieve independent, nondiscriminatory operation of, and 1917
separate ownership and control of, such electric transmission 1918
facilities on or after the starting date of competitive retail 1919
electric service. 1920

Sec. 4928.14. (A) After its market development period, an An 1921
electric distribution utility in this state shall provide 1922
consumers, on a comparable and nondiscriminatory basis within its 1923
certified territory, a market based standard service offer of all 1924
competitive retail electric services necessary to maintain 1925
essential electric service to consumers, including a firm supply 1926
of electric generation service. Such offer shall be filed with the 1927
public utilities commission under section 4909.18 of the Revised 1928
Code. _____ 1929

(B) After that market development period, each electric _____ 1930
distribution utility also shall offer customers within its 1931

certified territory an option to purchase competitive retail _____ 1932
electric service the price of which is determined through a _____ 1933
competitive bidding process. Prior to January 1, 2004, the _____ 1934
commission shall adopt rules concerning the conduct of the _____ 1935
competitive bidding process, including the information _____ 1936
requirements necessary for customers to choose this option and the _____ 1937
requirements to evaluate qualified bidders. The commission may _____ 1938
require that the competitive bidding process be reviewed by an _____ 1939
independent third party. No generation supplier shall be _____ 1940
prohibited from participating in the bidding process, provided _____ 1941
that any winning bidder shall be considered a certified supplier _____ 1942
for purposes of obligations to customers. At the election of the _____ 1943
electric distribution utility, and approval of the commission, the _____ 1944
competitive bidding option under this division may be used as the _____ 1945
market based standard offer required by division (A) of this _____ 1946
section. The commission may determine at any time that a _____ 1947
competitive bidding process is not required, if other means to _____ 1948
accomplish generally the same option for customers is readily _____ 1949
available in the market and a reasonable means for customer _____ 1950
participation is developed. _____ 1951

(C) After the market development period, the (B) Beginning _____ 1952
the first day of January of the calendar year that follows the _____ 1953
scheduled expiration of an electric distribution utility's rate _____ 1954
plan, the standard service offer of the utility, for the purpose _____ 1955
of compliance with division (A) of this section, shall consist of _____ 1956
all of the following: _____ 1957

(1) As to each customer class, the total charges to customers _____ 1958
under that rate plan that are in effect, as filed with the _____ 1959
commission, on the first day of February of that year of _____ 1960
expiration, exclusive of any charges for transmission and _____ 1961
distribution services; _____ 1962

(2) As to each customer class, any adjustments for costs that _____ 1963

are incurred by the utility, the recovery of which are pursuant to 1964
an application authorized by the commission under the rate plan, 1965
and that go into effect on or after that first day of February and 1966
before that first day of January; 1967

(3) As to each customer class, any adjustments for deferred 1968
costs authorized by commission order, to the extent not included 1969
under divisions (B) (1) and (2) of this section; 1970

(4) As to the specific customer, any price applicable to that 1971
customer that was approved by commission order under section 1972
4905.31 of the Revised Code issued prior to October 28, 2007, 1973
exclusive of the transmission and distribution service components 1974
of that price. As used in divisions (B) and (D) (2) (a) of this 1975
section, "rate plan" means the standard service offer order in 1976
effect on the effective date of the amendment of this section by 1977
S.B. 221 of the 127th general assembly. 1978

(C) For the purpose of complying with division (A) of this 1979
section, beginning on the effective date of the amendment of this 1980
section by S.B. 221 of the 127th general assembly and pursuant to 1981
filing requirements the commission shall prescribe by rule, a 1982
utility may file an application for commission approval of a 1983
modified standard service offer. Upon that filing, the commission 1984
shall set the date and time for hearing, send written notice of 1985
the hearing to the utility, and publish notice of the hearing one 1986
time in a newspaper of general circulation in each county in the 1987
service area affected by the application. 1988

(D) (1) Subject to division (D) of this section, a standard 1989
service offer proposed under division (C) of this section, and 1990
herein designated an electric security plan, shall adjust a 1991
utility's standard service offer relative to changes in one or 1992
more costs incurred by the utility to serve jurisdictional load in 1993
this state and specified in the application. An adjustment for a 1994
change in a capitalized cost shall also include a just and App. Appx. 000240

reasonable return on that cost. The amount of any adjustment under 1996
division (D) of this section shall be offset by any decrease in 1997
costs, excluding reductions in amortization relating to costs 1998
recovered through a regulatory transition charge authorized by the 1999
commission as of February 1, 2008, and by any change in 2000
kilowatt-hours sold that are associated with serving 2001
jurisdictional load in this state. Costs, as determined by the 2002
commission, may include, but are not limited to, any of the 2003
following: 2004

(a) Environmental compliance costs for one or more specified 2005
generating facilities, as determined by the commission, except 2006
those included under division (D)(1)(c) of this section; 2007

(b) The cost of fuel for one or more specified generating 2008
facilities or of purchased power; 2009

(c) The cost of construction of one or more new, specified 2010
generating facilities that, superseding Chapter 4906. of the 2011
Revised Code, the commission determines and certifies the need 2012
for as to the standard service offer on the basis of resource 2013
planning projections developed in accordance with policies and 2014
procedures the commission shall prescribe by rule; or the cost, in 2015
excess of two hundred fifty million dollars, of construction of an 2016
environmental retrofit to a specified, then-existing generating 2017
facility. A price adjustment for such a new facility or 2018
environmental retrofit shall be consistent with section 4909.15 of 2019
the Revised Code and consistent with section 4909.18 of the 2020
Revised Code as applicable; and, subject to such terms and 2021
conditions as the commission prescribes in an order issued under 2022
division (D)(6) of this section, shall be for the actual life of 2023
the facility. 2024

(d) Operating, maintenance, and other costs, including taxes; 2025

(e) Costs of investment in one or more specified generating 2026

<u>facilities;</u>	2027
<u>(f) Costs of providing standby and default service pursuant</u>	2028
<u>to divisions (A) and (H) of this section.</u>	2029
<u>However, costs under division (D) of this section shall</u>	2030
<u>exclude forfeitures, administrative or civil penalties, fines,</u>	2031
<u>court costs, and attorney's fees associated with violations of or</u>	2032
<u>noncompliances with federal or any state's environmental laws or</u>	2033
<u>with facilities' permits.</u>	2034
<u>A standard service offer that includes costs under division</u>	2035
<u>(D) (1) (a), (b), (d), (e), or (f) of this section may provide for</u>	2036
<u>automatic increases or decreases in the standard service offer</u>	2037
<u>price, but, in the case of a cost under division (D) (1) (d) of this</u>	2038
<u>section, only if the cost was outside of the utility's control or</u>	2039
<u>responsibility.</u>	2040
<u>In the case of an advanced energy technology or facility</u>	2041
<u>under section 4928.142 of the Revised Code, the costs of which are</u>	2042
<u>included in a standard service offer as authorized under this</u>	2043
<u>division, the portion of the standard service offer price</u>	2044
<u>attributable to those costs shall be bypassable by a consumer that</u>	2045
<u>has exercised choice of supplier under section 4928.03 of the</u>	2046
<u>Revised Code, but bypassable only to the extent the commission</u>	2047
<u>determines that the advanced energy technology or facilities</u>	2048
<u>implemented by that supplier are comparable to that implemented by</u>	2049
<u>the utility, under section 4928.142 of the Revised Code as of the</u>	2050
<u>issuance of an order under division (D) (6) of this section, for</u>	2051
<u>the purpose of the utility's compliance with division (A) of</u>	2052
<u>section 4928.142 of the Revised Code.</u>	2053
<u>(2) (a) For the purpose of a utility's initial application</u>	2054
<u>under division (D) (1) of this section, the adjustment for a</u>	2055
<u>particular cost shall be determined using a baseline measure of</u>	2056
<u>that cost as of the first day of February of the calendar year in</u>	2057

which the utility's rate plan is scheduled to expire. 2058

(b) If a utility continues to provide its standard service 2059
offer pursuant to an electric security plan, for any later such 2060
application by the utility, the baseline measure shall be the 2061
cost, and the associated kilowatt-hours sold, as determined under 2062
the utility's then-existing approved plan. With regard to a 2063
generating facility under division (D) (1) (c) of this section, 2064
associated decreases in cost and changes in kilowatt-hours sold 2065
shall include, but are not limited to, retirement of all or part 2066
of any other generating facility, the cost of which had been 2067
included in the utility's rate base prior to the effective date of 2068
the amendment of this section by Sub. S.B. 221 of the 127th 2069
general assembly or was included under division (D) (1) (c) or (e) 2070
of this section. 2071

(3) A standard service offer under division (D) (1) of this 2072
section may specify the standard, factors, or methodology that the 2073
commission shall use for the purpose of division (E) (2) (c) of this 2074
section and within such timeframe as the commission specifies in 2075
its order under division (D) (6) of this section, if the utility 2076
later files an application pursuant to division (E) of this 2077
section. 2078

(4) Regarding an application filed under division (D) (1) of 2079
this section by a utility that transferred all or part of its 2080
generating facilities to an affiliate of the utility and to the 2081
extent authorized by federal law, the commission may consider 2082
purchased power or other contracts or agreements between the 2083
utility and any of its affiliates or between the utility and the 2084
holding company owning or controlling the utility. 2085

(5) For the purpose of division (D) of this section, if the 2086
utility has entered into a contract or agreement with an affiliate 2087
for the provision of a competitive retail electric service, the 2088
commission shall treat as a cost of the utility under the 2089

<u>security plan the affiliate's costs of providing that service.</u>	2090
<u>(6) The burden of proof under division (D) (6) of this section</u>	2091
<u>shall be on the utility. The commission by order may approve or</u>	2092
<u>modify and approve a standard service offer under division (D) (1)</u>	2093
<u>of this section if it finds both of the following:</u>	2094
<u>(a) The offer and the prices it establishes are just and</u>	2095
<u>reasonable as to each customer class and are consistent with the</u>	2096
<u>policy specified in section 4928.02 of the Revised Code.</u>	2097
<u>(b) The utility is in compliance with section 4928.141 of the</u>	2098
<u>Revised Code. In its order, the commission shall prescribe such</u>	2099
<u>requirements for the utility as the commission considers necessary</u>	2100
<u>for the utility to implement applicable objectives of the policy</u>	2101
<u>specified in section 4928.02 of the Revised Code. The order also</u>	2102
<u>may provide a schedule and the procedural and substantive terms</u>	2103
<u>and conditions for periodic commission review of the approved</u>	2104
<u>offer.</u>	2105
<u>(E) (1) As authorized under this division, a standard service</u>	2106
<u>offer proposed under division (C) of this section, and herein</u>	2107
<u>designated a market rate option, shall require that the utility's</u>	2108
<u>standard service offer price be determined periodically through an</u>	2109
<u>open, competitive bidding process. Prior to the approval of such</u>	2110
<u>an offer under division (E) (2) of this section, the utility shall</u>	2111
<u>conduct such competitive bidding for the purpose of establishing</u>	2112
<u>the original price under the offer.</u>	2113
<u>(2) The burden of proof under division (E) (2) of this section</u>	2114
<u>shall be on the utility. The commission by order shall approve or</u>	2115
<u>modify and approve the standard service offer under division</u>	2116
<u>(E) (1) of this section if the commission determines all of the</u>	2117
<u>following are met:</u>	2118
<u>(a) The offer and the prices it establishes are just and</u>	2119
<u>reasonable as to each customer class and are consistent with the</u>	2120

<u>policy specified in section 4928.02 of the Revised Code.</u>	2121
<u>(b) The utility is in compliance with section 4928.141 of the Revised Code.</u>	2122
	2123
<u>(c) With respect to generation service, the relevant markets are subject to effective competition. For that purpose and except as otherwise provided under division (D) (3) of this section, the commission shall consider the factors prescribed in division (D) of section 4928.06 of the Revised Code and such other or additional factors as the commission may prescribe by rule. The commission shall prescribe by rule the methodology it will use to evaluate whether the effective competition standard under division (E) (2) (c) of this section is met.</u>	2124
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<u>(d) The standard service offer price for a customer class as determined under competitive bidding under division (E) (1) of this section is more favorable than, or at least comparable to, its price-to-compare for that class. That price-to-compare shall be the price that the commission shall determine for the comparable time period and in the manner of an electric security plan under division (D) of this section.</u>	2133
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<u>In its order, the commission shall prescribe such requirements for the utility as it considers necessary for the utility to implement applicable objectives of the policy specified in section 4928.02 of the Revised Code. The order also may provide the procedural and substantive terms and conditions for periodic commission review of the approved offer. That review shall provide for the reconciliation of the standard service offer price to ensure that the price is just and reasonable as to each customer class and consistent with the policy specified in section 4928.02 of the Revised Code.</u>	2140
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<u>(F) A utility's standard service offer approved under this section shall take effect on the date the commission shall specify</u>	2150
	2151

in the approval order and, on that date, the newly approved offer 2152
shall supersede the prior standard service offer of the utility. 2153

(G) (1) Nothing in this section precludes a utility for which 2154
a standard service offer under division (D) of this section has 2155
been approved by the commission in accordance with this section 2156
from later filing an application under division (E) of this 2157
section, or vice versa. 2158

(2) The commission has no authority to require a utility, for 2159
which it has ever approved a market rate option standard service 2160
offer under division (E) of this section, to file an application 2161
under division (D) of this section. 2162

(H) The failure of a supplier to provide retail electric 2163
generation service to customers within the certified territory of 2164
the electric distribution utility shall result in the supplier's 2165
customers, after reasonable notice, defaulting to the utility's 2166
standard service offer filed under division (A) of this section 2167
until the customer chooses an alternative supplier. A supplier is 2168
deemed under this division to have failed to provide such service 2169
if the commission finds, after reasonable notice and opportunity 2170
for hearing, that any of the following conditions are met: 2171

(1) The supplier has defaulted on its contracts with 2172
customers, is in receivership, or has filed for bankruptcy. 2173

(2) The supplier is no longer capable of providing the 2174
service. 2175

(3) The supplier is unable to provide delivery to 2176
transmission or distribution facilities for such period of time 2177
as may be reasonably specified by commission rule adopted under 2178
division (A) of section 4928.06 of the Revised Code. 2179

(4) The supplier's certification has been suspended, 2180
conditionally rescinded, or rescinded under division (D) 2181
of section 4928.08 of the Revised Code.

(I) Nothing in this section limits an electric distribution utility providing competitive retail electric service to electric load centers within the certified territory of another such utility.

Sec. 4928.141. During a proceeding under section 4928.14 of the Revised Code and upon submission of an appropriate discovery request, an electric distribution utility shall make available to the requesting party every contract or agreement that is between the utility or any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission.

Sec. 4928.142. (A) Subject to division (B) of this section, an electric distribution utility by the end of 2025 shall provide a portion of the electricity supply required for its standard service offer under section 4928.14 of the Revised Code from advanced energy. That portion shall equal twenty-five per cent of the total number of kilowatt-hours of electricity supplied by the utility to any and all electric consumers whose electric load centers are located within the utility's certified territory. However, subject to division (B) of this section, nothing in this section precludes a utility from providing a greater percentage. The advanced energy supply shall be consistent with the following requirements:

(1) At least half of the advanced energy implemented by the utility by the end of 2025 shall be generated from sustainable resources as defined in section 3706.01 of the Revised Code and shall include solar power. The remainder shall be supplied from advanced energy facilities as defined in divisions (X) (1) to (4) of section 3706.01 of the Revised Code.

As Reported by the House Public Utilities Committee

127th General Assembly

Regular Session

2007-2008

Sub. S. B. No. 221

Senator Schuler

(By Request)

**Cosponsors: Senators Jacobson, Harris, Fedor, Bocchieri, Miller, R., Morano,
Mumper, Niehaus, Padgett, Roberts, Wilson, Spada
Representatives Hagan, J., Blessing, Coley, Jones, Uecker**

A BILL

To amend sections 4905.31, 4928.01, 4928.02, 4928.05, 1
4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 2
4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 3
4929.02; to enact sections 9.835, 4928.141, 4
4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 5
4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 6
4928.66, 4928.68, 4928.69, and 4929.051; and to 7
repeal sections 4928.41, 4928.42, 4928.431, and 8
4928.44 of the Revised Code to revise state energy 9
policy to address electric service price 10
regulation, establish alternative energy 11
benchmarks for electric distribution utilities and 12
electric services companies, provide for the use 13
of renewable energy credits, establish energy 14
efficiency standards for electric distribution 15
utilities, require greenhouse gas emission 16
reporting and carbon dioxide control planning for 17
utility-owned generating facilities, authorize 18
energy price risk management contracts, and 19
authorize for natural gas utilities revenue 20

~~market-based standard offer required by division (A) of this section. The commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed.~~

~~(C) After the market development period, the~~ The failure of a supplier to provide retail electric generation service to customers within the certified territory of the an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer ~~filed under division (A) of this section~~ sections 4928.141, 4928.142, and 4928.143 of the Revised Code until the customer chooses an alternative supplier. A supplier is deemed under this ~~division~~ section to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

~~(1)(A)~~ The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

~~(2)(B)~~ The supplier is no longer capable of providing the service.

~~(3)(C)~~ The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

~~(4)(D)~~ The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

Sec. 4928.141. (A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and

nondiscriminatory basis within its certified territory, a 699
market-based standard service offer of all competitive retail 700
electric services necessary to maintain essential electric service 701
to consumers, including a firm supply of electric generation 702
service. To that end, the electric distribution utility shall 703
apply to the public utilities commission to establish the standard 704
service offer in accordance with section 4928.142 or 4928.143 of 705
the Revised Code and, at its discretion, may apply simultaneously 706
under both sections, except that the utility's first standard 707
service offer application at minimum shall include a filing under 708
section 4928.143 of the Revised Code. Only a standard service 709
offer authorized in accordance with section 4928.142 or 4928.143 710
of the Revised Code, shall serve as the utility's standard service 711
offer for the purpose of compliance with this section; and that 712
standard service offer shall serve as the utility's default 713
standard service offer for the purpose of section 4928.14 of the 714
Revised Code. However, pursuant to division (D) of section 715
4928.143 of the Revised Code, any rate plan that extends beyond 716
December 31, 2008, shall continue to be in effect for the subject 717
electric distribution utility for the duration of the plan's term. 718
719

(B) The commission shall set the time for hearing of a filing 720
under section 4928.142 or 4928.143 of the Revised Code, send 721
written notice of the hearing to the electric distribution 722
utility, and publish notice in a newspaper of general circulation 723
in each county in the utility's certified territory. The 724
commission shall adopt rules regarding filings under those 725
sections. 726

Sec. 4928.142. (A) For the purpose of complying with section 727
4928.141 of the Revised Code and subject to division (D) of this 728
section and, as applicable, subject to the rate plan requirement 729

of division (A) of section 4928.141 of the Revised Code, an 730
electric distribution utility may establish a standard service 731
offer price for retail electric generation service that is 732
delivered to the utility under a market-rate offer. 733

(1) The market-rate offer shall be determined through a 734
competitive bidding process that provides for all of the 735
following: 736

(a) Open, fair, and transparent competitive solicitation; 737

(b) Clear product definition; 738

(c) Standardized bid evaluation criteria; 739

(d) Oversight by an independent third party that shall design 740
the solicitation, administer the bidding, and ensure that the 741
criteria specified in division (A)(1)(a) to (c) of this section 742
are met; 743

(e) Evaluation of the submitted bids prior to the selection 744
of the least-cost bid winner or winners. 745

No generation supplier shall be prohibited from participating 746
in the bidding process. 747

(2) The public utilities commission shall modify rules, or 748
adopt new rules as necessary, concerning the conduct of the 749
competitive bidding process and the qualifications of bidders, 750
which rules shall foster supplier participation in the bidding 751
process and shall be consistent with the requirements of division 752
(A)(1) of this section. 753

(B) Prior to initiating a competitive bidding process for a 754
market-rate offer under division (A) of this section, the electric 755
distribution utility shall file an application with the 756
commission. An electric distribution utility may file its 757
application with the commission prior to the effective date of the 758
commission rules required under division (A)(2) of this section, 759

and, as the commission determines necessary, the utility shall 760
immediately conform its filing to the rules upon their taking 761
effect. 762

An application under this division shall detail the electric 763
distribution utility's proposed compliance with the requirements 764
of division (A)(1) of this section and with commission rules under 765
division (A)(2) of this section and demonstrate that all of the 766
following requirements are met: 767

(1) The electric distribution utility or its transmission 768
service affiliate belongs to at least one regional transmission 769
organization that has been approved by the federal energy 770
regulatory commission; or there otherwise is comparable and 771
nondiscriminatory access to the electric transmission grid. 772

(2) Any such regional transmission organization has a 773
market-monitor function and the ability to take actions to 774
identify and mitigate market power or the electric distribution 775
utility's market conduct; or a similar market monitoring function 776
exists with commensurate ability to identify and monitor market 777
conditions and mitigate conduct associated with the exercise of 778
market power. 779

(3) A published source of information is available publicly 780
or through subscription that identifies pricing information for 781
traded electricity on- and off-peak energy products that are 782
contracts for delivery beginning at least two years from the date 783
of the publication and is updated on a regular basis. 784

The commission shall initiate a proceeding and, within ninety 785
days after the application's filing date, shall determine by order 786
whether the electric distribution utility and its market-rate 787
offer meet all of the foregoing requirements. If the finding is 788
positive, the electric distribution utility may initiate its 789
competitive bidding process. If the finding is negative as to one 790

or more requirements, the commission in the order shall direct the 791
electric distribution utility regarding how any deficiency may be 792
remedied in a timely manner to the commission's satisfaction; 793
otherwise, the electric distribution utility shall withdraw the 794
application. However, if such remedy is made and the subsequent 795
finding is positive and also if the electric distribution utility 796
made a simultaneous filing under this section and section 4928.143 797
of the Revised Code, the utility shall not initiate its 798
competitive bid until at least one hundred twenty days after the 799
filing date of those applications. 800

(C) Upon the completion of the competitive bidding process 801
authorized by divisions (A) and (B) of this section, including for 802
the purpose of division (D) of this section, the commission shall 803
select the least-cost bid winner or winners of that process, and 804
such selected bid or bids, as prescribed as retail rates by the 805
commission, shall be the electric distribution utility's standard 806
service offer unless the commission, by order issued before the 807
third calendar day following the conclusion of the competitive 808
bidding process for the market rate offer, determines that one or 809
more of the following criteria were not met: 810

(1) Each portion of the bidding process was oversubscribed, 811
such that the amount of supply bid upon was greater than the 812
amount of the load bid out. 813

(2) There were four or more bidders. 814

(3) At least twenty-five per cent of the load is bid upon by 815
one or more persons other than the electric distribution utility. 816

All costs incurred by the electric distribution utility as a 817
result of or related to the competitive bidding process or to 818
procuring generation service to provide the standard service 819
offer, including the costs of energy and capacity and the costs of 820
all other products and services procured as a result of the 821

competitive bidding process, shall be timely recovered through the 822
standard service offer price, and, for that purpose, the 823
commission shall approve a reconciliation mechanism, other 824
recovery mechanism, or a combination of such mechanisms for the 825
utility. 826

(D) The first application filed under this section by an 827
electric distribution utility that, as of the effective date of 828
this section, directly owns, in whole or in part, operating 829
electric generating facilities that had been used and useful in 830
this state shall require that a portion of that utility's standard 831
service offer load for the first five years of the market rate 832
offer be competitively bid under division (A) of this section as 833
follows: ten per cent of the load in year one and not less than 834
twenty per cent in year two, thirty per cent in year three, forty 835
per cent in year four, and fifty per cent in year five. Consistent 836
with those percentages, the commission shall determine the actual 837
percentages for each year of years one through five. The standard 838
service offer price for retail electric generation service under 839
this first application shall be a proportionate blend of the bid 840
price and the generation service price for the remaining standard 841
service offer load, which latter price shall be equal to the 842
electric distribution utility's most recent standard service offer 843
price, adjusted upward or downward as the commission determines 844
reasonable, relative to the jurisdictional portion of any known 845
and measurable changes from the level of any one or more of the 846
following costs as reflected in that most recent standard service 847
offer price: 848

(1) The electric distribution utility's prudently incurred 850
cost of fuel used to produce electricity; 851

(2) Its prudently incurred purchased power costs; 852

(3) Its costs of satisfying the supply and demand portfolio 853

requirements of this state, including, but not limited to, 854

renewable energy resource and energy efficiency requirements; 855

(4) Its costs prudently incurred to comply with environmental 856

laws and regulations. 857

In making any adjustment to the most recent standard service 858

offer price on the basis of costs described in division (D)(4) of 859

this section, the commission shall consider the benefits that may 860

become available to the electric distribution utility as a result 861

of or in connection with the costs included in the adjustment, 862

including, but not limited to, the utility's receipt of emissions 863

credits or its receipt of tax benefits or of other benefits, and, 864

accordingly, the commission may impose such conditions on the 865

adjustment to ensure that any such benefits are properly aligned 866

with the associated cost responsibility. 867

Additionally, the commission may adjust the electric 868

distribution utility's most recent standard service offer price by 869

such just and reasonable amount that the commission determines 870

necessary to address any emergency that threatens the utility's 871

financial integrity or to ensure that the resulting revenue 872

available to the utility for providing the standard service offer 873

is not so inadequate as to result, directly or indirectly, in a 874

taking of property without compensation pursuant to Section 19 of 875

Article I, Ohio Constitution. The electric distribution utility 876

has the burden of demonstrating that any adjustment to its most 877

recent standard service offer price is proper in accordance with 878

this division. The commission's determination of the electric 879

distribution utility's most recent standard service offer price 880

shall exclude any previously authorized allowance for transition 881

costs with such exclusion being effective on and after the date 882

that allowance is scheduled to end under the utility's rate plan. 883

(E) Beginning in the second year of a blended price under 884

division (D) of this section and notwithstanding any other 885

requirement of this section, the commission may alter 886
prospectively the proportions specified in that division to 887
mitigate any effect of an abrupt change in the electric 888
distribution utility's standard service offer price that would 889
otherwise result in general or with respect to any rate group or 890
rate schedule but for such alteration. Any such alteration shall 891
be made not more often than annually, and the commission shall 892
not, by altering those proportions and in any event, cause the 893
duration of the blending period to exceed ten years as counted 894
from the effective date of the approved market rate offer. 895
Additionally, any such alteration shall be limited to an 896
alteration affecting the prospective proportions used during the 897
blending period and shall not affect any blending proportion 898
previously approved and applied by the commission under this 899
division. 900

(F) An electric distribution utility that has received 901
commission approval of its first application under division (C) of 902
this section shall not, nor ever shall be authorized or required 903
by the commission to, file an application under section 4928.143 904
of the Revised Code. 905

Sec. 4928.143. (A) For the purpose of complying with section 906
4928.141 of the Revised Code, an electric distribution utility may 907
file an application for public utilities commission approval of an 908
electric security plan as prescribed under division (B) of this 909
section. The utility may file that application prior to the 910
effective date of any rules the commission may adopt for the 911
purpose of this section, and, as the commission determines 912
necessary, the utility immediately shall conform its filing to 913
those rules upon their taking effect. 914

(B) Notwithstanding any other provision of Title XLIX of the 915
Revised Code to the contrary except division (D) of this section: 916

(1) An electric security plan shall include provisions 917
relating to the supply and pricing of electric generation service. 918
In addition, if the proposed electric security plan has a term 919
longer than three years, it shall include provisions in the plan 920
to permit the commission to test the plan pursuant to division (E) 921
of this section and any transitional conditions that should be 922
adopted by the commission if the commission terminates the plan as 923
authorized under that division. 924

(2) The plan may provide for or include, without limitation, 925
any of the following: 926

(a) Automatic recovery of the electric distribution utility's 927
costs of fuel used to generate the electricity supplied under the 928
offer; purchased power supplied under the offer, including the 929
cost of energy and capacity, and including purchased power 930
acquired from an affiliate; emission allowances; and federally 931
mandated carbon or energy taxes; 932

(b) A reasonable allowance for construction work in progress 933
for any of the electric distribution utility's cost of 934
constructing an electric generating facility or for an 935
environmental expenditure for any electric generating facility of 936
the electric distribution utility, provided the cost is incurred 937
or the expenditure occurs on or after January 1, 2009. Any such 938
allowance shall be subject to the construction work in progress 939
allowance limitations of division (A) of section 4909.15 of the 940
Revised Code, except that the commission may authorize such an 941
allowance upon the incurrence of the cost or occurrence of the 942
expenditure. No such allowance for generating facility 943
construction shall be authorized, however, unless the commission 944
first determines in the proceeding that there is need for the 945
facility based on resource planning projections submitted by the 946
electric distribution utility. Further, no such allowance shall be 947
authorized unless the facility's construction was sourced through 948

a competitive bid process, regarding which process the commission 949
may adopt rules. An allowance approved under division (B)(2)(b) of 950
this section shall be established as a nonbypassable surcharge for 951
the life of the facility. 952

(c) The establishment of a nonbypassable surcharge for the 953
life of an electric generating facility that is owned or operated 954
by the electric distribution utility, was sourced through a 955
competitive bid process subject to any such rules as the 956
commission adopts under division (B)(2)(b) of this section, and is 957
newly used and useful on or after January 1, 2009, which surcharge 958
shall cover all costs of the utility specified in the application, 959
excluding costs recovered through a surcharge under division 960
(B)(2)(b) of this section. However, no surcharge shall be 961
authorized unless the commission first determines in the 962
proceeding that there is need for the facility based on resource 963
planning projections submitted by the electric distribution 964
utility. Additionally, if a surcharge is authorized for a facility 965
pursuant to plan approval under division (C) of this section and 966
as a condition of the continuation of the surcharge, the electric 967
distribution utility shall dedicate to the Ohio consumers bearing 968
the surcharge all the electricity generated by that facility. 969
Before the commission authorizes any surcharge pursuant to this 970
division, it may consider, as applicable, the effects of any 971
decommissioning, deratings, and retirements. 972

(d) Provisions for the decommissioning, derating, or 973
retirement of an electric generating facility; 974

(e) Terms, conditions, or charges relating to limitations on 975
customer shopping for retail electric generation service, 976
bypassability, standby, back-up, or supplemental power service, 977
default service, carrying costs, amortization periods, and 978
accounting or deferrals, including future recovery of such 979
deferrals, as would have the effect of stabilizing or providing 980

<u>certainty regarding retail electric service;</u>	981
<u>(f) Automatic increases or decreases in any component of the standard service offer price;</u>	982
<u>(g) 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; and provisions for the recovery of the utility's cost of securitization. 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 the utility's rates.</u>	983
<u>(h) 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;</u>	984
<u>(i) 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</u>	985
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modernization. 1013

(j) Provisions under which the electric distribution utility 1014
may implement economic development, job retention, and energy 1015
efficiency programs, which provisions may allocate program costs 1016
across all classes of customers of the utility and those of 1017
electric distribution utilities in the same holding company 1018
system. 1019

(C) (1) The burden of proof in the proceeding shall be on the 1020
electric distribution utility. The commission shall issue an order 1021
under this division for an initial application under this section 1022
not later than one hundred twenty days after the application's 1023
filing date and, for any subsequent application by the utility 1024
under this section, not later than two hundred seventy-five days 1025
after the application's filing date. Subject to division (D) of 1026
this section, the commission by order shall approve or modify and 1027
approve an application filed under division (A) of this section if 1028
it finds that the electric security plan so approved, including 1029
its pricing and all other terms and conditions, including any 1030
deferrals and any future recovery of deferrals, is favorable in 1031
the aggregate as compared to the expected results that would 1032
otherwise apply under section 4928.142 of the Revised Code. 1033
Additionally, if the commission so approves an application that 1034
contains a surcharge under division (B) (2) (b) or (c) of this 1035
section, the commission shall ensure that the benefits derived for 1036
any purpose for which the surcharge is established are reserved 1037
and made available to those that bear the surcharge. Otherwise, 1038
the commission by order shall disapprove the application. 1039

(2) (a) If the commission modifies and approves an application 1041
under division (C) (1) of this section, the electric distribution 1042
utility may withdraw the application, thereby terminating it, and 1043
may file a new standard service offer under this section or a 1044

standard service offer under section 4928.142 of the Revised Code. 1045

(b) If the utility terminates an application pursuant to 1046
division (C)(2)(a) of this section or if the commission 1047
disapproves an application under division (C)(1) of this section, 1048
the commission shall issue such order as is necessary to continue 1049
the provisions, terms, and conditions of the utility's most recent 1050
standard service offer, along with any expected increases or 1051
decreases in fuel costs from those contained in that offer, until 1052
a subsequent offer is authorized pursuant to this section or 1053
section 4928.142 of the Revised Code, respectively. 1054

(D) Regarding the rate plan requirement of division (A) of 1055
section 4928.141 of the Revised Code, if an electric distribution 1056
utility that has a rate plan that extends beyond December 31, 1057
2008, files an application under this section for the purpose of 1058
its compliance with division (A) of section 4928.141 of the 1059
Revised Code, that rate plan and its terms and conditions are 1060
hereby incorporated into its proposed electric security plan and 1061
shall continue in effect until the date scheduled under the rate 1062
plan for its expiration, and that portion of the electric security 1063
plan shall not be subject to commission approval or disapproval 1064
under division (C) of this section. However, that utility may 1065
include in its electric security plan under this section, and the 1066
commission may approve, modify and approve, or disapprove subject 1067
to division (C) of this section, provisions for the incremental 1068
recovery or the deferral of any costs that are not being recovered 1069
under the rate plan and that the utility incurs during that 1070
continuation period to comply with section 4928.141, division (B) 1071
of section 4928.64, or division (A) of section 4928.66 of the 1072
Revised Code. 1073

(E) If an electric security plan approved under division (C) 1074
of this section, except one withdrawn by the utility as authorized 1075
under that division, has a term, exclusive of phase-ins or 1076

deferrals, that exceeds three years from the effective date of the 1077
plan, the commission shall test the plan in the fourth year, and 1078
if applicable, every fourth year thereafter, to determine whether 1079
the plan, including its then-existing pricing and all other terms 1080
and conditions, including any deferrals and any future recovery of 1081
deferrals, continues to be favorable in the aggregate and during 1082
the remaining term of the plan as compared to the expected results 1083
that would otherwise apply under section 4928.142 of the Revised 1084
Code. If the test results are in the negative, the commission may 1085
terminate the electric security plan, but not until it shall have 1086
provided interested parties with notice and an opportunity to be 1087
heard. The commission may impose such conditions on the plan's 1088
termination as it considers reasonable and necessary to 1089
accommodate the transition from an approved plan to the more 1090
advantageous alternative. In the event of an electric security 1091
plan's termination pursuant to this division, the commission shall 1092
permit the continued deferral and phase-in of any amounts that 1093
occurred prior to that termination and the recovery of those 1094
amounts as contemplated under that electric security plan. 1095

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Sec. 4928.144. The public utilities commission by order may 1097
authorize any just and reasonable phase-in of any electric 1098
distribution utility rate or price established under sections 1099
4928.141 to 4928.143 of the Revised Code, and inclusive of 1100
carrying charges, as the commission considers necessary to ensure 1101
rate or price stability for consumers. If the commission's order 1102
includes such a phase-in, the order also shall provide for the 1103
creation of regulatory assets, by authorizing the deferral of 1104
incurred costs equal to the amount not collected, plus carrying 1105
charges on that amount. Further, the order shall authorize the 1106
collection of those deferrals through a nonbypassable surcharge on 1107
any such rate or price so established for the electric 1108

AN ACT

To amend sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02; to enact sections 9.835, 3318.112, 4928.141, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051; and to repeal sections 4928.41, 4928.42, 4928.431, and 4928.44 of the Revised Code to revise state energy policy to address electric service price regulation, establish alternative energy benchmarks for electric distribution utilities and electric services companies, provide for the use of renewable energy credits, establish energy efficiency standards for electric distribution utilities, require greenhouse gas emission reporting and carbon dioxide control planning for utility-owned generating facilities, authorize energy price risk management contracts, and authorize for natural gas utilities revenue decoupling related to energy conservation and efficiency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02 be amended and sections 9.835, 3318.112, 4928.141, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051 of the Revised Code be enacted to read as follows:

Sec. 9.835. (A) As used in this section:

(1) "Energy price risk management contract" means a contract that

applicable, the appropriate amended documents filed under division (A)(3) of this section. Such refiling shall occur during the month of December of every fourth year after the initial filing of a document under division (A)(1) of this section.

(3) If the address of the person filing a document under division (A)(1) or (2) of this section changes, or if a person's agent or the address of the agent changes, from that listed on the most recently filed of such documents, the person shall file an amended document containing the new information.

(4) The consent and designation required by divisions (A)(1) to (3) of this section shall be in writing, on forms prescribed by the public utilities commission. The original of each such document or amended document shall be legible and shall be filed with the commission, with a copy filed with the office of the consumers' counsel and with the attorney general's office.

(B) A person who enters this state pursuant to a summons, subpoena, or other form of process authorized by this section is not subject to arrest or service of process, whether civil or criminal, in connection with other matters that arose before the person's entrance into this state pursuant to such summons, subpoena, or other form of process.

(C) Divisions (A) and (B) of this section do not apply to any of the following:

(1) A corporation incorporated under the laws of this state that has appointed a statutory agent pursuant to section 1701.07 or 1702.06 of the Revised Code;

(2) A foreign corporation licensed to transact business in this state that has appointed a designated agent pursuant to section 1703.041 of the Revised Code;

(3) Any other person that is a resident of this state or that files consent to service of process and designates a statutory agent pursuant to other laws of this state.

~~Sec. 4928.14. (A) After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based 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. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.~~

~~(B) After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined~~

~~through a competitive bidding process. Prior to January 1, 2004, the commission shall adopt rules concerning the conduct of the competitive bidding process, including the information requirements necessary for customers to choose this option and the requirements to evaluate qualified bidders. The commission may require that the competitive bidding process be reviewed by an independent third party. No generation supplier shall be prohibited from participating in the bidding process, provided that any winning bidder shall be considered a certified supplier for purposes of obligations to customers. At the election of the electric distribution utility, and approval of the commission, the competitive bidding option under this division may be used as the market-based standard offer required by division (A) of this section. The commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed.~~

~~(C) After the market development period, the~~ The failure of a supplier to provide retail electric generation service to customers within the certified territory of ~~the~~ an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under ~~division (A) of this section~~ sections 4928.141, 4928.142, and 4928.143 of the Revised Code until the customer chooses an alternative supplier. A supplier is deemed under this ~~division~~ section to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

~~(1)(A)~~ (A) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

~~(2)(B)~~ (B) The supplier is no longer capable of providing the service.

~~(3)(C)~~ (C) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.

~~(4)(D)~~ (D) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

Sec. 4928.141. (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.

Sec. 4928.142. (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 distribution 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 the effective date of this section, 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 and not less 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.

Sec. 4928.143. (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) 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; and 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.

Sec. 4928.144. 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.

Sec. 4928.145. During a proceeding under sections 4928.141 to 4928.144 of the Revised Code and upon submission of an appropriate discovery request, an electric distribution utility shall make available to the requesting party every contract or agreement that is between the utility or any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision and that is relevant to the proceeding, subject to such protection for proprietary or confidential information as is determined appropriate by the public utilities commission.

Sec. 4928.146. Nothing in sections 4928.141 to 4928.145 of the Revised Code precludes or prohibits an electric distribution utility providing competitive retail electric service to electric load centers within the certified territory of another such utility.

Sec. 4928.151. The public utilities commission shall adopt and enforce rules prescribing a uniform, statewide policy regarding electric transmission and distribution line extensions and requisite substations and related facilities that are requested by nonresidential customers of electric utilities, so that, on and after the effective date of the initial rules so adopted, all such utilities apply the same policies and charges to those customers. Initial rules shall be adopted not later than six months after the effective date of this section. The rules shall address the just and reasonable allocation to and utility recovery from the requesting customer or other customers of the utility of all costs of any such line extension and any requisite substation or related facility, including, but not limited to, the costs of necessary technical studies, operations and maintenance costs, and capital costs, including a return on capital costs.

Sec. 4928.17. (A) Except as otherwise provided in sections 4928.142 or 4928.143 or 4928.31 to 4928.40 of the Revised Code and beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the public utilities



*Bill Analysis**Legislative Service Commission***S.B. 221**127th General Assembly
(As Introduced)

Sen. Schuler (By request)

BILL SUMMARY

- Authorizes the Public Utilities Commission (PUCO) to return generally to pre-S.B. 3 (pre-Electric Restructuring Law) regulation of retail electric generation service if that regulation is necessary to implement the statutory state electric services policy.
- Revises and adds to the current objectives of state electric services policy enacted under S.B. 3.
- Prohibits an electric utility selling or transferring any generating facility it owns in whole or in part to any person without prior PUCO approval.
- Retains a standard service offer requirement for electric distribution utilities and newly prescribes the allowable nature of those offers as either an "electric security plan" or a "market rate option."
- Requires an electric security plan to include the basis of the valuation of the generating facilities to be used and the basis of the cost of rendering service using those facilities, as those bases are defined by PUCO rule or order.
- However, requires valuation to factor in a utility's transition revenues under S.B. 3 and facility depreciation; and specifically authorizes the inclusion of environmental compliance costs and the inclusion of construction costs of any new generating facility located in Ohio that the PUCO certifies the need for on the basis of resource planning projections developed in accordance with PUCO rules.
- Requires an electric distribution utility with a PUCO-approved electric security plan to file an energy delivery infrastructure modernization plan or any plan providing for the utility's recovery of costs and a just and reasonable rate of return on such modernization.

App. Appx. 000270

- Regarding the bill's market rate option requires open, competitive bidding for generation supply and subjects approval of the option to various criteria in addition to those applicable to an electric security plan.
- Requires the PUCO to adopt rules prescribing advanced energy portfolio standards that will apply to the standard service offers of electric distribution utilities.
- Requires the PUCO to establish energy efficiency standards relating to the projected load growths of electric distribution utilities and authorizes rules providing for revenue decoupling.
- Requires the PUCO to establish carbon control planning requirements for generating facilities and to establish greenhouse gas emission reporting requirements.
- Adds the following to the types of air quality projects that can be funded by the Ohio Air Quality Development Authority (OAQDA) and declares that both qualify as facilities for the control of air and thermal pollution under Section 13, Article VIII, Ohio Constitution: property, devices, or equipment used in the manufacture and production of any equipment that qualifies as an air quality project; and property, devices, or equipment that reduce air contaminant emissions through the generation of electricity using sustainable resources.
- In the manner of its current authority to fund air quality projects, authorizes OAQDA to issue revenue bonds to fund specified types of advanced energy projects and declares that such projects qualify as air and thermal pollution control facilities under the Ohio Constitution.
- Grants OAQDA authority regarding programs to achieve best cost rates for state-owned buildings, facilities, and operations, state-supported colleges and universities, willing local governments, and willing school districts through pooled purchases of electricity and the financing of taxable or tax-exempt prepayment of commodities; and regarding programs to achieve optimal cost electricity for key industrial and energy-intensive sectors.
- Grants OAQDA authority regarding programs to achieve optimal cost financing for new electric generating facilities and regarding the siting, financing, construction, operation, and risk reduction for next-generation base load generating systems, including clean coal facilities with carbon capture or sequestration or advanced nuclear power plants.

App. Appx. 000271

- Grants OAQDA authority regarding energy efficiency incentives, sustainable resource energy installations, and research and development regarding sustainable energy.
- Requires the Department of Natural Resources, the Ohio Environmental Protection Agency, and the PUCO jointly by rule to develop an interim policy framework for regulating pilot and demonstration, carbon sequestration activities in Ohio or sequestration products produced in Ohio.
- Requires the PUCO to employ a Federal Energy Advocate to monitor Federal Energy Regulatory Commission and other federal activities and advocate on behalf of Ohio retail electric service consumers.

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CONTENT AND OPERATION

Authority for pre-S.B. 3 regulation

(R.C. 4905.31 and 4928.05(A)(1))

Current law enacted under the Electric Restructuring Law of S.B. 3 of the 123rd General Assembly (primarily, R.C. Chapter 4928.) prohibits municipal regulation of a competitive retail electric service^[1] under R.C. Chapter 743., and prohibits the PUCO from regulating such a service under public utility law (R.C. Chapters 4901. to 4909., 4933., 4935., and 4963.) except as provided under the Restructuring Law, and as provided under certain existing statutes and then only to the extent related to service reliability and public safety.

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The bill removes current law's prohibition regarding the PUCO and authorizes the PUCO to return to traditional regulation^[2] of a competitive retail electric service. To do so, the PUCO must determine that that regulation is necessary to implement statutory electric services policy (see "State electric services policy," below, and COMMENT 1). As long as the PUCO does not return to traditional regulation, PUCO regulation of generation service apparently will continue as it is under current law except with respect to price regulation (see "Price regulation," below).

By way of background, "traditional regulation" addresses those facets of utility operation that affect the provision of utility services, for example, utility stock and bond issuance, mergers and acquisitions, and, of course, service pricing.

Regarding such pricing, the PUCO, under a constant duty to balance the interests of utilities and consumers, determines the amount of revenue a utility needs to cover all its operating costs and earn a rate of return on its overall plant investment. The utility then sets its rates, subject to PUCO approval, so that they will provide it the opportunity to earn that revenue requirement. This "traditional ratemaking" uses a snapshot method of identifying operating costs and plant investment so that, by statute, their calculation is contemporary to the time period for which rates are being determined. In general, any time a utility desires to change its rates because of a change in its cost or investment status, it has to file a base rate case with the PUCO, in which not the specific change, but the utility's entire revenue, expense, cost, and investments are evaluated anew based on contemporary information.

Additional notable aspects of traditional regulation (which also relate to pricing under "Energy security plan," below) are that the valuation of utility assets and the determination of a utility's operating costs for rate-making purposes are specified in statute. For instance, under traditional regulation valuation must be done on an original cost basis,^[3] for facilities *used and useful* in rendering service, and using books and records maintained by the utility in accordance with a uniform system of accounts specified by the PUCO (R.C. 4905.13, 4909.05(C), and 4909.15(A)). Further, the rate-making process of traditional regulation generally requires the filing of a base rate case application under a statute (R.C. 4909.18) that prescribes certain hearing and other requirements. (This latter aspect of traditional regulation is also relevant to the bills' standard service offer provisions (see "Approval process," below).

State electric services policy

(R.C. 4928.02)

The bill revises and adds to the current objectives of the state electric services policy enacted under S.B. 3. Under both current law and the bill, the electric policy applies statewide. The PUCO is required to ensure that the policy is effectuated (R.C. 4928.06(A), not in the bill).

The current policy objectives, which have their genesis in S.B. 3's competitive generation market concept, are as follows: (1) ensure the availability to consumers of

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adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service, (2) 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, (3) 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, (4) encourage innovation and market access for cost-effective supply- and demand-side retail electric service, (5) encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service, (6) recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment, (7) 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, (8) ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power, and (9) facilitate the state's effectiveness in the global economy.

The bill changes these policy objectives by adding five new objectives and modifying three of the current objectives. Specifically, objective (4) above is changed to read: "*encourage innovation and market access for cost-effective retail electric service including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.*"

Objective (5) above is changed to read: "*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.*"

Objective (8) above is changed to read: "*ensure retail electric service consumers just and reasonable rates and protection against unreasonable sales practices, market deficiencies, and market power.*"

The following new objectives are added to the state electric services policy: (1) preclude imbalances in knowledge and expertise among parties in a proceeding under the Restructuring Law to eliminate any appearance of disproportionate influence by any of those parties, (2) ensure that consumers and shareholders share the benefits of, as well as the responsibility for, electric utility investment in facilities supplying retail electric generation service, (3) provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates, (4) protect at-risk populations when considering the implementation of any new advanced energy technology, (5) encourage implementation of distributed generation across customer classes through regular review and updating of rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering.

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Divestiture policy

(R.C. 4928.17(E))

Current law enacted by S.B. 3 authorizes an electric utility to divest itself of any generating asset without prior PUCO approval. The bill prohibits an electric utility selling or transferring any generating facility it owns in whole or in part to any person without prior PUCO approval. (Prior to S.B. 3, an electric utility, like any other public utility, was subject to policy and a process regarding such prior PUCO approval under R.C. 4905.48 (not in the bill). PUCO approval authority under the bill does not reference that statute.)

Price regulation

(R.C. 4928.14 and 4928.141)

By way of background, S.B. 3 in effect repealed traditional price regulation for electric generation service and declared that the price of generation service would be competitively market-determined starting January 1, 2001. That is, incumbent electric utilities would no longer have state-established exclusive service territories for generation service,^[4] and other suppliers of generation services ("electric service companies," meaning generally, power marketers, power brokers, and aggregators) could compete to supply electricity to transmission/distribution customers of the incumbent utilities at each customer's option. Too, the incumbents were free to vie for each other's generation customers.-

Under S.B. 3, beginning generally in 2006 and currently, an electric utility's only regulated duty regarding generation service is to provide a "standard service offer" that assures the constant availability of a firm supply of electricity to (1) any of its distribution customers that have never chosen an alternate generation supplier and (2) customers that did choose but returned, if only briefly, to the utility because their supplier defaulted on its contract.^[5] In general, for various reasons, the standard service offers of incumbent utilities over time became, instead of an "essential service fall-back" offer, *the* generation service offer for most of their distribution customers.

Current law enacted under S.B. 3 contemplates that a utility's standard service offer generation price will be "market-based" (not necessarily meaning market-determined) or else will be determined by competitive bidding, but not if the PUCO determines "at any time that a competitive bidding process is not required [because] other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed."

Since the time S.B. 3's standard service offer requirement took effect, the incumbent utilities have operated under various standard service offers that were developed by settlement among parties and approved by the PUCO as meeting S.B. 3's standard service offer requirement. These standard service offers are typically referred to as "rate stabilization plans." The current rate stabilization plans of the incumbent utilities are scheduled to expire at the end of 2008, except for Dayton Power & Light's, which is

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scheduled to expire at the end of 2010. Rate stabilization is an utility/PUCO-generated concept described as responding to an assessment that there is no effective competition in the electric generation market. The general nature of the utilities' rate stabilization plans is that they preserve generation prices at existing levels^[6] but allow prices to increase in relation to certain costs and under certain circumstances.

The bill retains the standard service offer requirement for electric utilities, but changes the allowable nature of those offers. In that regard, the bill authorizes two types of standard service offers: an "electric security plan" and a "market rate option." It further states that the bill does not preclude PUCO approval of a standard service offer similar to one currently in effect.

Electric security plan. An electric security plan must include the basis of the valuation of the specific generating facilities to be used in providing retail electric generation service and the basis of the cost of rendering generation service using those facilities. The bill provides that the PUCO must define those valuation and cost bases by rule or order. However, the valuation of facilities must factor in the extent to which the utility received transition revenues under S.B. 3^[7] (R.C. 4928.40) and the extent to which the facilities have been depreciated over time.

Further, prices under an electric security plan may include amounts for specified costs, including, but not limited to, (1) environmental compliance costs associated with the generating facilities and (2) costs incurred by the utility on or after January 1, 2009, in the construction of any generating facility that is located in Ohio and that, notwithstanding power siting law (Chapter 4906.) to the contrary, the PUCO determines and certifies the need for on the basis of resource planning projections developed in accordance with PUCO-prescribed policies and procedures.

Market rate option. The bill describes the market rate option as an option under which a utility's standard service offer prices periodically are determined through an open, competitive bidding process.

Approval criteria. Standard service offer approval, or modification and approval, requires that the PUCO make both of the following findings: (1) the offer and the prices it establishes are just and reasonable and in furtherance of the state electric service policy described above and (2) the utility is in compliance with the bill's contract filing requirement for the standard service offer proceeding (see "**Approval process,**" below).

However, the bill additionally prohibits the PUCO approving a market rate option unless the utility demonstrates that (1) the relevant markets are subject to effective competition, (2) the utility does not impose unreasonable or discriminatory costs or undue burdens on generation service competition within its generation service territory, (3) the offer will not impose undue price increases on consumers, (4) the offer is reasonable on both a short- and long-term basis, and (5) power purchases supporting the offer are prudent and reasonable.

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For the purpose of evaluating effective competition in (1) above, the PUCO must consider factors prescribed under S.B. 3, which include, but are not limited to, (1) the number and size of alternative providers of the service, (2) the extent to which the service is available from alternative suppliers in the relevant market, (3) the ability of alternative suppliers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions, and (4) other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of suppliers of services (R.C. 4928.06(D)).

Also, regarding any standard service offer consisting of an electric security plan in an application filed by a utility that transferred all or part of its generation facilities to an affiliate, the commission, to the extent authorized by federal law, may consider power supply or generation service contracts or agreements between the utility and its affiliates or between the utility and the holding company owning or controlling the utility.

Approval process. The bill requires a utility to file an application with the PUCO setting forth its standard offer. Initially, such an application must be filed not later than six months after the bill's effective date.

Under the bill, the application is subject to such filing and procedural requirements as the PUCO must prescribe by rule or order. However, in a standard service offer proceeding, an electric distribution utility must file with the PUCO every contract or agreement between the utility or any of its affiliates and a consumer, electric services company, political subdivision, or any party to the proceeding, including any contract or agreement in effect on the filing date of the utility's initial standard service offer application. The bill requires that the details of the contract or agreement be made available as privileged information to intervenors in the proceeding. Additionally, the bill provides that PUCO rules may include transition rules necessary for the initial implementation of the bill's standard service offer requirement.

The bill expressly does not preclude a utility for which an electric security plan application has been approved by the PUCO from later filing an application for a market rate option standard service offer, or vice versa. But, if the PUCO disapproves a market rate option standard service offer filed in a utility's first application under the bill, the utility must then immediately file an application for approval of an electric security plan.

In an order approving a standard service offer, the PUCO must prescribe any requirements for the utility, as it considers necessary to implement the state policy and must provide the term of the offer and a schedule and the procedural and substantive terms and conditions for periodic PUCO review of the approved offer. In the case of an offer consisting of a market rate option, the review must provide for reconciliation of the standard service offer prices to ensure that they are just and reasonable and in furtherance of the state policy.

Approval effect. Regarding a utility's approved, initial standard service offer, the bill specifies that the offer takes effect on the date the PUCO specifies in its order. The bill

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further states that, on that specified date, the offer supersedes any prior authority granted by Ohio law under which the utility provided generation service.

Additionally, the bill states that nothing in its standard service offer provisions limits an electric distribution utility providing competitive retail electric (generation) service to electric load centers^[8] within the certified territory of another such utility.

Advance energy portfolio standards

(R.C. 4928.142)

The bill requires the PUCO to adopt rules prescribing advanced energy portfolio standards that will apply to the standard service offers of electric utilities. In adopting the rules, the PUCO must consider available technology, costs, job creation, and economic impacts. The rules must require evaluation of and encourage, where necessary, development and implementation of next-generation energy technologies, including, but not limited to, renewable energy sources, clean coal technology, advanced nuclear generation, fuel cells, and cogeneration.

The bill requires that the rules seek to achieve specified interim goals such that, by 2025, advanced energy technologies must provide 25% of a utility's standard service offer. At least half of the advanced energy the utility implements must be generated from renewable energy sources. The renewable sources must include solar power, with any remainder supplied by, but not limited to, any clean coal technology with carbon controls, an advanced nuclear plant, or a cogeneration project, the original construction of which is initiated after January 1, 2009. Additionally, at least half of the advanced energy implemented must be met through facilities located in Ohio.

Electric system modernization

(R.C. 4928.111)

The bill requires an electric utility with a PUCO-approved electric security plan to file with the PUCO a "long-term energy delivery infrastructure modernization plan or any plan providing for the utility's recovery of costs and a just and reasonable rate of return on such infrastructure modernization." The plan must specify the initiatives the utility must take to improve electric service reliability by rebuilding, upgrading, or replacing utility infrastructure *and* generating facilities. The plan must be filed in an application under the traditional ratemaking law (R.C. 4909.18) and therefore subject to any applicable hearing and other requirements of that law.

Energy efficiency standards

(R.C. 4928.64)

The bill requires the PUCO to establish by rule energy efficiency standards applicable to electric distribution utilities. Under the rules, a utility must implement energy efficiency

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measures that will result in not less than 25% of projected growth in its electric load and not less than 10% of its total peak demand being achieved, by 2025, through those measures. The rules must include a requirement that an electric distribution utility provide a customer upon request with three years of consumption data in an accessible form. Additionally, the rules may provide for "decoupling." (Although not further described in the bill, this term usually refers to a policy that detaches utility earnings from amount of commodity sold.)

Greenhouse gas emissions, carbon control

(R.C. 4928.69)

The bill requires the PUCO to adopt rules establishing greenhouse gas^[9] emission reporting requirements (presumably applicable only to public utilities regulated by the PUCO). The rules must include participation in the Climate Registry. The Registry's web site describes the Registry as "a collaboration between states, provinces, and tribes aimed at developing and managing a common greenhouse gas emissions reporting system with high integrity that is capable of supporting various greenhouse gas emissions reporting and reduction policies for its member states and tribes and reporting entities."^[10]

The bill also requires the PUCO to adopt rules establishing carbon control planning requirements for each electric generating facility located in Ohio that emits greenhouse gases, including facilities in operation on the bill's effective date.

Carbon sequestration

(R.C. 1551.41)

The bill requires the Department of Natural Resources, the Ohio Environmental Protection Agency, and the PUCO, jointly by rule, to develop an interim policy framework for supervision and regulation by the agencies of pilot and demonstration, carbon sequestration activities located in Ohio and sequestration products produced in Ohio.

State revenue bonds

(R.C. 122.41, 122.451, 3706.01 through 3706.18, and 4905.40)

Current law authorizes the Ohio Air Quality Development Authority (OAQDA) to issue revenue bonds and notes, the proceeds of which can be used to fund the cost^[11] of air quality projects. Funding can come in the form of an OAQDA loan or grant or can otherwise be paid from bond proceeds.

The bill adds to the types of air quality projects that can be funded by the OAQDA. It also gives OAQDA new, identical, statutory authority to issue revenue bonds to fund advanced energy projects (see **COMMENT 2**). The latter also involves extending to advanced energy projects two existing statutory provisions relating to a Department of Development mortgage insurance program for air quality, wastewater, or solid wastes projects.

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Air quality projects

Current law declares that "air quality projects" qualify as facilities for the control of air pollution and thermal pollution related to air under Section 13, Article VIII, Ohio Constitution (R.C. 3706.01(G); see also R.C. 3706.03(A)). That constitutional provision empowers state government to lend the state's aid and credit to private entities (by issuing of debt backed by revenues other than tax revenues) for the express purposes of controlling air, water, and thermal pollution or disposing of solid waste. The constitutional provision also states that,

except for facilities for pollution control or solid waste disposal, as determined by law, no guarantees or loans and no lending of aid or credit shall be made [by statute] for facilities to be constructed for the purpose of providing electric or gas utility service to the public.

The relationship between the constitutional provision and statute is that statute, subject to the limitations of the constitutional provision, designates OAQDA to implement the constitutional provision by funding air quality (air or thermal pollution) projects.

Under current statute, projects eligible for OAQDA funding are, in brief: (1) methods, or modifications or replacements of property, processes, devices, structures, or equipment, directed at air contaminants,^[12] (2) property used for collecting, storing, treating, using, processing, or disposing of a by-product or solid waste resulting from a project described in (1), (3) motor vehicle inspection stations and station equipment, (4) ethanol or other biofuel facilities and facility equipment, (5) property, devices, or equipment that reduce emissions of air contaminants through improvements in energy efficiency or energy conservation, (6) research and development projects under the Ohio Coal Development Office, (7) property used for collecting, storing, treating, using, processing or disposing of a by-product or solid waste resulting from a project described in (6) or from the use of clean coal technology, excluding property used primarily for other subsequent commercial purposes, (8) property that is part of the FutureGen project^[13] or related to its siting, and (9) property or any system to be used for any of the purposes described in (1) to (8), whether another purpose is also served, and any property or system incidental to or that has to do with, or the end purpose of which is, any of (1) to (8) above.

The bill makes the following eligible as air quality projects and expands (9) above to include these new types of projects: (1) property, devices, or equipment necessary for the manufacture and production of any equipment that qualifies as an air quality project, and (2) property, devices, or equipment that reduce air contaminant emissions through the generation of electricity using sustainable resources. "Sustainable resources" include, but are not limited to, solar, wind, tidal or wave, biomass, biofuel, hydro, or geothermal resources. The bill declares that both of these new types of air quality projects qualify as facilities for the control of air pollution and thermal pollution related to air under Section 13, Article VIII, Ohio Constitution (R.C. 3706.01(G)).

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Advanced energy projects

Under the bill, OAQDA's authority to fund advanced energy projects is the same as its authority to fund air quality projects. "Advanced energy projects" consist of methods or of modifications or replacements of property, processes, devices, structures, or equipment, regarding any of the following: (1) a coal-based generating facility that can control or prevent carbon dioxide emissions by at least 80% (compared to the emissions that would occur without its clean coal technology), (2) for advanced nuclear energy production, generation III technology as defined by the Nuclear Regulatory Commission, other later technology, or "significant improvements to existing facilities," (3) electric generating fuel cells including, but not limited to, proton exchange membrane fuel cells, phosphoric acid fuel cells, molten carbonate fuel cells, or solid fuel cells, and (4) cogeneration technology using a heat engine or power station to generate electricity and useful heat simultaneously. An advanced energy project also includes any property or system to be used in whole or in part for (1) to (4) above, whether another purpose also is served, and any property or system incidental to or that has to do with, or the end purpose of which is, any of (1) to (4).

The bill declares that advanced energy projects for industry, commerce, distribution, or research, including public utility companies, qualify as facilities for the control of air pollution and thermal pollution related to air under Section 13, Article VIII, Ohio Constitution (R.C. 3706.03(A)).

Additional OAQDA authority

(R.C. 3706.04)

Current law lists a number of general powers of the OAQDA with respect to air quality projects, including, for example, adopting an official OAQDA seal, making loans and grants, acquiring or constructing property, engaging in certain competitive bidding, and receiving federal funds. The bill extends those same powers with respect to advanced energy projects funded by OAQDA.

Further, the bill establishes additional OAQDA authority (although the bill is not clear regarding how these new powers relate, if at all, to OAQDA bonds or bond proceeds). The bill authorizes OAQDA to develop, encourage, promote, support, and implement programs to achieve best cost rates for state-owned buildings, facilities, and operations, state-supported colleges and universities, willing local governments, and willing school districts through pooled purchases of electricity and the financing of taxable or tax-exempt prepayment of commodities. OAQDA additionally may develop, encourage, promote, support, and implement programs to achieve optimal cost electricity available to key industrial and energy-intensive sectors of Ohio's economy.

The bill also empowers OAQDA to develop, encourage, promote, support, and implement programs to achieve optimal cost financing for electric generating facilities to be constructed on or after January 1, 2009. And, it empowers OAQDA to lead, encourage, promote, and support siting,^[14] financing, construction, and operation for, and reduce the

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costs of associated risks of, early implementations of next-generation base load generating systems, including clean coal generating facilities with carbon capture or sequestration or advanced nuclear power plants.

Additional authority is granted for OAQDA to develop, encourage, and provide incentives for investments in energy efficiency; develop, encourage, promote, and support implementation in Ohio of sustainable resource energy installations; and engage in and coordinate state-supported energy research and development with respect to reliable, affordable, and sustainable energy in Ohio.

Federal energy advocate; RTO participation

(R.C. 4928.68)

The bill requires the PUCO to employ a Federal Energy Advocate to monitor the activities of the Federal Energy Regulatory Commission (FERC) and other federal agencies and advocate on behalf of the interests of Ohio retail electric service consumers. The attorney general must represent the Advocate before the FERC and other federal agencies. Among other duties assigned by the PUCO, the Advocate must examine the value of the participation of Ohio electric utilities in regional transmission organizations and submit a report to the PUCO on whether continued participation of those utilities is in the interest of retail electric consumers.

COMMENT

1. The bill authorizes the PUCO to return to traditional regulation of a competitive retail electric service if necessary to implement state electric services policy. The bill could be clarified regarding what that authority means with respect to current law that appears to continue under the bill notwithstanding a return to traditional regulation and, specifically, whether the bill intends that the generation prices of electric utilities be regulated but those charged by other suppliers not be regulated. The bill also is not clear as to whether the authority to return to traditional regulation also includes PUCO authority to revert back to current regulation as amended by the bill.

2. In keeping with the apparent intent of the bill, the definition of "revenues" in R.C. 3706.01 should be amended to add appropriate references to advance energy projects.

HISTORY

ACTION	DATE
Introduced	09-25-07

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S0221-I-127.doc/jc

[1] For the purpose of this analysis, "competitive retail electric service" means electric generation service. By statutory declaration in current R.C. 4928.03, electric generation service is a competitive retail electric service. So are services provided by alternative generation suppliers: power marketing, power brokering, and customer aggregation. Current law (R.C. 4928.04) gives the PUCO authority to declare ancillary services, metering, and billing and collection services competitive services as well, but the PUCO has not exercised that authority, so those services remain noncompetitive services under the Restructuring Law. The bill does not amend or repeal any of these current law designations or authority. It also makes no changes in another major area of Electric Restructuring Law--tax policy applicable to electric utilities and electric services.

[2] A return to traditional regulation does not mean a return to pre-S.B. 3 regulation entirely, since S.B. 3 repealed certain provisions of traditional regulation, such as provisions authorizing an electric fuel component in rates and provisions addressing environmental compliance facilities of electric utilities, and amended other provisions.

[3] As opposed to some other basis, for example, original cost less depreciation or replacement cost new.

[4] Although such exclusive territories continued as to other components of electric service, such as distribution (R.C. 4933.81 et seq.).

[5] More fully, a customer can return under current law to (the standard service offer of) its incumbent utility if the customer's supplier (1) has defaulted on its contract, (2) is in receivership, (3) has filed for bankruptcy, (4) is no longer capable of providing the service, (5) is unable to provide delivery to transmission or distribution facilities for such reasonable period of time as the PUCO may specify by rule, or (6) has had its PUCO certification suspended, conditionally rescinded, or rescinded (R.C. 4928.14(F)).

[6] Generally meaning, at the level of the utility's pre-2000 price of electricity, determined through an unbundling process, which required the price of generation to be what remained after all other electric service components were removed from the bundled price for electric service that reflected the vertical integration of Ohio electric utilities pre-S.B. 3. Those bundled prices had not changed since the utilities' last rate cases, which generally were in the late 1980s and early 1990s.

[7] "Transition revenues" refers to a source of revenue available to incumbent utilities, by application to the PUCO, for generation costs "unrecoverable in a competitive market" (R.C. 4928.40). Senate Bill 3 required the application to be in the form of a requisite transition plan that covered a number of issues relevant to utilities' monopoly position as providers of electric services and to their evolution to a competitive generation market. In actuality, transition plans consisted of negotiated settlements submitted for PUCO approval.

[8] Basically, an electric load center is the metered point of electricity delivery (R.C. 4928.01(A)(8) and 4933.81(E)).

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[9] "[G]reenhouse gases allow sunlight to enter the atmosphere freely. When sunlight strikes the Earth's surface, some of it is reflected back towards space as infrared radiation (heat). Greenhouse gases absorb this infrared radiation and trap the heat in the atmosphere. ...Some of [the gases] occur in nature (water vapor, carbon dioxide, methane, and nitrous oxide), while others are exclusively human-made (like gases used for aerosols)...During the past 20 years, about three-quarters of human-made carbon dioxide emissions were from burning fossil fuels." From the U.S. Energy Information Administration, at < <http://www.eia.doe.gov/oiaf/1605/ggccebro/chapter1.html>>.

[10] <<http://www.theclimateregistry.org/>>. According to the web site, as of August 9, 2007, Ohio is listed having joined the Registry, along with all other states except Alaska, Texas, Louisiana, Mississippi, Arkansas, North Dakota, South Dakota, Nebraska, Kentucky, Indiana, and West Virginia. The Ohio contact listed on the site is the Director of Ohio EPA. The state's listing currently enables a utility's voluntary participation in the Registry.

[11] "Cost" means the cost of acquisition and construction, the cost of acquisition of all land, rights-of-way, property rights, easements, franchise rights, and interests required for such acquisition and construction, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, the cost of acquiring or constructing and equipping a principal OAQDA office and sub-offices, the cost of diverting highways, interchange of highways, and access roads to private property, including the cost of land or easements for such access roads, the cost of public utility and common carrier relocation or duplication, the cost of all machinery, furnishings, and equipment, financing charges, interest prior to and during construction and for no more than 18 months after completion of construction, engineering, expenses of research and development, the cost of any commodity contract, including related fees and expenses, legal expenses, plans, specifications, surveys, studies, cost and revenue estimates, working capital, other expenses necessary or incident to determining the feasibility or practicability of acquiring or constructing a project, administrative expense, and such other expense as may be necessary or incident to the acquisition or construction of the project, the financing of such acquisition or construction, including the amount authorized in the OAQDA bond resolution, the financing of the placing of such project in operation, and any obligation, cost, or expense incurred by any governmental agency or person for surveys, borings, preparation of plans and specifications, and other engineering services, or any other cost described above (R.C. 3706.01 (I)).

[12] That is, methods, modifications, or replacements that remove, reduce, prevent, contain, alter, convey, store, disperse, or dispose of particulate matter, dust, fumes, gas, mist, smoke, noise, vapor, heat, radioactivity, radiation, or odorous substances, or substances containing those contaminants, or that render them less noxious or reduce their concentration in the air (R.C. 3706.01(C) and (G)).

[13] This project is a coal-fueled, zero-emissions power plant designed to prove the feasibility of producing electricity and hydrogen from coal and nearly eliminating carbon dioxide emissions through capture and permanent storage. The future site of the project has been narrowed by the U.S. Department of Energy to Texas or Illinois.

[14] This apparently intends that OAQDA lead, encourage, promote, and support siting of such facilities before the Power Siting Board, if the facilities qualify as major utility facilities under power siting law.



*Bill Analysis**Legislative Service Commission***Sub. S.B. 221**127th General Assembly
(As Passed by the Senate)**Sens. Schuler (By request), Jacobson, Harris, Fedor, Boccieri, R. Miller, Morano, Mumper, Niehaus, Padgett, Roberts, Wilson, Spada**

BILL SUMMARY

- Focuses on two main subject areas: electricity prices and electricity sources.

On pricing:

- Preserves the right of customer choice enacted by S.B. 3 of the 123rd General Assembly; as to generation service, generally extends the life of the utilities' current rate plans beyond their scheduled expiration; and allows future, cost-related adjustments to generation prices.
- Also grants the Public Utilities Commission (PUCO) the authority to regulate electric utilities under the traditional regulatory approach that applied to them before S.B. 3.
- Revises and adds to the current objectives of state electric services policy enacted under S.B. 3.
- Retains the general standard service offer (SSO) requirement for electric distribution utilities.
- Declares that, as of January 1, 2009 (2011 for Dayton Power & Light), a utility's SSO price:

--As to each customer with a (bilateral or other) contract with a utility approved by the PUCO before October 28, 2007, will consist of that contract price, exclusive of its transmission and distribution service components;

--As to each of its customer classes, will consist of the total charges--exclusive of charges for transmission and distribution services--that are payable by customers on February 1, 2008 (2010 for DP&L) under the utility's current SSO rate plan and, further, is subject to (1) any price adjustments for costs incurred

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by the utility and authorized under its existing rate plan for implementation on or after that February 1, but before the following January 1, and (2) to the extent they are not included in those total charges or price adjustments, any price adjustments for deferred costs authorized by PUCO order.

- Authorizes a distribution utility to apply for a modified SSO consisting of either an "electric security plan" (ESP) or a "market rate option" (MRO).
- Provides that, under an ESP, a utility's SSO price can change relative to changes in the baseline measure of any one or more costs incurred by it to serve jurisdictional load in Ohio, excluding certain costs related to environmental law violations.
- Allows an ESP to provide for automatic SSO price adjustments for certain enumerated costs and requires consistency with traditional rate-making law if the costs concern construction of a new generating facility or major environmental retrofit.
- Requires that any adjustment for a particular cost in a utility's ESP application be determined using a baseline measure of cost.
- Requires that, other than in a utility's initial application, that baseline must be the cost, and the associated kilowatt-hours sold, as determined under the utility's then-existing approved plan and that, regarding a new generating facility or major environmental retrofit, associated decreases in cost and changes in kilowatt-hours sold must include any retirement of all or part of any other generating facility, the cost of which had been included in the utility's rate base prior to the bill's effective date or was included in a prior ESP.
- Authorizes the PUCO to specify in an ESP any alternate standard, factors, or methodology that it must use, within a timeframe the PUCO specifies, to approve a MRO for the utility if it later files an application for that approval.
- Requires open, competitive bidding for generation supply under a MRO.
- Prohibits an electric utility selling or transferring any generating facility it owns in whole or in part to any person without prior PUCO approval.
- Requires an electric distribution utility with a PUCO-approved ESP to file an energy delivery infrastructure modernization plan or any plan providing for the utility's recovery of costs and a just and reasonable rate of return on such modernization.

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- Adds to current law regarding line extensions a provision requiring the PUCO to consider rules regarding distribution costs, including line extensions, in carrying out the state electric policy.
- Requires the PUCO to employ a Federal Energy Advocate and requires the Advocate to examine the value of the participation of Ohio electric utilities in regional transmission organizations and submit a report to the PUCO.
- Requires that the Advocate monitor Federal Energy Regulatory Commission and other federal agencies and advocate on behalf of Ohio retail electric service consumers at the federal level.

On energy sources:

- Requires an electric distribution utility by the end of 2025 to supply a portion of its SSO supply from advanced energy, in the amount of 25% of the number of kilowatt-hours it supplies in its certified distribution territory, and subject to other requirements including regarding the use of sustainable resources and regarding the location of the facility.
- Requires the PUCO to establish energy efficiency standards relating to the actual load growths and peak demands of electric distribution utilities and authorizes rules providing for revenue decoupling.
- Requires the PUCO to establish carbon control planning requirements for generating facilities and to establish greenhouse gas emission reporting requirements.
- Adds the following to the types of air quality projects that can be funded by the Ohio Air Quality Development Authority (OAQDA) and declares that both qualify as air and thermal pollution facilities under Section 13, Article VIII, Ohio Constitution: property, devices, or equipment used in the manufacture and production of any equipment that qualifies as an air quality project; and property, devices, or equipment that reduce air contaminant emissions through the generation of electricity using sustainable resources.
- In the manner of its current authority to fund air quality projects, authorizes OAQDA to issue revenue bonds to fund specified types of advanced energy projects and declares that such projects qualify as air and thermal pollution control facilities under the Ohio Constitution.
- Grants OAQDA authority regarding programs to achieve best cost rates for state-owned buildings, facilities, and operations, state-supported colleges and

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universities, willing local governments, and willing school districts through pooled purchases of electricity and the financing of taxable or tax-exempt prepayment of commodities; and regarding programs to achieve optimal cost electricity for key industrial and energy-intensive sectors.

- Grants OAQDA authority regarding programs to achieve optimal cost financing for new electric generating facilities and regarding the siting, financing, construction, operation, and risk reduction for next-generation base load generating systems, including clean coal facilities with carbon capture or sequestration or advanced nuclear power plants.
 - Grants OAQDA authority regarding energy efficiency incentives, sustainable resource energy installations, and research and development regarding sustainable energy.
 - Requires the Department of Natural Resources, the Ohio Environmental Protection Agency, and the PUCO jointly by rule to develop an interim policy framework for regulating pilot and demonstration, carbon sequestration activities in Ohio or sequestration products produced in Ohio.
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CONTENT AND OPERATION

Overview

The bill focuses on two main subject areas: electricity prices and electricity sources.

Regarding pricing, the bill focuses on the policy and process under which the electricity prices of Ohio's seven incumbent operating utilities^[1] will be established after the scheduled expiration of the current rate plans under which they serve Ohio's retail electric market (December 31, 2010, for Dayton Power & Light; all others, the end of 2008). In brief, the bill preserves the right of customer choice enacted by the electric law of S.B. 3 of the 123rd General Assembly, extends the life of the utilities' current rate plans beyond their scheduled expiration, and allows future, cost-related adjustments to generation prices. However, if necessary, the PUCO can also regulate electric utilities under the traditional regulatory approach that applied to them before S.B. 3. The bill also repeals transitional (2001-2005) provisions of S.B. 3 that are obsolete.^[2] However, it retains the competitive market provisions of that law, so it apparently does not intend that any such return to

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traditional regulation would reinstate the exclusive generation supplier status that existed for those utilities before S.B. 3.

The bill's pricing provisions do not focus only on generation service but also contain a provision regarding long-term planning for distribution system modernization and related cost recovery. It also requires a PUCO staff report on the value of utility participation in regional transmission organizations.

Regarding energy sources, the bill prohibits future utility divestitures of electric generating facilities without prior PUCO approval; grants authority for state-issued revenue bonds to finance advanced energy projects; provides for a 2025, advanced energy portfolio requirement for electric utilities and 2025 load growth and peak demand energy efficiency standards for electric utilities; requires a greenhouse gas emissions reporting system and requires carbon control planning for generating facilities; and provides for the development of an interim policy framework for regulating carbon sequestration in Ohio.

I. Electricity prices

Return to pre-S.B. 3 regulation

(R.C. 4905.31 and 4928.05(A)(1))

By way of background, S.B. 3 in effect repealed "traditional regulation" of electric generation service and declared that the price of generation service would be competitively market-determined starting January 1, 2001. Incumbent electric utilities no longer had state-established, exclusive service territories for generation service.^[3] Other suppliers of generation service ("electric services companies," meaning generally, power marketers, power brokers, and aggregators) could compete to supply electricity to transmission/distribution customers of the incumbent utilities at each customer's option.^[4] Too, incumbent electric utilities were free to vie for each other's generation customers.

To effect that competitive market, S.B. 3 generally revoked PUCO authority to regulate generation service under public utility law (R.C. Chapters 4901. to 4909., 4933., 4935., and 4963.) except as to service reliability and public safety and except as to standard service offers (SSOs) (see "Price regulation," below).

The bill allows the PUCO to decide to reinstate traditional regulation^[5] of generation service (see COMMENT 1). The standard by which the PUCO could do so under the bill is that it finds that traditional regulation is necessary to implement the statutory electric services policy described next below.

What does it mean to return to "traditional regulation"? In brief, traditional regulation addresses all facets of utility operation that affect the provision of utility services, for example, utility stock and bond issuance, mergers and acquisitions, and, of course, service pricing. Under its duty to balance the interests of utilities and consumers, the PUCO determines a utility's "revenue requirement"--the amount of revenue a utility needs to cover

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all its operating costs and earn a rate of return on its overall plant investment. Largely based on consumption data and subject to PUCO approval, the utility then sets its rates so that they will provide it the opportunity to earn that revenue target.

This traditional ratemaking uses a snapshot method of identifying operating costs and plant investment so that, by statute, their calculation is contemporary to the time period for which rates are being determined. In general, any time a utility desires to change its rates because of any change in cost or investment, it has to file a "base rate case" with the PUCO, in which not the specific change, but all the asset, cost, revenue, and expense elements comprising a utility's rates are evaluated anew based on contemporary information.

Additional notable aspects of traditional regulation (which further relate to pricing under "Energy security plan," below) are that the basis for valuating utility assets and the basis for determining a utility's operating costs for rate-making purposes are specified in statute. For instance, under traditional regulation valuation must be done on an original cost basis,^[6] for facilities "used and useful" in rendering service, and using books and records maintained by the utility in accordance with a uniform system of accounts specified by the PUCO (R.C. 4905.13, 4909.05(C), and 4909.15(A)). Further, the rate-making process of traditional regulation generally requires the filing of a base rate case application under a statute (R.C. 4909.18) that prescribes certain hearing and other requirements.

State electric services policy

(R.C. 4928.02)

The bill revises and adds to the current objectives of the state electric services policy enacted under S.B. 3. Among other reasons relating to how the electric law is implemented, the state policy is significant because, under the bill, it is integral to the criterion on which the PUCO can decide to return to pre-S.B. 3 regulation and because "consistency with" the policy is a criterion the bill requires the PUCO to weigh when approving generation prices other than under traditional regulation.

Under both current law and the bill, the statutory electric policy applies statewide, and the PUCO is required to ensure that the policy is effectuated (R.C. 4928.06(A), not in the bill).

The current policy objectives, which have their genesis in S.B. 3's competitive generation market concept, are as follows: (1) ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service, (2) 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, (3) ensure diversity of electricity supplies and suppliers, by giving consumers effective choice of supplies and suppliers and by encouraging the development of distributed and small generation facilities, (4) encourage innovation and market access for cost-effective supply- and demand-side retail electric service, (5) encourage cost-effective and efficient access to information regarding the operation of the

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transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service, (6) recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment, (7) 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, (8) ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power, and (9) facilitate the state's effectiveness in the global economy.

The bill changes these policy objectives by adding seven new objectives and modifying three of the current objectives. Specifically, objective (4) above is changed to read: "encourage innovation and market access for *cost-effective retail electric service, including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.*"

Objective (5) above is changed to read: "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.*"

Objective (8) above is changed to read: "ensure retail electric service consumers *just and reasonable rates and* protection against unreasonable sales practices, market deficiencies, and market power."

The following new objectives are added to the state electric services policy: (1) 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, (2) preclude imbalances in knowledge and expertise among parties in a proceeding under the electric law to eliminate any appearance of disproportionate influence by any of those parties, (3) ensure that consumers and shareholders share the benefits of electric utility investment in facilities supplying retail electric generation service, (4) provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates, (5) protect at-risk populations when considering the implementation of any new advanced energy technology, (6) encourage implementation of distributed generation across customer classes through regular review and updating of rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering, and (7) encourage the education of small business owners in Ohio regarding the use of energy efficiency programs and advanced energy technologies in their businesses and encourage that use.

Price regulation

(R.C. 4928.14 and 4928.141)

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Under S.B. 3, beginning generally in 2006 and currently, an electric utility's only duty regarding generation service is to provide a SSO that assures the availability of a firm supply of electricity to (1) any of its distribution customers that have never chosen an alternate generation supplier and (2) any customers that did choose but returned, if only briefly, to the utility, including because their supplier defaulted on its contract.^[7] In general, for various reasons, the standard service offer of each incumbent utility over time has become, instead of an "essential service, fall-back" offer, *the* generation service offer for most of its distribution customers.

Current law enacted under S.B. 3 contemplates that a utility's standard service offer generation price will be "market-based." Alternately, it can be determined by competitive bidding, but not if the PUCO determines "at any time that a competitive bidding process is not required [because] other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed."

Generally, since the time S.B. 3's SSO requirement took effect, the incumbent utilities have operated under various SSOs that were developed by settlement among parties. These SSOs are typically referred to as "rate stabilization plans." Rate stabilization is an utility/PUCO-generated concept described as responding to an assessment that there is no effective competition in the electric generation market. The general nature of the utilities' rate stabilization plans is that they preserve generation prices at existing levels^[8] but allow for price adjustments in relation to certain costs or under certain circumstances.

2009 (2011) SSOs

The bill retains the general standard service offer requirement for electric utilities. It declares that, as of January 1, 2009 (2011 for DP&L), as to each customer with a (bilateral or other) contract with a utility approved by the PUCO before October 28, 2007, a utility's SSO will consist of that contract price, exclusive of its transmission and distribution service components.

Also, as of that January 1, a utility's SSO, as to each of its customer classes, will consist of the total charges--exclusive of charges for transmission and distribution services--that are payable by customers on February 1, 2008 (2010 for DP&L) under the utility's current SSO rate plan and, further, that are subject to (1) any price adjustments for costs incurred by the utility and authorized under its existing rate plan for implementation on or after that February 1, but before the following January 1, and (2) to the extent they are not included in those total charges or price adjustments, any price adjustments for deferred costs authorized by PUCO order. (One effect of this provision is that any current rate stabilization charge^[9] of a utility scheduled to expire under its current rate plan will continue.)

Later SSOs

Relative to its plan to take effect in 2009, the bill allows any utility to seek approval of a new SSO, in the form of either an "electric security plan" or a "market rate option." Such an ESP or MRO will take effect on the date the PUCO specifies in its approval order and supersedes the utility's prior SSO.

The bill expressly states that it does not preclude a utility for which an ESP has been approved under the bill from later filing an application for a MRO or vice versa; and that the PUCO has no authority to require a utility for which it has ever approved a MRO, to file an application for an ESP. Additionally, the bill does not limit a utility competing for generation customers in the certified distribution service territory of another utility.

The bill requires the PUCO to adopt rules governing the filing requirements for an application for a new SSO. Upon that filing, the PUCO must set the date and time for hearing, send written notice of the hearing to the utility, and publish notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application.

Additionally, the bill contains a contract discovery provision. Specifically, subject to such protection for proprietary or confidential information as is determined appropriate by the PUCO, a utility must make available to any party to an ESP or MRO proceeding that submits an appropriate discovery request every contract or agreement that is relevant to the proceeding and is between the utility, or any of its affiliates, and a consumer, electric services company, political subdivision, or any party to the proceeding.

Electric security plans

Terms and conditions. Under an ESP, a utility's generation prices will change relative to changes in one or more costs specified in the utility's application and incurred by it to serve jurisdictional load in Ohio.

Under the bill, if the utility has entered into a contract or agreement with an affiliate for the provision of a competitive retail electric service, the PUCO must treat the affiliate's costs of providing that service as a cost of the utility under the ESP.

Any allowable adjustment under an ESP for a change in a capitalized cost must include a just and reasonable return on that cost.

Additionally, the amount of any price adjustment must be offset by any decrease in costs and change in kilowatt-hours sold that are associated with serving Ohio jurisdictional load, excluding a decrease that would have occurred pursuant to the scheduled expiration of a regulatory transition charge^[10] charged by a utility. (Specifically, the bill excludes any reductions in amortization relating to costs recovered through a regulatory transition charge authorized by the PUCO as of February 1, 2008.) Thus, under an ESP, consumer rates will continue to include an amount relating to regulatory asset costs pertinent to S.B. 3.

Excluded as allowable costs under an ESP are any financial penalties, fines, court costs, and attorney's fees associated with violations of or noncompliances with federal or any

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state's environmental laws or with facilities' permits. Otherwise, any cost incurred by a utility to serve jurisdictional load in Ohio is allowable under an ESP. The bill enumerates certain of those costs, but an ESP is not limited to only those costs.

The enumerated costs are (1) environmental compliance costs for one or more specified generating facilities, (2) the cost of fuel for one or more specified generating facilities or the cost of purchased power (3) operating, maintenance, and other costs, including taxes, (4) costs of investment in one or more specified generating facilities, and (5) costs of providing standby and default service pursuant to electric law (specifically, R.C. 4928.14(A) and relettered (H)). An ESP that includes any of those costs can provide for automatic increases or decreases in the SSO price, but, in the case of a cost under (3), only if the cost was outside of the utility's control or responsibility.

In addition, costs in an ESP expressly can include (6) the cost of construction, in excess of \$250 million, of an environmental retrofit to a specified, then-existing generating facility and (7) the cost of construction of one or more new, specified generating facilities that, superseding Power Siting Board authority under R.C. Chapter 4906., the PUCO determines and certifies the need for as to the SSO on the basis of resource planning projections developed in accordance with policies and procedures the PUCO must prescribe by rule (see **COMMENT 2**). Under the bill, then, the presumption of need that otherwise would apply under power siting law (R.C. 4906.10(A)(1)) to a generating facility does not apply to a facility described in (7).

In the case of a price adjustment for a cost described in (6) and (7), the bill requires that the adjustment be consistent with the rate-making formula and standards of continuing R.C. 4909.15 and consistent with procedures that ordinarily apply to a base rate case under R.C. 4909.18 "as [those procedures may be] applicable." Additionally, subject to such terms and conditions as the PUCO prescribes in its order approving the ESP, a price adjustment under (6) or (7) must be for the actual life of the facility.

If the costs of an advanced energy technology or facility implemented under the bill (see "Advanced energy," below) are included in the ESP, the portion of the SSO price attributable to those costs are not payable by any consumer that has exercised choice of supplier under continuing law (R.C. 4928.03), but only "to the extent" the PUCO determines that the advanced energy technology or facilities implemented by that supplier are comparable to that implemented by the utility under the bill at the time of the issuance of an ESP approval order. (That means that, if the PUCO determines that the supplier's advanced energy portfolio is only partially comparable to the utility's, a proportional amount of the part of the SSO price attributable to the utility's advanced energy costs included in the ESP will be payable.)

The bill requires that any adjustment for a particular cost in a utility's initial ESP application be determined using a baseline measure of cost as of February 1 of the year in which the utility's existing rate plan will expire (2008 or 2010, as applicable).

If a utility continues to provide its SSO pursuant to an ESP, for any later such application by the utility, the baseline measure must be the cost, and the associated kilowatt-hours sold, as determined under the utility's then-existing approved plan. With regard to a generating facility described in (6) and (7) above, associated decreases in cost and changes in kilowatt-hours sold must include, but are not limited to, retirement of all or part of any other generating facility, the cost of which had been included in the utility's rate base prior to the bill's effective date or was included in an ESP as a cost described in (4), (6), or (7) above (see COMMENT 3).

Aside from price adjustments, the bill additionally authorizes the PUCO to specify in an ESP any alternate standard, factors, or methodology that it must use, within the timeframe the PUCO specifies, to approve a MRO for the utility if it later files an application for that approval (see "Market rate option," below).

ESP approval. The bill allows the PUCO, when deciding upon an application for an ESP filed by a utility that transferred all or part of its generating facilities to an affiliate of the utility, and to the extent authorized by federal law, to consider purchased power or other contracts or agreements between the utility and its affiliates or between the utility and the holding company that owns or controls the utility.

Under the bill, the burden of proof regarding an ESP application is on the utility. The PUCO must find both of the following to approve, or modify and approve, an ESP: (1) the plan and prices it establishes are just and reasonable as to each customer class and are consistent with the state electric policy and (2) the utility is in compliance with the contract discovery provision mentioned earlier in this analysis.

In its approval order, the PUCO must prescribe such requirements necessary for the utility to implement "applicable" objectives of the state policy. The order also can provide a schedule and the procedural and substantive terms and conditions for periodic PUCO review of the ESP.

Market rate option

Terms and conditions. The bill states that, under a MRO, a utility's SSO price must be determined periodically through an open, competitive bidding process. Prior to the approval of the MRO, the utility must conduct such competitive bidding to establish the original price under the MRO.

MRO approval. As with an ESP, the burden of proof in a MRO proceeding is on the utility. The PUCO by order must approve, or modify and approve, the MRO if it determines all of the following are met: (1) the MRO and its prices are just and reasonable as to each customer class and are consistent with the state electric policy and (2) the utility is in compliance with the contract discovery provision of the bill.

Aside from those two standards, which also apply to ESP approval, the PUCO must determine for a MRO that (3) with respect to generation service, the relevant markets are subject to effective competition. For that purpose and unless the PUCO already established

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an effective competition standard, factors, or methodology in an earlier ESP for that utility as allowed under the bill, the PUCO must consider the factors prescribed in continuing electric law^[11] and such other or additional factors as it can prescribe by rule. It also must prescribe by rule the methodology it will use to evaluate whether the effective competition standard is met.

In addition, for a MRO, the PUCO must determine that (4) the MRO price for a customer class as determined under the original competitive bidding is more favorable than, or at least comparable to, its price-to-compare for that class. That price-to-compare is a PUCO-determined price that is for the comparable time period and is established "in the manner of an [ESP]."

As with an ESP order, a MRO approval order must prescribe such requirements as are necessary for the utility to implement applicable objectives of the state electric policy. The order can provide the procedural and substantive terms and conditions for periodic PUCO review of the MRO. That review must provide for the reconciliation of the standard service offer price to ensure that the price is just and reasonable as to each customer class and consistent with the state policy.

Distribution system modernization; line extensions

(R.C. 4928.02 and 4928.111)

The bill requires an electric utility with a PUCO-approved ESP to file with the PUCO a "long-term energy delivery infrastructure modernization plan or any plan providing for the utility's recovery of costs and a just and reasonable rate of return on such infrastructure modernization." The plan must specify the initiatives the utility must take to improve electric service reliability by rebuilding, upgrading, or replacing the utility's distribution system. The plan must be filed as an application under the traditional ratemaking law (R.C. 4909.18) and therefore subject to any hearing and other requirements to the extent they would apply under that law.

The bill also contains a provision requiring the PUCO, in carrying out the state electric policy, to "consider rules as they apply to the costs of distribution infrastructure, including, but not limited to, lines extensions for the purpose of development" in Ohio. Under continuing law, a utility's filed distribution rates must "include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the [PUCO]" (R.C. 4928.15(A)).

RTO participation; consumer advocate

(R.C. 4928.68)

The bill requires the PUCO to employ a federal energy advocate. The bill requires that person to examine the value of the participation of Ohio electric utilities in regional

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transmission organizations^[12] and submit a report to the PUCO on whether continued participation of those utilities is in the interest of retail electric consumers.

Additionally under the bill, the PUCO employee must monitor the activities of the Federal Energy Regulatory Commission and other federal agencies and, represented by the Attorney General, must advocate on behalf of the interests of Ohio retail electric service consumers. Currently, there is one, state-level entity that functions as a consumer advocate: the Ohio Consumers' Counsel, who advocates on both the state and federal levels, on behalf of the residential consumers of electric, gas, natural gas, and certain other public utilities (R.C. Chapter 4911.). The PUCO itself often is a party to federal proceedings.

Governmental aggregation

(R.C. 4928.20 and 4928.21)

Current law authorizes the electric load of electric customers to be aggregated for the purpose of purchasing retail electric generation (R.C. 4928.03). Aggregators performing that function include governmental aggregators, specifically, municipalities, townships, and counties that can aggregate the electric load of customers within their respective jurisdictions. Current law establishes various requirements for and limitations on a governmental aggregation, including, for instance, a popular vote on the question of whether the local government can aggregate load without first obtaining the individual permission of each customer.

The bill changes current law's limitation that, in the case of such an "automatic" governmental aggregation, the local government must allow any person that is so enrolled in the aggregation an opportunity to opt out of the aggregation every *two* years, without paying a switching fee. Under the bill, a customer can opt-out *up to every four years* without paying a switching fee.

II. Energy sources

Divestiture policy

(R.C. 4928.17(E))

Current law enacted by S.B. 3 authorizes an electric utility to divest itself of any generating asset without prior PUCO approval. The bill prohibits an electric utility selling or transferring any generating facility it owns in whole or in part to any person without prior PUCO approval. (Prior to S.B. 3, an electric utility, like any other public utility, was subject to policy and a process regarding such prior PUCO approval under R.C. 4905.48 (not in the bill). PUCO approval authority under the bill does not reference that statute.)

Advanced energy portfolio

(R.C. 4928.142)

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Advanced energy requirement

The bill requires that, by the end of 2025, each electric distribution utility must comply with the bill's requirement for advanced energy in its SSO supply portfolio. An effect of the bill is that it allows the utility to decide the manner and timing of its compliance with that requirement. The requisite amount of advanced energy for each utility is 25% of the total number of kilowatt-hours of electricity the utility supplies to any and all electric consumers whose electric load centers are located in its certified distribution service territory. The bill expressly states that it does not preclude a utility from providing a greater percentage.

In fulfilling the 25% requirement, the utility must comply with the following standards: (1) at least 50% of the advanced energy it implements by the end of 2025 must be generated from sustainable resources and must include solar power, and the remainder must be supplied from advanced energy facilities, (2) at least 50% of the advanced energy it implements by the end of 2025 must be met through facilities located in Ohio, (3) the utility must comply with the advanced energy requirement in a manner that considers available technology, costs, job creation, and economic impacts, and (4) to be counted as an advanced energy technology or facility, its on-site construction must be initiated after the bill's effective date. (The effect of (4) is to allow current advanced energy technology or facilities that are not yet in their on-site construction phase to be counted toward the 2025 standard.) Once counted, a particular technology or facility remains counted for purposes of the utility's compliance with the bill's advanced energy requirement.

The bill defines "sustainable resources" as including, but not limited to, solar; wind, tidal or wave; biomass, including, but not limited to, biomass involving the use of tree parts; landfill gas; biofuel; hydro; or geothermal resources that are used in the generation of electricity.

The bill also defines "sustainable resources" as including fuel cells powered by those resources. As noted in (4) below, fuel cells used to generate electricity also count as "advanced energy facilities" under the bill. (Apparently, the same fuel cell powered by sustainable resources could then be counted twice, for purpose of compliance with both the sustainable resources and advanced energy requirements of the bill.)

The bill defines "advanced energy facilities" as consisting of methods or any modifications or replacements of any property, processes, devices, structures, or equipment that meet any of the following: (1) regarding clean coal technology, technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion, (2) regarding advanced nuclear energy production, generation III technology as defined by the Nuclear Regulatory Commission, other later technology, or "significant improvements to existing facilities," (3) fuel cells used to generate electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric

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acid fuel cell, molten carbonate fuel cell, or solid fuel cell, (4) regarding cogeneration technology, technology using a heat engine or power station to generate electricity and useful heat simultaneously. Under the bill, "advanced energy facility" further includes any property or system to be used in whole or in part for any of the purposes in (1) to (4) above, whether another purpose also is served, and any property or system incidental to or that has to do with, or the end purpose of which is, any of the foregoing.

PUCO strategy; advisory committee

The bill requires the PUCO to submit to the General Assembly an annual report describing the compliance of electric distribution utilities with the bill's advanced energy requirement and describing any interim goals or strategy for utility compliance or for encouraging the use of advanced energy in supplying Ohio's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts. The PUCO must allow and consider public comments on the report before submitting it. The bill expressly states that nothing in the report binds any person, including any utility for the purpose of its compliance with the advanced energy requirement or the purpose of enforcing that requirement.

The bill additionally requires the Governor to appoint an advanced energy advisory committee in consultation with the chair of the PUCO. The committee is charged with examining available technology for and related timetables, goals, and costs of the bill's advanced energy requirement and semiannually submitting a report of its recommendations to the PUCO.

Enforcement and exception to compliance

Under the bill, if the PUCO determines, after notice and hearing, that the utility has failed to comply with the 2025-25% requirement, it must issue an order requiring the utility to comply fully within such time as must be specified in the order. The order must specify the process and schedule for later verifying the utility's compliance to the PUCO.

However, the PUCO's authority to order a utility's full compliance is subject to a price limitation: under the bill, the PUCO cannot require full compliance "to the extent that" the ratio between the blended advanced energy and nonadvanced energy price in 2025 and the portion of that price attributable to nonadvanced energy exceeds 1.03. (In other words, full compliance cannot be required if the utility's overall standard service price in 2025 would rise by more than 3% if the utility were made to fully comply with the 2025-25% requirement; and the PUCO could require something less than full compliance, up "to the extent that" that price effect would not occur.)

Regarding financial penalties for noncompliance, the bill authorizes the PUCO to pursue mandamus, injunction, or other civil remedies against a utility to compel its compliance with a compliance order under the bill or with an order in a later proceeding in which it determines the utility has failed to comply with the compliance order. The bill also authorizes the PUCO to assess forfeitures. The maximum amount of the forfeiture is \$10,000 per day per noncompliance. (R.C. 4928.16(B)(2), referencing R.C. 4905.54 *et seq.*) (That
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amount is the same as that which applies to a public utility under traditional regulation and can otherwise apply to an electric distribution utility for violations of or noncompliances with electric law under R.C. Chapter 4928.) Under continuing law, such forfeitures are deposited to the credit of the general revenue fund (R.C. 113.09).

Energy efficiency standards

(R.C. 4928.64)

The bill requires the PUCO to establish by rule energy efficiency standards applicable to electric distribution utilities. Under the rules, a utility must implement energy efficiency measures that will result in not less than 25% of actual growth in its electric load and not less than 10% of its total peak demand being achieved through those measures by 2025. The rules must include a requirement that an electric distribution utility provide a customer upon request with two years of consumption data in an accessible form.

Additionally, the rules may provide for "decoupling." (Although not further described in the bill, this term generally refers to a policy that detaches utility earnings from amount of commodity sold.)

Greenhouse gas emissions, carbon control

(R.C. 4928.69)

The bill requires the PUCO to adopt rules establishing greenhouse gas^[13] emission reporting requirements (see **COMMENT 4**). The rules must include participation in the Climate Registry. The Registry's web site describes the Registry as "a collaboration between states, provinces, and tribes aimed at developing and managing a common greenhouse gas emissions reporting system with high integrity that is capable of supporting various greenhouse gas emissions reporting and reduction policies for its member states and tribes and reporting entities."^[14]

The bill also requires the PUCO to adopt rules establishing carbon control planning requirements for each electric generating facility located in Ohio that emits greenhouse gases, including facilities in operation on the bill's effective date.

Carbon sequestration

(R.C. 1551.41)

The bill requires the Department of Natural Resources, the Ohio Environmental Protection Agency, and the PUCO, jointly by rule, to develop an interim policy framework for supervision and regulation by the agencies of pilot and demonstration, carbon sequestration activities located in Ohio and sequestration products produced in Ohio.

State revenue bonds

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(R.C. 122.41, 122.451, 3706.01 through 3706.18, and 4905.40)

Current law authorizes the Ohio Air Quality Development Authority (OAQDA) to issue revenue bonds and notes, the proceeds of which can be used to fund the cost^[15] of air quality projects. Funding can come in the form of an OAQDA loan or grant or can otherwise be paid from bond proceeds.

OAQDA's financing authority is granted in relation to the enactment of Section 13, Article VIII, Ohio Constitution (referenced in R.C. 3706.01(G) and 3706.03(A)). That constitutional provision empowers state government to lend the state's aid and credit to private entities (by issuing of debt backed by revenues other than tax revenues) for the express purposes of controlling air, water, and thermal pollution or disposing of solid waste. But the constitutional provision also includes a prohibition that,

except for facilities for pollution control or solid waste disposal, as determined by law, no guarantees or loans and no lending of aid or credit shall be made [by statute or otherwise] for facilities to be constructed for the purpose of providing electric or gas utility service to the public.

The bill adds to the types of air quality projects that can be funded by the OAQDA. It also gives OAQDA new, identical, statutory authority to issue revenue bonds for advanced energy projects. The latter also involves extending to advanced energy projects two existing statutory provisions relating to a Department of Development mortgage insurance program for air quality, wastewater, or solid wastes projects.

The bill additionally expressly denies OAQDA the authority to build, own, or operate an air quality facility or advanced energy facility, except as may be required to effect a facility's financing.

Air quality projects

Projects currently eligible for OAQDA funding are, in brief: (1) methods, or modifications or replacements of property, processes, devices, structures, or equipment, directed at air contaminants,^[16] (2) property used for collecting, storing, treating, using, processing, or disposing of a by-product or solid waste resulting from a project described in (1), (3) motor vehicle inspection stations and station equipment, (4) ethanol or other biofuel facilities and facility equipment, (5) property, devices, or equipment that reduce emissions of air contaminants through improvements in energy efficiency or energy conservation, (6) research and development projects under the Ohio Coal Development Office, (7) property used for collecting, storing, treating, using, processing, or disposing of a by-product or solid waste resulting from a project described in (6) or from the use of clean coal technology, excluding property used primarily for other subsequent commercial purposes, (8) property that is part of the FutureGen project^[17] or related to its siting, and (9) property or any system to be used for any of the purposes described in (1) to (8), whether another purpose is also

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served, and any property or system incidental to or that has to do with, or the end purpose of which is, any of (1) to (8) above.

The bill makes the following newly eligible as "air quality projects" and also expands (9) above to include these new types of projects: (1) property, devices, or equipment necessary for the manufacture and production of any equipment that qualifies as an air quality project, and (2) property, devices, or equipment that reduce air contaminant emissions through the generation of electricity using sustainable resources. The bill declares that both of these new types of air quality projects qualify as facilities for the control of air pollution and thermal pollution related to air under Section 13, Article VIII, Ohio Constitution (R.C. 3706.01(G)). "Sustainable resources" under the bill include, but are not limited to, solar, wind, tidal or wave, biomass, including, biomass involving the use of tree parts, biofuel, hydro, or geothermal resources; and include fuel cells powered by sustainable resources.

Advanced energy projects

OAQDA authority to fund advanced energy projects under the bill, and the statutory requirements for bonds and all other funding details, mirror those of existing law as to air quality projects. Similar to the law regarding air quality projects, the bill declares that advanced energy projects for industry, commerce, distribution, or research, including public utility companies, qualify as facilities for the control of air pollution and thermal pollution related to air under Section 13, Article VIII, Ohio Constitution (R.C. 3706.03(A)). This declaration is subject to the limitation within that constitutional provision, as noted above.

Under the bill, "advanced energy projects" consist of methods or of modifications or replacements of property, processes, devices, structures, or equipment, regarding any of the following: (1) for clean coal technology, technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the PUCO must adopt by rule and must be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion, (2) for advanced nuclear energy production, generation III technology as defined by the Nuclear Regulatory Commission, other later technology, or "significant improvements to existing facilities," (3) electric generating fuel cells including, but not limited to, proton exchange membrane fuel cells, phosphoric acid fuel cells, molten carbonate fuel cells, or solid fuel cells, and (4) cogeneration technology using a heat engine or power station to generate electricity and useful heat simultaneously. An advanced energy project also includes any property or system to be used in whole or in part for (1) to (4) above, whether another purpose also is served, and any property or system incidental to or that has to do with, or the end purpose of which is, any of (1) to (4).

Additional OAQDA authority

(R.C. 3706.04)

Current law lists a number of general powers of the OAQDA with respect to air quality projects, including, for example, adopting an official OAQDA seal, making loans and

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grants, acquiring or constructing property, engaging in certain competitive bidding, and receiving federal funds. The bill extends those same powers with respect to advanced energy projects funded by OAQDA.

Further, the bill establishes additional OAQDA authority. The bill authorizes OAQDA to develop, encourage, promote, support, and implement programs to achieve best cost rates for state-owned buildings, facilities, and operations, state-supported colleges and universities, willing local governments, and willing school districts through pooled purchases of electricity and the financing of taxable or tax-exempt prepayment of commodities. OAQDA additionally may develop, encourage, promote, support, and implement programs to attract and retain key industrial and energy-intensive sectors of Ohio's economy.

The bill also empowers OAQDA to develop, encourage, promote, support, and implement programs to achieve optimal cost financing for electric generating facilities to be constructed on or after January 1, 2009. And, it empowers OAQDA to lead, encourage, promote, and support siting,^[18] financing, construction, and operation for, and reduce the costs of associated risks of, early implementations of next-generation base load generating systems, including clean coal generating facilities with carbon capture or sequestration or advanced nuclear power plants.

Additional authority is granted for OAQDA to develop, encourage, and provide incentives for investments in energy efficiency; develop, encourage, promote, and support implementation in Ohio of sustainable resource energy installations; and engage in and coordinate state-supported energy research and development with respect to reliable, affordable, and sustainable energy in Ohio.

The bill does not address funding for the additional OAQDA authority it confers.

COMMENT

1. The bill is not clear as to whether PUCO authority to institute traditional regulation of generation service also includes authority to go back and forth between that regulatory approach and the framework otherwise established under R.C. Chapter 4928.

2. The bill authorizes the PUCO to certificate the need for a new generating facility under an ESP. If that is the only intended authority, the bill's reference to superseding R.C. Chapter 4906. might be made more precise by referencing only R.C. 4906.10(A)(1), the specific provision under which the Power Siting Board would otherwise determine need for a generating facility.

3. The use of "rate base" is not clear in R.C. 4928.14(D)(2)(b) as to whether it intends to refer to an asset included in the utility's rates under traditional regulation prior to S.B. 3's effective date or intends to mean the utility's rates in effect any time prior to the bill's effective date.

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4. The bill is not clear as to whom the PUCO's greenhouse gas reporting and carbon control planning requirements under R.C. 4928.69 will apply, that is, as to public utilities the PUCO regulates and/or other owners of electric generation. If it includes the latter, there is no authority under current law or the bill for the PUCO to enforce compliance as to those nonutility owners.

HISTORY

ACTION	DATE
Introduced	09-25-07
Reported, S. Energy and Public Utilities	10-31-07
Passed Senate (32-0)	10-31-07

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[1] Duke Energy Ohio, Cleveland Electric Illuminating, Ohio Edison, Toledo Edison, Ohio Power, Columbus Southern Power, and Dayton Power & Light.

[2] R.C. 4928.31, 4928.32, 4928.33, 4928.34, 4928.35, 4928.36, 4928.37, 4928.38, 4928.39, 4928.40, 4928.41, 4928.42, 4928.431, and 4928.44.

[3] Although such exclusive "certified" territories continued as to other components of electric service, such as distribution (R.C. 4933.81 *et seq.*, not in the bill).

[4] Generally, neither current law nor the bill affect the right of a municipal utility to provide electric service within its jurisdiction as established under the Ohio Constitution; nor do they affect the exclusive authority of an electric cooperative to provide electric service to its members within its certified territory as that territory is established by statute. Within the limitations of those respective authorities, both municipals and electric cooperatives compete with electric utilities and electric services companies.

[5] A return to traditional regulation does not exactly mean a return to pre-S.B. 3 regulation, since S.B. 3 repealed certain provisions of traditional regulation, such as provisions authorizing an electric fuel component in rates and provisions addressing environmental compliance facilities of electric utilities, and amended other provisions.

[6] As opposed to some other basis, for example, original cost less depreciation or replacement cost new.

[7] More fully, a customer can return under current law to the SSO of its incumbent utility if the customer's supplier (1) has defaulted on its contract, (2) is in receivership, (3) has filed for

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bankruptcy, (4) is no longer capable of providing the service, (5) is unable to provide delivery to transmission or distribution facilities for such reasonable period of time as the PUCO may specify by rule, or (6) has had its PUCO certification suspended, conditionally rescinded, or rescinded (R.C. 4928.14(C)); under the bill, the division is changed to (H)).

[8] Generally meaning, at the level of the utility's pre-2000 price of electricity, determined through an unbundling process that required the price of generation to be the amount that remained after all other electric service components were removed from the bundled price for electric service that reflected the vertical integration of Ohio electric utilities prior to S.B. 3. Those bundled prices had not changed since the utilities' last rate cases, which generally occurred in the late 1980s to mid-90s, so, they have not been evaluated since then under the rate-making criteria of traditional regulation.

[9] For instance, in the case of Cleveland Electric Illuminating, Toledo Edison, and Ohio Edison, that charge was set to equal the generation transition charge authorized for the utilities' five-year, post-S.B. 3 period. The PUCO recognized the charge as covering their cost of reserving and supplying generation under the SSO requirement.

[10] A regulatory transition charge is a charge that S.B. 3 permitted the PUCO to grant an electric utility so that it could collect revenue from customers for pre-S.B. 3 regulatory assets that met the definition of a "transition cost" under S.B. 3. Under S.B. 3, that revenue period for a utility was to end not later than December 31, 2010. "Regulatory assets" are the unamortized amounts capitalized or deferred on a utility's books of account per PUCO orders and can include such items as deferred PIPP (Percentage of Income Payment Plan) arrears or deferred demand-side management costs (R.C. 4928.01(A)(26), 4928.39, and 4928.40 of current law).

[11] Under R.C. 4928.06(D), these factors include, but are not limited to, (1) the number and size of alternative providers of the service, (2) the extent to which the service is available from alternative suppliers in the relevant market, (3) the ability of alternative suppliers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions, and (4) other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of suppliers of services.

[12] In brief, these "RTOs" coordinate the transportation of electricity over transmission lines of any number of participating utilities. Ohio utilities currently belong to either or both of two such RTOs: MISO (The Midwest Independent System Operator) or PJM Interconnection.

[13] "[G]reenhouse gases allow sunlight to enter the atmosphere freely. When sunlight strikes the Earth's surface, some of it is reflected back towards space as infrared radiation (heat). Greenhouse gases absorb this infrared radiation and trap the heat in the atmosphere. . . . Some of [the gases] occur in nature (water vapor, carbon dioxide, methane, and nitrous oxide), while others are exclusively human-made (like gases used for aerosols). . . . During the past 20 years, about three-quarters of human-made carbon dioxide emissions were from burning fossil fuels." From the U.S. Energy Information Administration, at < <http://www.eia.doe.gov/oiaf/1605/ggcebro/chapter1.html>>.

[14] <<http://www.theclimateregistry.org/>>. According to the web site, as of August 9, 2007, Ohio is listed as having joined the Registry, along with all other states except Alaska, Texas, Louisiana, Mississippi, Arkansas, North Dakota, South Dakota, Nebraska, Kentucky, Indiana, and West

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Virginia. The Ohio contact listed on the site is the Director of Ohio EPA. The state's listing currently enables a utility's voluntary participation in the Registry.

[15] "Cost" means the cost of acquisition and construction, the cost of acquisition of all land, rights-of-way, property rights, easements, franchise rights, and interests required for such acquisition and construction, the cost of demolishing or removing any buildings or structures on land so acquired, including the cost of acquiring any lands to which such buildings or structures may be moved, the cost of acquiring or constructing and equipping a principal OAQDA office and sub-offices, the cost of diverting highways, interchange of highways, and access roads to private property, including the cost of land or easements for such access roads, the cost of public utility and common carrier relocation or duplication, the cost of all machinery, furnishings, and equipment, financing charges, interest prior to and during construction and for no more than 18 months after completion of construction, engineering, expenses of research and development, the cost of any commodity contract, including related fees and expenses, legal expenses, plans, specifications, surveys, studies, cost and revenue estimates, working capital, other expenses necessary or incident to determining the feasibility or practicability of acquiring or constructing a project, administrative expense, and such other expense as may be necessary or incident to the acquisition or construction of the project, the financing of such acquisition or construction, including the amount authorized in the OAQDA bond resolution, the financing of the placing of such project in operation, and any obligation, cost, or expense incurred by any governmental agency or person for surveys, borings, preparation of plans and specifications, and other engineering services, or any other cost described above (R.C. 3706.01 (I)).

[16] That is, methods, modifications, or replacements that remove, reduce, prevent, contain, alter, convey, store, disperse, or dispose of particulate matter, dust, fumes, gas, mist, smoke, noise, vapor, heat, radioactivity, radiation, or odorous substances, or substances containing those contaminants, or that render them less noxious or reduce their concentration in the air (R.C. 3706.01(C) and (G)).

[17] This project is a coal-fueled, zero-emissions power plant designed to prove the feasibility of producing electricity and hydrogen from coal and nearly eliminating carbon dioxide emissions through capture and permanent storage. The future site of the project has been narrowed by the U.S. Department of Energy to Texas or Illinois.

[18] This apparently intends that, if the facilities qualify as major utility facilities under power siting law, OAQDA would lead, encourage, promote, and support siting of such facilities before the Power Siting Board.



Bill Analysis*Legislative Service Commission*

Sub. S.B. 221*
127th General Assembly
(As Reported by H. Public Utilities)

Sens. Schuler, Jacobson, Harris, Fedor, Bocchieri, R. Miller, Morano, Mumper, Niehaus, Padgett, Roberts, Wilson, Spada

BILL SUMMARY

- Focuses on two main subject areas: electricity prices and electricity sources.

Electricity prices:

- Preserves the right of customer choice enacted by S.B. 3 of the 123rd General Assembly.
- Revises and adds to the current objectives of state electric services policy enacted under S.B. 3.
- Provides that a "self-generator" under Electric Restructuring Law need not own the generating facility, rather, it can host it on its premises.
- Permits special contract law to be enforced for the purposes of the Electric Restructuring Law.
- Expressly authorizes under special contract law the filing of a financial device to recover costs incurred in conjunction with economic development and job retention, the bill's peak demand reduction and energy efficiency programs, advanced metering, and government mandates.
- Authorizes a mercantile customer or a group of those customers to establish a reasonable arrangement with a utility under special contract law.
- Provides that special contracts must be submitted to the PUCO by application for its approval.
- Preserves the requirement that each electric distribution utility have a standard service offer (SSO).

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- Preserves current law's provision that each utility's SSO will be the default service for a customer, but changes the statutory nature and process for PUCO approval of an SSO.
- Expressly states that its SSO provisions do not preclude or prohibit an electric distribution utility providing competitive retail electric service to electric load centers within the certified territory of another such utility.
- Modifies the corporate separation law so that the law applies to an electric utility "except as otherwise provided in" the market rate offer (MRO) and electric security plan (ESP) provisions of the bill.
- Removes any limitation on divestiture by an electric utility that is not a distribution utility.
- Removes the current law's provision that a utility's authority to divest is subject to the provisions of public utility law relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset.
- Authorizes the PUCO to grant rate phase-ins and states that the authority continuing law confers on the PUCO to supervise or regulate a competitive retail electric service does not limit that phase-in authority.
- Requires that an SSO be either an MRO or an ESP.
- Authorizes discovery requests of certain utility agreements during an MRO or ESP proceeding.
- Requires all utilities to file an SSO before 1/1/09.
- Requires the first SSO application of a utility to be an ESP, but allows a utility to simultaneously file an MRO.
- Provides SSO provisions that reflect differences among the electric distribution utilities.
- Authorizes "transitional" MROs that require utilities that own generating assets to "ramp up" to market and operate under a blended generation price during that period.
- Provides that an electric distribution utility that files an MRO cannot, and cannot be required to, file an ESP.

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- Provides that the bids selected for an MRO be the least-cost bids and establishes several other criteria regarding the bid results that can preclude an MRO application from going forward.
- Authorizes the PUCO to adjust the blended price of a transitional MRO.
- States that public utility law (R.C. Title 49) does not apply to an ESP.
- Prescribes what an ESP application must contain and also enumerates certain things that, at the utility's discretion, the application can contain, but does not limit any discretionary items to those the bill enumerates.
- Requires an ESP to contain provisions related to the supply and pricing of electric generation service and, if the proposed ESP has a term longer than three years, requires that it must include provisions to permit the PUCO to test the ESP.
- Permits an ESP to include automatic cost recovery, a construction work in progress allowance/nonbypassable surcharge, a nonbypassable surcharge for a competitively bid generating facility, facility decommissioning, derating, and retirement, rate stabilization, automatic price adjustments, securitization, transmission and related services, distribution service, and economic development and energy efficiency.
- Prescribes as a standard for PUCO approval that the ESP pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO.
- Requires that, if an ESP provides a nonbypassable surcharge for CWIP or a competitively sourced generating facility, the PUCO must 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.
- Allows an electric distribution utility to withdraw an ESP application, thereby terminating it, if the PUCO modifies and then approves the application.
- Requires the PUCO, if it modifies and approves or disapproves an ESP application, to issue an order continuing the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs, until a subsequent ESP or MRO is filed and authorized.
- Extends to a FERC-approved regional transmission organization that is responsible for maintaining reliability in all or part of Ohio the requirement to consent to service of process and designate an agent.

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- Requires the PUCO to employ a Federal Energy Advocate to generally assist with transmission oversight.
- Prohibits an electric distribution utility charging a customer of a municipal utility in existence before 1/1/98 any surcharge, service termination charge, exit fee, or transition charge.
- Requires the PUCO, in carrying out the state electric services policy, to 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 Ohio.
- Requires the PUCO to adopt and enforce rules prescribing a uniform, statewide policy regarding electric transmission and distribution line extensions and requisite substations and related facilities that are requested by nonresidential customers of electric utilities.
- Lengthens from two years to up to three years the time period for an automatic governmental aggregation before a participant can op-out.
- Authorizes a state official or the legislative or other governing authority of a county, city, village, township, park district, or school district to enter into an energy price risk management contract.

Electricity sources:

- Requires an electric distribution utility and an electric services company to provide from "alternative energy resources" a portion of their electricity supplies from alternative energy resources.
- Defines alternative energy resources as consisting of specified advanced energy resources and renewable energy resources with the placed-in-service date of January 1, 1998, and as consisting of existing or new mercantile customer-sited resources.
- Specifies that the requisite portion of the electric supply derived from alternative energy must equal 25% of the total number of kilowatt hours of electricity sold by the utility or company to any and all retail electric consumers whose electric load centers are served by the utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within Ohio.
- Provides that half of the alternative energy can be generated from advanced energy resources, but at least half must be generated from renewable energy resources,

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including 0.05% from solar energy resources, with yearly benchmarks increasing in percentage of electric supply through 2024.

- Establishes a cost cap relative to a utility's or company's obligation to comply with a renewable energy resource benchmark.
- Authorizes the PUCO to make a force majeure determination regarding all or part of a utility's or company's compliance with a minimum, renewable energy resource benchmark.
- Authorizes the PUCO to enforce the renewable energy and solar energy resource benchmarks through the assessment of compliance payments.
- Requires the Governor, in consultation with the PUCO chairperson, to appoint an Alternative Energy Advisory Committee to semiannually review the bill's alternative energy requirements.
- Requires the PUCO to submit an annual report to the General Assembly describing alternative energy benchmark compliance and the use of alternative energy resources.
- Prescribes energy savings and peak demand reduction requirements for electric distribution utilities through 2025, sets yearly benchmarks, and authorizes PUCO enforcement of compliance through the assessment of forfeitures.
- Authorizes the PUCO to approve a revenue decoupling mechanism for an electric distribution utility if it reasonably aligns the interests of the utility and of its customers in favor of energy efficiency or energy conservation programs.
- Requires the Governor's Energy Advisor to periodically report to the General Assembly and as requested by House and Senate standing committees responsible for energy efficiency and conservation issues regarding energy efficiency and conservation initiatives undertaken by the Advisor and state government.
- Authorizes a natural gas utility to apply for Public Utilities Commission (PUCO) approval of an alternative rate plan that includes a revenue decoupling mechanism.
- Defines "revenue decoupling mechanism" as a rate design or other cost recovery mechanism that provides recovery of the fixed costs of service and a fair and reasonable rate of return, irrespective of system throughput or volumetric sales.
- By declaring that such a plan is an application "not for an increase in rates," removes certain requirements for a hearing on any alternative rate plan that includes a revenue decoupling mechanism, proposes rates and charges based upon

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the billing determinants and revenue requirements authorized by the PUCO in the utility's most recent rate case, and establishes, continues, or expands an energy efficiency or energy conservation program.

- Prohibits the bill being construed as supporting a claim or finding that an application for such a conservation-related plan filed before the bill's effective date *is* an application to increase rates (and therefore generally subject to hearing).
- Adds the following, twelfth objective to the statutory natural gas policy: to promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation.
- Changes the requirement that the PUCO follow the state policy when carrying out its duties under the alternative regulation law, to require that both the PUCO and Ohio Consumers' Counsel (OCC) follow the policy in exercising their respective authorities under that law.
- Requires the PUCO, to the extent permitted by federal law, to adopt rules establishing greenhouse gas emissions reporting and carbon dioxide control planning requirements for each electric generating facility located in Ohio that is owned or operated by a public utility that is subject to PUCO jurisdiction and that emits greenhouse gases, including facilities in operation on the bill's effective date.

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CONTENT AND OPERATION

The bill focuses on two main subject areas: electricity prices and electricity sources.

I. Electricity prices

State policy provisions

State electric services policy

(R.C. 4928.02)

The bill revises and adds to the current objectives of the state electric services policy enacted under S.B. 3. Under both current law and the bill, the statutory electric policy applies statewide, and the PUCO is required to ensure that the policy is effectuated (R.C. 4928.06(A), not in the bill).

The current policy objectives, which have their genesis in S.B. 3's competitive generation market concept, are as follows: (1) ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service, (2) 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, (3) ensure diversity of electricity supplies and suppliers, by giving consumers effective choice of supplies and suppliers and by encouraging the development of distributed and small generation facilities, (4) encourage innovation and market access for cost-effective supply- and demand-side retail electric service, (5) encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service, (6) recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment, (7) 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, (8) ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power, and (9) facilitate the state's effectiveness in the global economy.

Although the bill does not amend the wording of objective (1), its change in the regulatory framework for retail electric service prices, discussed below, will provide a different pricing context for implementing the objective's concept of "reasonably priced retail electric service." In addition, the bill changes the state policy objectives by adding five new objectives and modifying three of the current objectives. Specifically, objective (4) above is changed to read: "encourage innovation and market access for cost-effective retail electric service, *including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.*"

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Objective (5) above is changed to read: "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.*"

Objective (7) above is changed to read: "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.*"

The following new objectives are added to the state electric services policy: (1) 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, (2) provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates, (3) encourage implementation of distributed generation across customer classes through regular review and updating of rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering, (4) protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource, and (5) encourage the education of small business owners in Ohio regarding the use of energy efficiency programs and advanced energy technologies in their businesses and encourage that use.

"Self-generator"

(R.C. 4928.01(A)(7) and (32))

The bill makes certain changes that relate to customer generation of electricity. It modifies current law's definition of "self-generator." Under current law, a "self-generator" is an entity in Ohio that owns an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to retail electric service providers, whether the facility is installed or operated by the owner or by an agent under a contract.

The bill modifies that definition by providing, in effect, that a self-generator need not own the generating facility, rather it can host it on its premises. It similarly modifies the exclusion that current law grants to a self-generator from being considered an "electric light company" under the Electric Restructuring Law. In addition, the bill removes an undefined term--"retail electric service providers"--from the definition of "self-generator" and replaces it with the term "entity," thereby recognizing that a self-generator can sell excess electricity to anyone, not just to persons engaged in the retail sale of electric service.

Scope of PUCO authority regarding retail generation service

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(R.C. 4905.31 and 4928.05(A)(1))

Current law specifies the scope of the PUCO's authority regarding a competitive retail electric service (generation service), by enumerating specific provisions of public utility rate-making law (R.C. Chapters 4905. and 4909.) that continue to apply to that service notwithstanding that the service is offered competitively in Ohio. The bill includes a reference to the special contract law (R.C. 4905.31), thereby clearly permitting that law to be enforced for the purposes of the Electric Restructuring Law.

Currently, the special contract law in effect authorizes a public utility to file a rate schedule or enter into any reasonable arrangement with another public utility or with its customers, consumers, or employees. The law describes a number of types of those schedules or arrangements, concluding with the general description of any financial device that may be practicable or advantageous to the parties. The bill states that, in the case of an electric distribution utility, such a financial device may include a device to recover costs incurred in conjunction with (1) any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program, (2) any development and implementation of peak demand reduction and energy efficiency programs under the bill's energy efficiency requirements (see "Energy efficiency," below), (3) any acquisition and deployment of advanced metering, including the costs of any meters retired as a result of advanced metering implementation, and (4) compliance with any government mandate.

The bill removes obsolete references in that list to schedules or arrangements relating to emissions fees.

More importantly, the bill authorizes a mercantile customer of an electric distribution utility or a group of those customers to establish a reasonable arrangement with that utility by filing an application with the PUCO.

The bill does not specify the standards the PUCO will use to approve a schedule or reasonable arrangement under the special contract law, but presumably, the PUCO will continue to approve schedules and arrangements under that law as it has done in the past. The bill does require that every schedule or arrangement is posted on the PUCO's docketing information system and is accessible through the internet.

Additionally, the bill states that the authority continuing law confers on the PUCO to supervise or regulate a competitive retail electric service (currently only generation service) must not be construed to limit the commission's authority under the bill's rate phase-in provisions (see "Rate or price phase-ins/nonbypassable surcharge," below).

SSO requirement

General requirement

(R.C. 4928.141(A), 4928.142(B) and (F), 4928.143(A), 4928.145, and 4928.17(A))

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The bill contains the requirement that each electric distribution utility in Ohio make available a standard service offer within its exclusive, certified distribution territory. Under both current law and the bill, a utility's SSO generally must be a market-based offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service, and be offered on a comparable and nondiscriminatory basis. The bill preserves current law's provision that each utility's SSO will be the default service for a customer, but changes the statutory nature and process for PUCO approval of an SSO.

Under the bill, an SSO must be either an MRO or an ESP. The first SSO application of all the utilities must be an ESP application, but the bill also allows a utility to simultaneously file an MRO application. Once an MRO is approved for any distribution utility, its SSO must always be an MRO: the utility cannot, and cannot be required to, file an ESP.

A utility must file an MRO or ESP application before 1/1/2009, and can file an MRO or ESP before the effective date of the PUCO rules required under the bill, but, as the PUCO determines necessary, must immediately conform its filing to the rules upon their taking effect.

In connection with an MRO or ESP, the bill modifies the corporate separation law with a phrase that states that law applies to an electric utility "except as otherwise provided in" the MRO and ESP provisions of the bill.^[1]

Additionally, the bill requires that, in any contested, MRO or ESP proceeding and upon submission of an appropriate discovery request, an electric distribution utility must make available to the requesting party every contract or agreement that is between the utility and a party to the proceeding and that is relevant to the proceeding. This requirement, however, is subject to such protection for proprietary or confidential information as the PUCO determines appropriate.

The bill expressly states that its provisions do not preclude or prohibit an electric distribution utility providing competitive retail electric service to electric load centers within the certified territory of another such utility.

SSO variations

(R.C. 4928.142(D) and 4928.143(D))

The bill's SSO provisions reflect differences among the distribution utilities. Specifically, Dayton Power & Light (DP&L) is the only utility with a current rate plan (commonly called an RSP) that expires at the end of 2010, instead of 2008 as the other utilities. Additionally, the First Energy operating utilities reportedly are the only distribution utilities that do not directly own or control generating facilities. First Energy generating assets are owned by an affiliate of the distribution utilities. All the other distribution utilities transferred their generating assets to separate subsidiaries, pursuant to continuing law that

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requires functional separation, but not necessarily divestiture, between any generation business and the transmission and distribution business of an electric distribution utility (R.C. 4928.17).

Under the bill, all electric distribution utilities are required to file new SSOs with the PUCO, in the form of an MRO or ESP, before 1/1/2009, and all current rate plans (commonly referred to as RSPs) of electric distribution utilities terminate on their scheduled termination date. In the case of DP&L, however, the bill requires that, regardless of the term of DP&L's initial ESP, the unexpired portion of its current rate plan will be incorporated into its ESP and must constitute its ESP until the end of 2010. Also, the bill authorizes DP&L to apply for supplemental authority under its first ESP (see "DP&L variation," below). Nothing in the bill prohibits DP&L from also simultaneously filing an MRO for its initial SSO. So, depending on whether it makes the simultaneous MRO and ESP filings and depending on which filing is approved by the PUCO, DP&L, as other utilities, could operate under either an MRO or an ESP beginning on 1/1/2009.

The bill also provides "transitional MROs"--the name this analysis gives to the first MRO filed by any distribution utility that owns or controls generating assets that had been used and useful in Ohio (in other words, any distribution utility except the First Energy utilities). Under such an MRO, the bill provides that the utility will transition to the market, in the sense that the utility can bid out only a certain portion of its electric load (see "Transitional MROs," below).

General filing process

(R.C. 4928.141(B))

The bill requires the PUCO to provide a hearing on an MRO or ESP application, 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 distribution territory. The PUCO must adopt rules regarding MRO and ESP filings.

Market rate offers

Nature of an MRO (R.C. 4928.142(A)). Under the bill, an MRO must be determined through a competitive bidding process that provides for all of the following: (1) open, fair, and transparent competitive solicitation, (2) clear product definition, (3) standardized bid evaluation criteria, (4) oversight by an independent third party that will design the solicitation, administer the bidding, and ensure that the foregoing requirements are met, and (5) evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners. The PUCO must modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of bidders, which rules must foster supplier participation and be consistent with (1) through (5) above. But, no generation supplier can be prohibited from participating in the bidding process.

Transitional MROs (R.C. 4928.142(D)). The first MRO filed by an electric distribution utility that, as of the bill's effective date, directly owns, in whole or in part,

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operating electric generating facilities that had been used and useful in Ohio must provide that a portion of that utility's SSO load for the first five years of the MRO be competitively bid as follows: 10% of the load in year one and not less than 20% in year two, 30% in year three, 40% in year four, and 50% in year five. The bill requires the PUCO, consistent with those percentages, to determine the actual percentages for each year of years one through five.

MRO application (R.C. 4928.142(B)). An MRO application must detail the electric distribution utility's proposed compliance with the requirements described under "**Nature of an MRO**" (above) for the competitive bidding process and with the PUCO rules.

Additionally, the application must demonstrate that all of the following requirements are met: (1) the utility or its transmission service affiliate belongs to at least one FERC-approved RTO, or there otherwise is comparable and nondiscriminatory access to the electric transmission grid, (2) any such RTO has a market-monitor function and the ability to take actions to identify and mitigate market power or the 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, and (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.

MRO approval process (R.C. 4928.142(B)). The PUCO must initiate a proceeding and, within 90 days after the application's filing date, determine by order whether the utility and its market-rate offer has demonstrated the items required in the application, as enumerated in (1) to (3) immediately above. If the finding is positive, the utility can initiate its competitive bidding process. If it is negative as to one or more requirements, the PUCO in the order must direct the utility regarding how any deficiency may be remedied in a timely manner to the PUCO's satisfaction; otherwise, the utility must withdraw the application. However, if such remedy is made and the subsequent finding is positive, and also if the utility made a simultaneous filing of an ESP application, the utility cannot initiate its competitive bid until at least 120 days after the filing date of those applications.

MRO generation price (R.C. 4928.142(C) and (D)). Upon the completion of the competitive bidding process, the PUCO must select the least-cost bid winner or winners of that process. Those selected bid or bids, as prescribed as retail rates by the PUCO, will be the utility's SSO unless the PUCO, by order issued before the third calendar day following the conclusion of the bidding process, determines that (1) any portion of the bidding process was not oversubscribed, such that the amount of supply bid upon was not greater than the amount of the load bid out, (2) there were fewer than four bidders, or (3) at least 25% of the load was not bid upon by one or more persons other than the electric distribution utility.

In addition, the bill requires all costs incurred by the utility as a result of or related to the competitive bidding process or to procuring generation service to provide the MRO, including the costs of energy and capacity and the costs of all other products and services

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procured as a result of the competitive bidding process, must be timely recovered through the SSO price. For that purpose, the bill requires the PUCO to approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

Transitional MRO generation price (R.C. 4928.142(D) and (E)). In the case of a Transitional MRO, the bill requires that the SSO price for electric generation service will be a proportionate blend of the bid price and the generation service price for the remaining utility's remaining SSO load. The latter price must equal to the utility's most recent SSO price, adjusted upward or downward as the PUCO determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of one or more of the following as reflected in that most recent standard service offer price: (1) the utility's prudently incurred cost of fuel used to produce electricity, (2) its prudently incurred purchased power costs, (3) its costs of satisfying Ohio's supply and demand portfolio requirements, including, but not limited to, renewable energy resource and energy efficiency requirements, and (4) its costs prudently incurred to comply with environmental laws and regulations.

In making any such price adjustment to the most recent SSO price, the PUCO must consider the benefits that may become available to the 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. Accordingly, the PUCO may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility.

Additionally, the PUCO can adjust the utility's most recent SSO price by such just and reasonable amount as it 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 MRO is not so inadequate as to result, directly or indirectly, in a taking of property under the Ohio Constitution (Article I, Section 19).

Too, the bill authorizes the PUCO, beginning in the second year of a blended price under a Transitional MRO and notwithstanding any other requirement concerning MROs, to alter, prospectively, the proportions constituting a blended price, to mitigate any effect of an abrupt change in the utility's SSO price that would otherwise result in general or with respect to any rate group or rate schedule if not for the alteration. Any such alteration cannot be made more often than annually, and the PUCO cannot, by altering those proportions and in any event, cause the duration of the blending period to exceed ten years as counted from the approved MRO's effective date. Additionally, any such alteration must be limited to an alteration affecting the prospective proportions used during the blending period and cannot affect any blending proportion previously approved and applied by the PUCO pursuant to the bill.

The PUCO's determination of the utility's most recent SSO price must exclude any previously authorized allowance for transition costs, with that exclusion being effective on and after the date the allowance is scheduled to end under the utility's present-day rate plan.

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A utility has the burden of demonstrating that any adjustment to its most recent SSO price is proper under the bill's Transitional MRO provisions.

ESPs

Nature of an ESP (R.C. 4928.143(B) and (D)). The bill states, in effect, that any contrary provision of public utility law (R.C. Title 49) does not apply to an ESP. This means, for example, that, with the exceptions noted in "CWIP allowance/nonbypassable surcharge," and "Nonbypassable surcharge for a competitively bid generating facility," below), the bill will authorize an electric utility's distribution rates to be determined under an ESP in a manner different from the traditional rate-making requirements that applied to those rates before the enactment of this bill and that will continue to apply to a utility with an approved MRO.

The bill prescribes what an ESP application must contain and also enumerates certain things that, at the utility's discretion, it can contain. But any discretionary items in an ESP are not limited to the items the bill enumerates. Essentially, an ESP must contain provisions related to the supply and pricing of electric generation service and, if the proposed ESP has a term longer than three years, it must include provisions to permit the PUCO to test the plan as described in "Testing an ESP," below, as well as any transitional conditions that the utility would want the PUCO to adopt if the PUCO were to terminate the ESP after such a test.

As noted above in "SSO variations," in its initial ESP application DP&L can request PUCO approval of provisions for the incremental recovery or the deferral of any of the following costs that are not being recovered under its current rate plan and that it incurs during that rate plan continuation period under the ESP: (1) costs to comply with the bill's SSO/default service requirements, (2) costs to comply with the bill's alternative energy requirements (see "Alternative energy requirements," below), and (3) costs to comply with the bill's energy efficiency requirements (see "Energy efficiency," below).

As explained immediately below, enumerated items that the bill authorizes any utility to request in an ESP include the following: provisions for or regarding (1) automatic cost recovery, (2) a construction work in progress (CWIP) allowance/nonbypassable surcharge, (3) a nonbypassable surcharge for a competitively bid generating facility, (4) generating facility retirement, (5) rate stabilization, (6) automatic price adjustments, (7) securitization, (8) transmission and related services, (9) distribution service, and (10) economic development and energy efficiency.

ESP application (R.C. 4928.143(B)). Automatic cost recovery. An ESP can include provisions for the automatic recovery of the following costs of the utility (meaning, recovery without further PUCO authorization): (1) fuel used to generate the electricity supplied under the SSO, (2) purchased power supplied, including the cost of energy and capacity, and including purchased power acquired from an affiliate, (3) emission allowances, and (4) federally mandated carbon or energy taxes.

CWIP allowance/nonbypassable surcharge. An ESP can include a request for a reasonable CWIP for any of the utility's cost of constructing a generating facility or for an environmental expenditure for any such facility of the utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. The bill requires that any such CWIP allowance be subject to the CWIP limitations of public utility law (R.C. 4909.15, not in the bill), except that the PUCO can authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. However, the bill prohibits such a CWIP allowance unless the PUCO first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the utility. Further, no CWIP allowance can be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the PUCO can adopt rules.

Under the bill, any authorized CWIP allowance must be established as a nonbypassable surcharge for the life of the facility.

Nonbypassable surcharge for a competitively bid generating facility. An ESP can request 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 rules as the PUCO adopts under the bill's CWIP provisions (see "CWIP allowance/nonbypassable surcharge," above), and is newly used and useful on or after January 1, 2009. The surcharge must cover all of the utility's costs specified in the application, excluding costs recovered through a surcharge authorized for a CWIP allowance described above. But, no surcharge can be authorized unless the PUCO 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 the surcharge is authorized for such a facility pursuant to plan approval and as a condition of the continuation of the surcharge, the utility must dedicate to the Ohio consumers bearing the surcharge all the electricity generated by that facility. Before the PUCO authorizes such a surcharge, it can consider the effects, as applicable, of any decommissionings, deratings, and retirements.

Rate stabilization. An ESP can include terms, conditions, or charges that both would have the effect of stabilizing or providing certainty regarding retail electric service and relate to (1) limitations on customer shopping for retail electric generation service, (2) bypassability, (3) standby, back-up, or supplemental power service, (4) default service, (5) carrying costs, (6) amortization periods, and (7) accounting or deferrals, including future recovery of such deferrals.

Generation facility retirement. Under the bill, an ESP can contain provisions for generating facility decommissioning, derating, or retirement.

Automatic price adjustments. Under the bill, an ESP can include provisions for automatic increases or decreases in any component of the SSO price.

Securitization. An ESP can request approval of provisions for the utility to securitize any phase-in authorized under the bill (see "Rate or price phase-ins/nonbypassable," App. Appx. 000323)

surcharge," below), inclusive of carrying charges, of its SSO price (see "Rate or price phase-ins/nonbypassable surcharge," below), as well as provisions for the recovery of the utility's cost of securitization. If the PUCO's order includes such a phase-in, the order also must 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 must authorize the collection of those deferrals through a nonbypassable surcharge on the utility's rates.

Under current law retained by the bill, "regulatory assets" are the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the PUCO or pursuant to generally accepted accounting principles as a result of a prior PUCO rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent PUCO action. They include, but are not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan (PIPP) arrears; post-in-service capitalized charges and assets recognized in connection with statement of Financial Accounting Standards No. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the PUCO. (R.C. 4928.01(A)(26).)

Transmission and related services. An ESP can include provisions relating to transmission, ancillary, congestion, or any related service required for the SSO, including provisions for the recovery of any cost of such service that the electric distribution utility incurs pursuant to the SSO.

Distribution service. An ESP can include provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of public utility law (R.C. Title 49) 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 utility. The infrastructure and modernization provisions can include a long-term energy delivery infrastructure modernization plan for the 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.

Economic development and energy efficiency. An ESP can include provisions under which the electric distribution utility can implement economic development, job retention, and energy efficiency programs. Those provisions can allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

ESP approval process (R.C. 4928.143(C)). The burden of proof in an ESP proceeding is on the applicant utility.

The PUCO must issue an order approving, modifying and approving, or disapproving an initial ESP application not later than 120 days after the application's filing date and within 275 days for later applications. The PUCO must disapprove the application unless it finds that the ESP so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO. If it makes that finding, the PUCO can approve or modify and approve the ESP. Additionally, if the ESP provides a nonbypassable surcharge for CWIP or a competitively sourced generating facility as authorized under the bill, the PUCO must 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.

If the PUCO modifies and then approves an ESP application, the electric distribution utility can withdraw the application, thereby terminating it. If the utility does so, or if the PUCO disapproves the ESP application, the PUCO must issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent ESP or MRO is filed and authorized under the bill.

Testing an ESP (R.C. 4928.143(E)). Regarding an ESP that has a term, exclusive of phase-ins or deferrals, of longer than three years, the bill requires the PUCO to test that plan in its 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 favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under an MRO. If the test results are in the negative, the PUCO may terminate the ESP, but must 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 ESP. Before terminating the ESP, the PUCO must provide interested parties with notice and an opportunity to be heard. The PUCO can 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.

Rate or price phase-ins/nonbypassable surcharge

(R.C. 4928.144)

As it considers necessary to ensure rate or price stability for consumers, the PUCO by order can authorize, inclusive of carrying charges, any just and reasonable phase-in of any electric distribution utility rate or price established under an ESP or MRO. The order also must provide for the creation of regulatory assets (see "Securitization," above), by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying

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charges on that amount. Further, the order must authorize the collection of those deferrals through a nonbypassable surcharge any rate or price established for the utility by the PUCO.

Transmission operations

RTO operating requirements

(R.C. 4928.09)

The bill extends to a FERC-approved regional transmission organization (RTO)^[2] that is responsible for maintaining reliability in all or part of Ohio requirements that apply under continuing law to electric utilities, electric services companies, and billing and collection agents. Those requirements consist of (1) consenting to the jurisdiction of the Ohio courts and service of process in Ohio and (2) designating an agent authorized to receive that service of process, by filing with the commission a document designating that agent.

Federal Energy Advocate

(R.C. 4928.24)

The bill requires the PUCO to employ a Federal Energy Advocate. The advocate must examine the value of the participation of Ohio electric utilities in regional transmission organizations and submit a report to the PUCO on whether continued participation of those utilities is in the interest of retail electric consumers.

Additionally under the bill, the PUCO employee must monitor the activities of FERC and other federal agencies and, represented by the Attorney General, must advocate on behalf of the interests of Ohio retail electric service consumers. Currently, there is one, state-level entity that functions as a consumer advocate: the Ohio Consumers' Counsel, who advocates on both the state and federal levels, on behalf of the residential consumers of electric, gas, natural gas, and certain other public utilities (R.C. Chapter 4911.). The PUCO itself often is a party to federal proceedings.

Municipal customer charge prohibition

(R.C. 4928.69)

The bill provides that, notwithstanding any provision of the Electric Restructuring Law and except as otherwise provided in an agreement under special contract law (R.C. 4905.31), an electric distribution utility cannot charge any person that is a customer of a municipal electric utility in existence on or before 1/1/2008 any surcharge, service termination charge, exit fee, or transition charge.

Line extensions

(R.C. 4928.02 and 4928.151)

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Continuing law requires that an electric utility's distribution rate schedule must include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with PUCO rules, policy, precedents, or orders (R.C. 4928.15(A)).

The bill requires the PUCO, in carrying out the state electric services policy (see "State electric services policy," above) to 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 Ohio.

It also requires the PUCO adopt and enforce rules prescribing a uniform, statewide policy regarding electric transmission and distribution line extensions and requisite substations and related facilities that are requested by nonresidential customers of electric utilities, so that, on and after the effective date of the initial rules so adopted, all such utilities apply the same policies and charges to those customers. Initial rules must be adopted not later than six months after the bill's effective date. The rules must address the just and reasonable allocation to and utility recovery from the requesting customer or other customers of the utility of all costs of any such line extension and any requisite substation or related facility, including, but not limited to, the costs of necessary technical studies, operations and maintenance costs, and capital costs, including a return on capital costs.

Governmental aggregation

(R.C. 4928.20(D))

Current law authorizes the electric load of electric customers to be aggregated for the purpose of purchasing retail electric generation (R.C. 4928.03). Aggregators performing that function include governmental aggregators, specifically, municipalities, townships, and counties that can aggregate the electric load of customers within their respective jurisdictions. Current law establishes various requirements for and limitations on a governmental aggregation, including, for instance, a popular vote on the question of whether the local government can aggregate load without first obtaining the individual permission of each customer.

The bill changes current law's limitation that, in the case of such an "automatic" governmental aggregation, the local government must allow any person that is so enrolled in the aggregation an opportunity to opt out of the aggregation every *two* years, without paying a switching fee. Under the bill, a customer can opt-out *up to every three years* without paying a switching fee.

Energy price risk management contracts

(R.C. 9.835)

The bill authorizes a state official (an elected or appointed official or that person's designee, charged with the management of a state entity) or the legislative or other governing

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authority of a political subdivision (county, city, village, township, park district, or school district) to enter into an energy price risk management contract if it determines that doing so is in the best interest of the state entity or such political subdivision, and subject to, respectively, state or local appropriation to pay amounts due. The bill defines a "state entity" as the General Assembly, the Supreme Court, the Court of Claims, the office of an elected state officer, or a state department, bureau, board, office, commission, agency, institution, or other instrumentality established by Ohio law to exercise any function of state government. "State entity" excludes a political subdivision, an institution of higher education, all the state retirement systems, and the City of Cincinnati retirement system.

Under the bill, an "energy price risk management contract" is a contract that mitigates for the term of the contract the price volatility of energy sources, including, but not limited to, natural gas, gasoline, oil, and diesel fuel, and that is a budgetary and financial tool only and not a contract for the procurement of an energy source. The bill prohibits the term of the contract extending beyond the end of the fiscal year in which the contract is entered into. Under the bill, money received pursuant to such a contract entered into by a state official must be deposited to the credit of the state General Revenue Fund, and, unless otherwise provided by ordinance or resolution enacted or adopted by the legislative authority of the political subdivision authorizing any such contract, money received under the contract must be deposited to the credit of the general fund of the political subdivision.

II. Energy sources

Corporate separation

(R.C. 4928.17(E))

Current statute authorizes, but does not require, an electric utility to divest itself of any generating asset without prior PUCO approval. The bill focuses divestiture policy on electric distribution utilities specifically, thereby removing any limitation on divestiture by an electric utility that is not a distribution utility. The bill also removes the current law's provision that a utility's authority to divest is subject to the provisions of Title 49 of the Revised Code relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset.

Alternative energy requirements

(R.C. 4928.01 and 4928.64)

The bill requires an electric distribution utility, by 2025 and thereafter, to provide from "alternative energy resources" a portion of the electricity supply required for its requisite SSO, and an electric services company to provide a portion of its Ohio retail electricity supply, from alternative energy resources.

Under the bill, an alternative energy resource means an advanced energy resource or renewable energy resource that has a placed-in-service date of January 1, 1998, or after; or a mercantile customer-sited advanced energy resource or renewable energy resource, whether

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new or existing, that the mercantile customer^[3] commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided in the energy efficiency provisions of the bill (see "Energy efficiency," below). The bill specifically includes as such programs (1) a resource that has the effect of improving the relationship between real and reactive power, (2) a resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer, (3) storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics, (4) electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource, and (5) any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility. Additionally, under the bill and as it considers appropriate, the PUCO can classify any new technology as such an advanced energy resource or a renewable energy resource.

"Advanced energy resource"

The bill defines an "advanced energy resource" as (1) any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of any electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility, (2) any distributed generation system consisting of customer cogeneration of electricity and thermal output simultaneously, primarily to meet the energy needs of the customer's facilities, (3) clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American Society of Testing and Materials Standard D1757A or a reduction of metal oxide emissions in accordance with the Society's Standard D5142, (4) advanced nuclear energy technology consisting of generation III technology as defined by the Nuclear Regulatory Commission; other, later technology; or significant improvements to existing facilities, (5) any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell, and (6) demand-side management and any energy efficiency improvement.

"Renewable energy resource"

The bill defines a "renewable energy resource" as solar photovoltaic or solar thermal energy, wind energy, power produced by a hydroelectric facility, geothermal energy, fuel derived from solid wastes^[4] through fractionation, biological decomposition, or other process that does not principally involve combustion, biomass energy, biologically derived methane gas, or energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors. The term includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric

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acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; any wind turbine located in the state's territorial waters of Lake Erie; any storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak; or distributed generation system used by a customer to generate electricity from any such energy.

For the purpose of the bill's renewable energy resource requirement only, the bill defines the term "hydroelectric facility" to mean energy produced by a hydroelectric generating facility that is located at a dam on a river within or bordering Ohio or an adjoining state and (1) provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility, (2) demonstrates that it complies with the water quality standards of Ohio, which compliance may consist of certification under the federal "Clean Water Act of 1977" and demonstrates that it has not contributed to a finding by the State of Ohio that the river has impaired water quality under that act, (3) complies with mandatory prescriptions regarding fish passage as required by the FERC license issued for the project, regarding fish protection for riverine, anadromous, and catadromus fish, (4) complies with the recommendations of the OEPA and with the terms of the facility's FERC license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility, (5) complies with the federal "Endangered Species Act of 1973," (6) does not harm cultural resources of the area, as shown through compliance with the terms of its FERC license or, if not regulated by FERC, through development of a plan approved by the Ohio Historic Preservation Office, to the extent it has jurisdiction over the facility, (7) complies with the terms of its FERC license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by FERC, complies with similar requirements as are recommended by resource agencies, and provides access to water to the public without fee or charge, and (8) is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

Mercantile customer-sited resources

A mercantile customer-sited advanced energy or renewable energy resource qualifies as an alternative energy resource under this bill if the mercantile customer^[5] commits the resource for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under the energy efficiency provisions of the bill including, but not limited to, any of the following: (1) a resource that has the effect of improving the relationship between real and reactive power, (2) a resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by the mercantile customer, (3) storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics, (4) electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource, and (5) any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility.

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Benchmarks

The requisite portion of electric supply derived from alternative energy resources must equal 25% of the total number of kilowatt hours of electricity sold by the utility or company to any and all retail electric consumers whose electric load centers are served by the utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within Ohio. The bill states, however, that its alternative energy resource provisions do not preclude a utility or company from providing a greater percentage. The baseline for a utility's or company's compliance with the alternative energy resource requirements must be the average of such total kilowatt hours it sold in the preceding three calendar years, except that the PUCO can reduce a utility's or company's baseline to adjust for new economic growth in the utility's certified territory or, in the case of an electric services company, in the company's service area in Ohio.

Of the alternative energy resources implemented by a utility or company, the bill provides that half can be generated from advanced energy resources. However, at least half must be generated from renewable energy resources, including 0.5% from solar energy resources, in accordance with the following benchmarks:

<u>By end of year</u>	<u>Renewable energy resources</u>	<u>Solar energy resources</u>
2009	0.25%	0.004%
2010	0.50%	0.008%
2011	1%	0.015%
2012	1.5%	0.02%
2013	2%	0.06%
2014	2.5%	0.10%
2015	3.5%	0.14%
2016	4.5%	0.18%
2017	5.5%	0.22%
2018	6.5%	0.26%
2019	7.5%	0.3%
2020	8.5%	0.34%
2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each calendar year thereafter	12.5%	0.5%

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Further, under the bill, at least half of the renewable energy resources implemented by the utility or company must be met through facilities located in Ohio; the remainder must be met with resources that can be shown to be deliverable into Ohio.

The bill specifies that all costs incurred by a utility in complying with the bill's alternative energy resource requirements are bypassable by any consumer choosing an alternative generation supplier.

The bill establishes a cost cap relative to a utility's or company's obligation to comply with a renewable energy resource benchmark. Under the bill, no electric distribution utility or electric services company can, nor can be required to or be subject to a compliance payment the enforcement provisions of the bill, exceed that benchmark if that would result in an annual, estimated, average net increase in the total amounts paid by its customers due to the cost of the renewable energy resources to exceed 3% of the total amounts paid by each customer class in the previous calendar year, as determined by the PUCO. "Total amounts paid by customers" is defined as all costs for generation, transmission, distribution, metering, taxes, and all other costs comprising customer bills. The bill states that nothing in its force majeure provision affects the right of the utility or company to construct or operate any renewable energy resource or affects any electricity supply contract.

Regarding adjustments to the 3% limitation, the bill authorizes the PUCO, not later than 1/1/2013 and in consultation with DOD, the Ohio Air Quality Development Authority, and the Office of the Consumers' Counsel, to review the cost cap limitation and report to the House and Senate standing committees of the General Assembly that primarily deal with alternative energy issues regarding whether the 3% limitation unduly constrains the procurement of renewable energy resources. The report must include recommendations regarding whether that limitation should be maintained, eliminated, or changed.

Renewable and solar benchmark enforcement

Penalties. The bill requires the PUCO to review annually a utility's or company's compliance with the most recent, applicable, renewable energy resource or solar energy resource benchmark and, in the course of that review, identify any undercompliance or noncompliance that the PUCO determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control. If the PUCO determines, after notice and opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, that the utility or company has failed to comply with any such benchmark, it must impose a renewable energy compliance payment on the utility or company.

The compliance payment pertaining to the bill's solar energy resource benchmarks must be an amount per megawatt hour of undercompliance or noncompliance in the period under review, starting at \$450 for 2009, \$400 for 2010 and 2011, and similarly reduced every two years thereafter through 2024 by \$50, to a minimum of \$50.

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The compliance payment pertaining to the bill's renewable energy resource benchmarks must equal the number of additional renewable energy credits (see "Renewable energy credits," below) that the utility or company would have needed to comply with the applicable benchmark in the period under review times an amount beginning at \$45 and adjusted annually by the PUCO to reflect any change in the Consumer Price Index, but cannot be less than \$45.

The bill prohibits the compliance payment being passed through to consumers. It must be remitted to the PUCO, for deposit to the credit of the Advanced Energy Fund (see "Advanced Energy Fund assistance," below). Payment of the compliance payment will be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under continuing law (R.C. 4905.55 to 4905.60 and 4905.64, not in the bill).

The bill also requires the PUCO to establish a process to provide for at least an annual review of the alternative energy resource market in Ohio and in the service territories of RTOs that manage transmission systems located in Ohio. The PUCO must use the study results to identify any needed changes to the bill's amount of a renewable energy compliance payment. Specifically, the PUCO may increase the amount to ensure that payment of compliance payments is not used to achieve compliance in lieu of actually acquiring or realizing energy derived from renewable energy resources. However, under the bill, if it finds that the amount of the compliance payment should be otherwise changed, the PUCO must present this finding to the General Assembly for legislative enactment.

Force majeure exception

The bill authorizes an electric utility or electric services company to request the PUCO to make a force majeure determination regarding all or part of the utility's or company's compliance with any minimum, renewable energy resource benchmark during the period of compliance review as described above. The PUCO can require the utility or company to make solicitations for renewable energy resource credits as part of its default service before the utility or company can make a force majeure request.

Within 90 days after the filing of such a request, the PUCO must determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the PUCO must consider whether the utility or company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the PUCO must consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM Interconnection regional transmission organization or its successor and the Midwest System Operator or its successor.

If the PUCO determines that renewable energy or solar energy resources are not reasonably available to permit the utility or company to comply during the period of review

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with the applicable minimum benchmark, the PUCO must modify that compliance obligation of the utility or company as it determines appropriate to accommodate the finding. The bill provides that such a PUCO modification does not automatically reduce the obligation for the utility's or company's compliance in subsequent years, and the PUCO can require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation.

Annual report

The bill requires the PUCO to submit an annual report to the General Assembly describing the compliance of electric distribution utilities and electric services companies with the bill's alternative energy resource requirements and any strategy for utility and company compliance or for encouraging the use of alternative energy resources in supplying Ohio's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts. The PUCO must allow and consider public comments on the report prior to submission. The bill states that nothing in the report is binding on any person, including any utility or company for the purpose of its compliance with any alternative energy resource benchmark or the enforcement of a benchmark requirement.

Alternative Energy Advisory Committee

The bill requires the Governor, in consultation with the PUCO chairperson, to appoint an Alternative Energy Advisory Committee. The Committee must examine available technology for and related timetables, goals, and costs of the bill's alternative energy resource requirements and submit to the PUCO a semiannual report of its recommendations.

Advanced Energy Fund assistance

(R.C. 4928.01(A)(25), 4928.61, and 4928.621)

The bill adds revenue sources for continuing law's Advanced Energy Fund, which is administered by DOD to provide grants, contracts, loans, loan participation agreements, linked deposits, and energy production incentives for advanced energy projects, and revises the definition of "advanced energy project."

Revenue sources

The bill adds two new revenue sources for the Advanced Energy Fund: renewable energy compliance payments imposed by the PUCO pursuant to the bill (see "Renewable and solar benchmark enforcement," above) and forfeitures assessed by the PUCO for violations of the bill's energy efficiency provisions (see "Energy efficiency," above). The Fund will continue under the bill to receive revenue from the sources currently authorized by law: namely, a surcharge on all customers of electric distribution utilities and any participating municipal electric utilities and electric cooperatives,^[6] payments, repayments, and income from funded projects; and interest earnings on the Fund.

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"Advanced energy project"

Under current law, an "advanced energy project" is any technology, product, activity, or management practice or strategy that facilitates the generation or use of electricity and reduces or supports the reduction of energy consumption or supports the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users. Such energy expressly includes, but is not limited to, wind power; geothermal energy; solar thermal energy; and energy produced by micro turbines in distributed generation applications with high electric efficiencies, by combined heat and power applications, by fuel cells powered by hydrogen derived from wind, solar, biomass, hydroelectric, landfill gas, or geothermal sources, or by solar electric generation, landfill gas, or hydroelectric generation.

Instead of that last sentence, the bill provides that an "advanced energy project" includes, but is not limited to, advanced energy resources and renewable energy resources, the definitions for which appear in the "Alternative energy requirements," section of this analysis, above).

Additionally, without intending to limit who otherwise can apply for state assistance for advanced energy projects, the bill makes all of the following eligible for funding as an "advanced energy project":

(1) Any Edison Technology Center,^[7] for the purposes of creating an Advanced Energy Manufacturing Center in Ohio that will provide for the exchange of information and expertise regarding advanced energy, assisting with the design of advanced energy projects, developing workforce training programs for such projects, and encouraging investment in advanced energy manufacturing technologies for advanced energy products and investment in sustainable manufacturing operations that create high-paying jobs in Ohio;

(2) Any university or group of universities in Ohio that conducts research on any advanced energy resource (see "Alternative energy requirements," above) or any not-for-profit corporation formed to address issues affecting the price and availability of electricity and having members that are small businesses, for the purpose of encouraging research in Ohio that is directed at innovation in or the refinement of those resources or for the purpose of educational outreach regarding those resources.

The bill requires the university, university group, or not-for-profit corporation to use the funding to establish such a program of research or education outreach and requires that any such educational outreach be directed at an increase in, innovation regarding, or refinement of access by or of application or understanding of Ohio businesses and consumers regarding, advanced energy resources;

(3) Any independent group located in Ohio, the express objective of which is to educate Ohio small businesses regarding renewable energy resources and energy efficiency programs;

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(4) Any small business located in Ohio electing to utilize an advanced energy project or participate in an energy efficiency program.

Renewable energy credits

(R.C. 4928.65)

The bill authorizes an electric distribution utility or electric services company to use renewable energy credits any time in the five calendar years following the purchase or acquisition of such credits from any entity, including, but not limited to, a mercantile customer or an owner or operator of a hydroelectric generating facility that is located at a dam on a river that is within or bordering Ohio or an adjoining state, for the purpose of complying with the bill's renewable energy and solar energy resource requirements (see "Alternative energy requirements," above). The PUCO must adopt rules specifying that one unit of credit equals one megawatt hour of electricity derived from renewable energy resources. The rules also must provide for Ohio a system of registering renewable energy credits by specifying which of any generally available registries must be used for that purpose and not by creating a registry. That selected system of registering renewable energy credits shall allow a hydroelectric generating facility eligible for obtaining renewable energy credits and shall allow customer-sited projects or actions the broadest opportunities to be eligible for obtaining renewable energy credits.

Energy efficiency

General requirements

(R.C. 4928.66(A))

The bill requires electric distribution utilities to implement energy efficiency programs. Such programs expressly can include demand-response programs, customer-sited programs, and transmission and distribution infrastructure improvements that reduce line losses. The bill requires that its energy efficiency provisions must be applied to include facilitating efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code."

The bill also prohibits any such program or improvement to conflict with any statewide building code adopted by the Board of Building Standards.

Energy savings benchmarks

(R.C. 4928.66(A)(1)(a) and (2)(a))

Under the bill, beginning in 2009, an electric distribution utility must implement energy efficiency programs that achieve energy savings equivalent to at least 0.3% of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility

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during the preceding three calendar years to its Ohio customers. The savings requirement, using such a three-year average, must increase to an additional 0.5% in 2010, 0.7% in 2011, 0.8% in 2012, 0.9% in 2013, 1% in years 2014 to 2018, and 2% each year thereafter, achieving a cumulative, annual energy savings in excess of 22% by the end of 2025. The baseline for such energy savings will be the average of the total kilowatt hours the utility sold in the preceding three calendar years, except that the PUCO may reduce that baseline to adjust for new economic growth in the utility's certified territory.

Peak demand reduction benchmarks

(R.C. 4928.66(A)(1)(b) and (2)(a))

Beginning in 2009, an electric distribution utility must implement peak demand reduction programs designed to achieve a 1% reduction in peak demand in 2009 and an additional 0.75% reduction each year through 2018. In 2018, the standing committees in the Ohio House and Senate primarily dealing with energy issues must make recommendations to the General Assembly regarding future peak demand reduction targets.^[8] The baseline for a peak demand reduction will be the average peak demand on the utility in the preceding three calendar years, except that the PUCO may reduce that baseline to adjust for new economic growth in the utility's certified territory.

Baseline adjustments

(R.C. 4928.66(A)(2)(b) and (c))

The bill authorizes the PUCO to amend the energy savings benchmarks and the peak demand reduction benchmarks if, after application by the electric distribution utility, the PUCO determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks for regulatory, economic, or technological reasons beyond its reasonable control.

Additionally, the bill requires that a utility's compliance with the energy savings benchmarks and the peak demand reduction benchmarks must be measured by including the effects of all demand-response programs for its mercantile customers and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the "appropriate loss factors." If a mercantile customer commits such existing or new demand-response, energy efficiency, or peak demand reduction capability for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, the utility's baseline must be adjusted to exclude the effects of all such demand-response, energy efficiency, or peak demand reduction programs that may have existed during the period used to establish the baseline. An energy savings or peak demand reduction baseline also must be normalized for changes in numbers of customers, sales, weather, peak demand, and other appropriate factors so that the compliance measurement is not unduly influenced by factors outside the control of the electric distribution utility.

Energy efficiency enforcement

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(R.C. 4928.66(B) and (C))

The bill requires the PUCO, in accordance with rules it must adopt, to produce and docket an annual report containing the results of its verification of the annual levels of energy efficiency and peak demand reductions achieved by each electric distribution utility as required by the bill. A copy of the report must be provided to the Consumers' Counsel.

If it determines, after notice and opportunity for hearing and based upon the report, that an electric distribution utility has failed to comply with an energy efficiency or peak demand reduction requirement established by the bill, the PUCO must assess forfeiture on the utility as provided under continuing law (R.C. 4905.55 to 4905.60 and 4905.64, not in the bill), either in the amount, per day per undercompliance or noncompliance, relative to the period of the report, equal to that so prescribed for noncompliances (a maximum of \$10,000 currently), or in an amount equal to the then existing market value of one renewable energy credit per megawatt hour of undercompliance or noncompliance. Revenue from any such forfeiture assessed must be deposited to the credit of the Advanced Energy Fund (see "Advanced Energy Fund assistance," above).

Revenue decoupling/energy efficiency

(R.C. 4928.66(D))

The PUCO may establish rules regarding the content of an application by an electric distribution utility for PUCO approval of a revenue decoupling mechanism. The bill provides that such a revenue decoupling application is not to be considered an application to increase rates^[9] and that the application may be included as part of a proposal to establish, continue, or expand energy efficiency or conservation programs.

The PUCO can approve the revenue decoupling mechanism if it determines that the mechanism provides for the recovery of revenue that otherwise may be foregone by the utility as a result of or in connection with the utility's implementation of any energy efficiency or energy conservation programs and that the mechanism reasonably aligns the interests of the utility and of its customers in favor of those programs.

However, the bill also provides that any mechanism designed to recover the cost of the bill's energy efficiency and peak demand reduction requirements can exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, provided the PUCO determines that that exemption reasonably encourages such customers to commit those capabilities to those programs.

Energy Advisor report

(Section 5)

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The bill requires the Governor's Energy Advisor to periodically submit a written report to the General Assembly and report in person to and as requested by the standing committees of the Ohio House of Representatives and the Senate that have primary responsibility for energy efficiency and conservation issues regarding initiatives undertaken by the Advisor and state government pursuant to numbered paragraphs 3 and 4 of Executive Order 2007-02S, "Coordinating Ohio Energy Policy and State Energy Utilization." The first written report must be submitted not later than 60 days after the bill's effective date. Paragraph 3 pertains to energy efficiency and conservation measures by state agencies and paragraph 4 pertains to measures by state universities and colleges.

Customer information

(R.C. 4928.66(E))

The bill requires the PUCO to adopt rules that require an electric distribution utility to provide a customer upon request with two years' consumption data in an accessible form.

Net metering

(R.C. 4928.67)

Generally

Current law requires a retail electric service provider to develop a standard contract or tariff providing for net energy metering and requires the utility to make this contract or tariff available to customer-generators upon request and on a first-come, first-served basis, but only when the total rated generating capacity used by customer-generators is less than 1% of the provider's aggregate customer peak demand in Ohio. It requires that the contract or tariff be identical in rate structure, all retail rate components, and any monthly charges to the contract or tariff to which the same customer would be assigned if that customer were not a customer-generator.

The bill provides that this net metering requirement pertains to electric utilities and removes the reference to a "retail electric service provider." This conforms the statute to PUCO rules. The current term is not defined in the Restructuring Law and has been interpreted in PUCO rules as meaning an electric utility.

In addition, the bill removes current law's limitation that a net metering contract or tariff be made available when the total rated generating capacity used by customer-generators is less than 1% of the provider's aggregate customer peak demand in Ohio.

Hospital net metering

The bill newly requires an electric utility to develop a separate standard contract or tariff providing for net metering for a hospital that is also a customer-generator. Such a "hospital" includes a public health center and general, mental, chronic disease, or other type of hospital, and any related facility, such as a laboratory, outpatient department, nurses' home

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facility, extended care facility, self-care unit, or central service facility operated in connection with a hospital, and also includes an education and training facility for health professions personnel operated as an integral part of a hospital, but does not include any hospital furnishing primarily domiciliary care (R.C. 3701.01(C), not in the bill).

Under the bill, a hospital seeking such a contract or tariff need not comply with two requirements that apply to other net metering systems: a hospital's system need not (1) use as its fuel either solar, wind, biomass, landfill gas, or hydropower, or use a microturbine or a fuel cell or (2) be intended primarily to offset part or all of the customer-generator's requirements for electricity.

The bill provides that such a hospital net metering contract or tariff is not limited as to its availability and must be based upon (1) the rate structure, rate components, and any charges to which the hospital would otherwise be assigned if it were not a customer-generator and (2) the market value of the customer-generated electricity at the time it is generated. In addition, transmission and distribution charges in the contract or tariff apply to the flow of electricity both to the customer and from the customer to the electric utility.

The hospital contract or tariff also must allow the hospital customer-generator to operate its electric generating facilities individually or collectively without any wattage limitation on size.

Greenhouse gas emissions

(R.C. 4928.68)

Ohio currently does not have any rules regarding reporting by any types of emitter of greenhouse gases, which include, but are not limited to, electric generating facilities. A recent federal act requires the U.S. EPA to prescribe mandatory reporting requirements for greenhouse gas emissions and appropriate emission thresholds for particular economic sectors, including electric generation. Draft rules are expected this summer and final rules must be in place in mid-2009. The rules apparently will be issued under existing authority of the federal Clean Air Act, under which OEPA typically is the implementing state agency. Reportedly, other state agencies that wish to enforce such federal rules must petition the federal government for permission.

The bill requires the PUCO, to the extent permitted by federal law, to adopt rules establishing greenhouse gas^[10] emission reporting requirements for each electric generating facility located in Ohio that is owned or operated by a public utility that is subject to PUCO jurisdiction and that emits greenhouse gases, including facilities in operation on the bill's effective date. The rules must include participation in the Climate Registry.^[11] The Registry's web site describes the Registry as "a collaboration between states, provinces, and tribes aimed at developing and managing a common greenhouse gas emissions reporting system with high integrity that is capable of supporting various greenhouse gas emissions reporting and reduction policies for its member states and tribes and reporting entities."

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Neither continuing state law nor the bill provide for any type of penalty for a violation of any rule so adopted, although federal law may govern in this regard.

Carbon dioxide control

(R.C. 4928.68)

The bill requires the PUCO, expressly to the extent permitted by federal law, to adopt rules establishing carbon dioxide control planning requirements for each electric generating facility located in Ohio that is owned or operated by a public utility that is subject to PUCO jurisdiction and that emits greenhouse gases, including facilities in operation on the bill's effective date.

There currently are no such federal or state requirements, and none are being proposed for the foreseeable future. The bill does not describe the scope of the carbon control planning requirements, for example, whether the rules will be directed at the filing of long-term plans or address technology standards. Further, neither continuing state law nor the bill provide for any type of penalty for a violation of any rule so adopted.

Natural gas revenue decoupling

(R.C. 4929.01 and 4929.051; Section 4)

Alternative rate plan

Continuing Ohio law generally affirms PUCO authority to regulate the commodity sales service, distribution service, and ancillary service^[12] of a natural gas utility (R.C. 4929.03). Under continuing law, a natural gas utility can apply for PUCO approval of an alternative rate plan for its commodity sales service or ancillary service (R.C. 4929.05). Such a plan would establish a different method for determining the rates and charges for the service than ordinarily would occur under the traditional rate-making provisions of continuing law (R.C. 4909.15). Those provisions, for the purpose of setting the utility's rate schedule (tariff), require determination of the revenue requirement of the utility necessary to cover its identified operating costs and receive a fair and reasonable rate of return on its investment in plant used and useful in rendering the service.

As stated, an alternative rate plan allows other methods of determining the rate schedule of the utility than the previously described cost/rate of return method. The definition "alternative rate plan" specifies two, actual alternative mechanisms: (1) an automatic adjustment in rates based on a specified index or changes in a specified cost or costs^[13] and (2) a mechanism that tends to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred. Otherwise, current law specifies as allowable methods what are actually possible outcomes of alternative ratemaking. Those methods can include, but are not limited to, rate-setting methods that will (3) provide adequate and reliable natural gas services and goods in Ohio, (4) minimize the costs and time expended in the regulatory process, (5) afford rate stability, (6) promote and

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reward efficiency, quality of service, or cost containment, and (7) provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced, and readily available natural gas services and goods at just and reasonable rates and charges. (R.C. 4929.01.)

Under the bill, an alternative rate plan could newly include (8) a revenue decoupling mechanism, which the bill defines as a rate design or other cost recovery mechanism that provides recovery of the fixed costs of service and a fair and reasonable rate of return, irrespective of "system throughput" (the amount of gas entering the transmission/distribution system) or volumetric sales.

Plan approval process

Current law prescribes the process for obtaining PUCO approval of an alternative rate plan. It specifies that there must be notice, investigation, and hearing of an alternative rate plan. The standards the PUCO must use to approve the plan are that (1) the plan will produce just and reasonable rates and charges and, after a showing by the utility, (2) the utility is in compliance with the nondiscrimination provisions of Ohio law (R.C. 4905.35)^[14] and in substantial compliance with the state natural gas policy (which is amended by the bill, as described below), and (3) the utility is expected to be in substantial compliance with that policy following the plan's implementation. (R.C. 4929.05.)

The current approval process authorizes the request for approval of an alternative rate plan as part of an application filed under the rate-making law (R.C. 4909.18) that governs applications by utilities to establish new, or change existing, rates and charges for service. That law prescribes certain timelines for filing such an application and the information the application must contain. It also requires that, if the PUCO believes the application may be unjust or unreasonable, it must hold hearings on the matter. This could apply, for instance, when a utility was asking for a rate increase. However, if the PUCO determines an application is *not for an increase in rates*, the PUCO can permit the filing of the rate schedule and set the date it is to take effect; no hearing is required.

The bill provides that an alternative rate plan filed by a natural gas company under R.C. 4929.05 of continuing law and proposing a revenue decoupling mechanism can be an application "not for an increase in rates" if both of the following apply: (1) the rates, joint rates, tolls, classifications, charges, or rentals the plan proposes are based upon the billing determinants and revenue requirements authorized by the PUCO in the utility's most recent rate case proceeding and (2) the plan also establishes, continues, or expands an energy efficiency or energy conservation program (R.C. 4929.051).

Bill's effect on existing applications

Regarding any alternative rate plan that was filed before the bill's effective date under R.C. 4929.05 and that proposes a revenue decoupling mechanism and meets the two conditions described immediately above, uncodified law in the bill expressly prohibits the bill being applied in favor of (that is, construed as supporting) a claim or finding that the

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application *is* an application to increase rates (and therefore generally subject to hearing under traditional rate-making law).

State natural gas policy

(R.C. 4929.02)

Current Ohio law articulates a state policy that lists eleven objectives regarding natural gas service and requires the Public Utilities Commission (PUCO) to follow that policy when carrying out R.C. Chapter 4929. Aside from authorizing approval of alternative rate plans as described above, that chapter also establishes the conditions under which the PUCO can deregulate natural gas commodity sales and ancillary services upon a filing by a utility and certify governmental aggregators of natural gas and retail natural gas suppliers to operate in Ohio.

The bill adds a twelfth objective to the state policy: to promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation. It also requires both the PUCO and OCC to follow the state policy in exercising their respective authorities relative to Chapter 4929. Under continuing law, OCC serves as the advocate for residential consumers of utility services.

Miscellaneous

(R.C. 4928.20, 4928.31, 4928.34, 4928.35, 4928.41, 4928.42, 4928.431, and 4928.44)

The bill repeals four sections of the Electric Restructuring Law: R.C. 4928.41, regarding electric cooperative transition revenues; R.C. 4928.42, regarding transitional requirements for electric consumer education; R.C. 4928.431, regarding an obsolete Electric Employee Assistance Advisory Board created under S.B. 3; and R.C. 4928.44, regarding service offering for nonfirm electric service customers. Accordingly, the bill amends R.C. 4928.20, 4928.31, 4938.34, and 4938.35 to remove references to those repealed sections.

HISTORY

ACTION	DATE
Introduced	09-25-07
Reported, S. Energy & Public Utilities	10-31-07
Passed Senate (32-0)	10-31-07
Reported, H. Public Utilities	---

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S0221-RH-127.doc/jc

* - This analysis was prepared before the report of the House Public Utilities Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

[1] Although this change may be read as possibly allowing an MRO or ESP to provide for corporate separation other than as required by R.C. 4928.17, it may be intended to preclude the PUCO's exercise of authority in authorizing an MRO or ESP from being challenged on the grounds that the PUCO lacked the authority to do so in light of R.C. 4928.05's corporate separation requirement.

[2] Regional transmission organizations coordinate the movement of electricity on a regional basis throughout North America via the electric transmission grid.

[3] Under continuing law, a "mercantile customer" is a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than 700,000 kilowatt hours per year or is part of a national account involving multiple facilities in one or more states (R.C. 4928.01(A)(19)).

[4] As used here, "solid wastes" means "such unwanted residual solid or semisolid material as results from industrial, commercial, agricultural, and community operations, excluding earth or material from construction, mining, or demolition operations, or other waste materials of the type that normally would be included in demolition debris, nontoxic fly ash and bottom ash, including at least ash that results from the combustion of coal and ash that results from the combustion of coal in combination with scrap tires where scrap tires comprise not more than 50% of heat input in any month, spent nontoxic foundry sand, and slag and other substances that are not harmful or inimical to public health, and includes, but is not limited to, garbage, scrap tires, combustible and noncombustible material, street dirt, and debris. "Solid wastes" does not include any material that is an infectious waste or a hazardous waste." (R.C. 3734.01(E).)

[5] Under the bill, based on the definition of current law, a "mercantile customer" is a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than 700,000 kilowatt hours per year or is part of a national account involving multiple facilities in one or more states. Current law uses this definition for the term "mercantile commercial customers" and removes "commercial" from that phrase.

[6] Under continuing law, surcharge remittances continue only until December 31, 2011, or until the Fund reaches \$100 million, whichever is first.

[7] There are seven such centers in Ohio, three in Columbus and one each in Cleveland, Dayton, Toledo, and Cincinnati. A DOD web site describes the Centers as providing "a variety of product and process innovation and commercialization services to both established and early-stage technology-based businesses such as: new product design; CAD/CAM; prototyping; materials selection and handling; plant layout and design; quality systems; information systems; machining; joining technology assistance; and biotechnology business consulting." (<http://www.odod.state.oh.gov/tech/edison/tiedc.htm>>(4/11/08).

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[8] Because actions of a General Assembly are not binding on future General Assemblies, this recommendation requirement cannot be construed as mandatory. (See, OH Const. Art. II, §§1, 15).

[9] Referring to an application under R.C. 4909.18, which type of application would require a hearing.

[10] "[Greenhouse gases] allow sunlight to enter the atmosphere freely. When sunlight strikes the Earth's surface, some of it is reflected back towards space as infrared radiation (heat). Greenhouse gases absorb this infrared radiation and trap the heat in the atmosphere. . . . Some of [the gases] occur in nature (water vapor, carbon dioxide, methane, and nitrous oxide), while others are exclusively human-made (like gases used for aerosols). . . . During the past 20 years, about three-quarters of human-made carbon dioxide emissions were from burning fossil fuels." From the U.S. Energy Information Administration, at <http://www.eia.doe.gov/oiaf/1605/ggcebro/chapter1.html> (March 31, 2008).

[11] <http://www.theclimateregistry.org/>. According to the web site, as of April 11, 2008, Ohio is listed as having joined the Registry, along with all other states except Alaska, Texas, Louisiana, Mississippi, Arkansas, North Dakota, South Dakota, Nebraska, Kentucky, Indiana, and West Virginia. The Ohio contact listed on the site is the Director of Ohio EPA. The state's listing currently enables a utility's voluntary participation in the Registry.

[12] "Commodity sales service" is the sale of natural gas to consumers, excluding distribution or ancillary service (R.C. 4929.01(C)). In other words, it is the sale of the natural gas commodity to retail customers. "Ancillary service" is any service that is ancillary to the receipt or delivery of that natural gas commodity, including, but not limited to, storage, pooling, balancing, and transmission (R.C. 4929.01(B)).

[13] In addition, R.C. 4929.11 of the alternative regulation law authorizes the PUCO to allow "any automatic adjustment mechanism or device in a [utility's] rate schedules that allows [the] rates or charges for a regulated service or goods to fluctuate automatically in accordance with changes in a specified cost or costs."

[14] Generally, prohibitions against a utility giving undue preference or advantage, or undue or unreasonable prejudice or disadvantage, to anyone relative to utility service, discriminating among suppliers, or treating similarly situated consumers differently as to the terms and conditions of service.



*Bill Analysis**Legislative Service Commission*

Am. Sub. S.B. 221
127th General Assembly
(As Passed by the General Assembly)

Sens. Schuler, Jacobson, Harris, Fedor, Boccieri, R. Miller, Morano, Mumper, Niehaus, Padgett, Roberts, Wilson, Spada

Reps. J. Hagan, Blessing, Jones, Uecker, Budish, Chandler, Domenick, Evans, Flowers, J. McGregor, Yuko

Effective date: July 31, 2008

ACT SUMMARY

- Focuses on two main subject areas: energy pricing and energy sources.

Energy pricing:

- Preserves the right of consumer choice of electric generation supplier.
- Revises and adds to the objectives of state electric services policy.
- Provides that a "self-generator" under Electric Restructuring Law need not own the generating facility, rather, it can host it on its premises.
- Preserves the requirement that each electric distribution utility have a standard service offer (SSO).
- Continues to provide that each utility's SSO will be the default service for a customer, but changes the statutory nature and process for PUCO approval of an SSO.
- Requires that an SSO be either a market rate offer (MRO) or an electric security plan (ESP).
- Requires all utilities to have either an MRO or ESP by January 1, 2009, but provides that a utility's current SSO continues until such an MRO or ESP is approved.

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- Expressly requires that an MRO or ESP exclude any previously authorized allowances for transition costs.
- Requires the first SSO application of a utility to be an ESP, but allows a utility to simultaneously file an MRO.
- Provides SSO provisions that reflect differences among the electric distribution utilities.
- Authorizes "transitional" MROs that require utilities that own generating assets to "ramp up" to market and operate under a blended generation price during that period.
- Provides that an electric distribution utility that files an MRO cannot, and cannot be required to, file an ESP.
- Provides that the bids selected for an MRO be the least-cost bids and establishes several other criteria regarding the bid results that can preclude an MRO application from going forward.
- Authorizes the PUCO to adjust the blended price of a transitional MRO.
- States that public utility law (R.C. Title 49) does not apply to an ESP.
- Prescribes what an ESP application must contain and also enumerates certain things that, at the utility's discretion, the application can contain, but does not limit any discretionary items to those the act enumerates.
- Requires an ESP to contain provisions related to the supply and pricing of electric generation service and, if the proposed ESP has a term longer than three years, requires that it must include provisions to permit the PUCO to test the ESP.
- Permits an ESP to include automatic cost recovery, a construction work in progress allowance/nonbypassable surcharge, a nonbypassable surcharge for a competitively bid generating facility, rate stabilization, automatic price adjustments, securitization, transmission and related services, distribution service, and economic development and energy efficiency.
- Requires that, if an ESP provides a nonbypassable surcharge for a new, competitively sourced generating facility, the utility must dedicate to Ohio consumers the capacity and energy and the rate associated with that facility.
- Prescribes as the standard for PUCO approval of an ESP that its pricing and other terms and conditions, including any deferrals and any future recovery of deferrals,

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are more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO.

- Requires that, if the PUCO approves an ESP that contains a nonbypassable surcharge for construction work in progress or for a new, competitively sourced generating facility, it must 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.
- Allows an electric distribution utility to withdraw an ESP application, thereby terminating it, if the PUCO modifies and then approves the application.
- Requires the PUCO to issue an order continuing the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs, until a subsequent ESP or MRO is filed and authorized, if a utility so withdraws its ESP application or if the PUCO disapproves an ESP application.
- Requires the PUCO periodically to test an approved ESP against the expected results that would otherwise apply under an MRO and to determine if an ESP is likely to provide the electric distribution utility prospectively with excessive earnings, and authorizes the PUCO to remedy any such finding by terminating the plan.
- Requires the PUCO to consider at the end of each year of an ESP if any adjustments to the ESP price actually resulted in excessive earnings to the utility and to remedy any excessive earnings by requiring prospective price adjustments.
- Authorizes discovery requests of certain utility or affiliate agreements during an MRO or ESP proceeding.
- Expressly states that the act's SSO provisions do not preclude or prohibit an electric distribution utility providing competitive retail electric service to electric load centers within the certified territory of another such utility.
- Modifies the corporate separation law so that the law applies to an electric utility "except as otherwise provided in" the act's MRO and ESP provisions.
- Removes any limitation on divestiture by an electric utility that is not a distribution utility.
- Replaces prior law's authority that a utility can divest generating assets without prior PUCO approval subject to the provisions of public utility law relating to the transfer of transmission, distribution, or ancillary service provided by such

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generating asset, with a prohibition against any such divestiture without prior PUCO approval.

- Authorizes the PUCO to grant rate or price phase-ins under an MRO or ESP and states that the authority continuing law confers on the PUCO to supervise or regulate a competitive retail electric service does not limit that phase-in authority.
- Authorizes collection of the amounts deferred under a rate or price phase-in, plus carrying charges, to be collected through a nonbypassable surcharge or any rate or price established for the utility, but provides that customers in a governmental aggregation are responsible only for that portion of the phase-in surcharge that is proportionate to the benefits they receive as an aggregated group.
- Permits special contract law to be enforced for the purposes of the Electric Restructuring Law.
- Expressly authorizes under special contract law the filing of a financial device to recover costs incurred in conjunction with economic development and job retention, the act's peak demand reduction and energy efficiency programs, advanced metering, and government mandates.
- Authorizes a mercantile customer or a group of those customers to establish a reasonable arrangement with a utility under special contract law.
- Provides that special contracts must be submitted to the PUCO by application for its approval.
- Extends to a FERC-approved regional transmission organization that is responsible for maintaining reliability in all or part of Ohio the requirement to consent to service of process and designate an agent.
- Requires the PUCO to employ a Federal Energy Advocate to generally assist with transmission oversight.
- Prohibits an electric distribution utility charging a customer of a municipal utility in existence before January 1, 1998, any surcharge, service termination charge, exit fee, or transition charge.
- Requires the PUCO, in carrying out the state electric services policy, to consider rules as they apply to the costs of electric distribution infrastructure, including line extensions, for the purpose of development in Ohio.
- Requires the PUCO to adopt and enforce rules prescribing a uniform, statewide policy regarding electric transmission and distribution line extensions and requisite

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substations and related facilities that are requested by nonresidential customers of electric utilities.

- Lengthens from two years to up to three years the time period for an automatic governmental aggregation before a participant can opt-out.
- Provides that the default service of a person that opts out of a government aggregation before the commencement of the aggregation is a utility's SSO.
- Allows a legislative authority, on behalf of the customers that are part of its governmental aggregation, to choose not to receive standby service from the electric distribution utility in whose certified territory the aggregation is located and that operates under an approved ESP.
- Provides that a customer of a governmental aggregation that has so refused standby service and that leaves the aggregation and returns to the utility for competitive retail electric service has to pay the market price of power incurred by the utility to serve that consumer plus any amount attributable to the utility's cost of compliance with the act's alternative energy resource provisions to serve the consumer.
- Requires the PUCO to adopt rules to encourage and promote "large-scale" governmental, electric, aggregation in Ohio.
- Removes the statutory definition of "small generating facility" in Electric Restructuring Law and repeals certain transitional provisions of that law.
- Authorizes a natural gas utility to apply for PUCO approval of an alternative rate plan that includes a revenue decoupling mechanism.
- Defines such a "revenue decoupling mechanism" as a rate design or other cost recovery mechanism that provides recovery of the fixed costs of service and a fair and reasonable rate of return, irrespective of system throughput or volumetric sales.
- By declaring that such a plan is an application "not for an increase in rates," removes certain requirements for a hearing on any alternative rate plan that includes a revenue decoupling mechanism, proposes rates and charges based upon the acting determinants and revenue requirements authorized by the PUCO in the utility's most recent rate case, and establishes, continues, or expands an energy efficiency or energy conservation program.
- Prohibits the act being construed as supporting a claim or finding that an application for such a conservation-related plan filed before the act's effective date is an application to increase rates (and therefore generally subject to hearing).

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- Adds the following, twelfth objective to the statutory natural gas policy: to promote an alignment of natural gas company interests with consumer interests in energy efficiency and energy conservation.
- Changes the requirement that the PUCO follow the state policy when carrying out its duties under the alternative regulation law, to require that both the PUCO and Ohio Consumers' Counsel follow the policy in exercising their respective authorities under that law.
- Authorizes a state official or the legislative or other governing authority of a county, city, village, township, park district, or school district to enter into an energy price risk management contract.

Energy sources:

- Requires an electric distribution utility and an electric services company to provide from "alternative energy resources" a portion of their electricity supplies from alternative energy resources.
- Defines alternative energy resources as consisting of specified advanced energy resources and renewable energy resources with a placed-in-service date of January 1, 1998, or later, and as consisting of existing or new mercantile customer-sited resources.
- Specifies that the requisite portion of the electric supply derived from alternative energy must equal 25% of the total number of kilowatt hours of electricity sold by the utility or company to any and all retail electric consumers whose electric load centers are served by the utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within Ohio.
- Provides that half of the alternative energy can be generated from advanced energy resources, but at least half must be generated from renewable energy resources, including 0.5% from solar energy resources, subject to yearly, minimum, renewable and solar benchmarks that increase as a percentage of electric supply through 2024.
- Establishes a cost cap relative to a utility's or company's obligation to comply with the alternative energy resource benchmarks.
- Authorizes the PUCO to make a force majeure determination regarding all or part of a utility's or company's compliance with a minimum, renewable energy resource benchmark.

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- Authorizes the PUCO to enforce the renewable energy and solar energy resource benchmarks through the assessment of compliance payments.
- Confers on the Ohio School Facilities Commission the authority to adopt rules prescribing standards for solar ready equipment in school buildings under its jurisdiction and to waive all or part of those standards for a school district for good cause.
- Requires the Governor, in consultation with the PUCO chairperson, to appoint an Alternative Energy Advisory Committee to semiannually review the act's alternative energy requirements.
- Requires the PUCO to submit an annual report to the General Assembly describing alternative energy benchmark compliance and the use of alternative energy resources.
- Prescribes energy savings and peak demand reduction requirements for electric distribution utilities through 2025, sets yearly benchmarks, and authorizes PUCO enforcement of compliance through the assessment of forfeitures.
- Authorizes the PUCO to approve a revenue decoupling mechanism for an electric distribution utility if it reasonably aligns the interests of the utility and of its customers in favor of energy efficiency or energy conservation programs.
- Requires the Governor's Energy Advisor to periodically report to the General Assembly and as requested by House and Senate standing committees responsible for energy efficiency and conservation issues regarding energy efficiency and conservation initiatives undertaken by the Advisor and state government.
- Requires the PUCO, to the extent permitted by federal law, to adopt rules establishing greenhouse gas emissions reporting and carbon dioxide control planning requirements for each electric generating facility located in Ohio that is owned or operated by a public utility that is subject to PUCO jurisdiction and that emits greenhouse gases, including facilities in operation on the act's effective date.

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CONTENT AND OPERATION

The act addresses state energy policy primarily by making changes to the Electric Restructuring Law of R.C. Chapter 4928., including by establishing an alternative energy portfolio requirement for electric suppliers, although it also makes certain changes to the natural gas law of R.C. Chapter 4929. It focuses on two main subject areas: energy pricing and energy sources.

I. Energy pricing

Electricity policy

State electric services policy

(R.C. 4928.02)

The act revises and adds to the objectives of the state electric services policy enacted under S.B. 3 of the 123rd General Assembly. Under both prior law and the act, the statutory electric policy applies statewide, and the PUCO is required to ensure that the policy is effectuated (R.C. 4928.06(A), not in act).

The policy objectives, which had their genesis in S.B. 3's competitive generation market concept and are changed by the act as described below, are as follows: (1) ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service, (2) 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, (3) ensure diversity of electricity supplies and suppliers, by giving consumers effective choice of supplies and suppliers and by encouraging the development of distributed and small generation facilities, (4) encourage innovation and market access for cost-effective supply- and demand-side retail electric service, (5) encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service, (6) recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment, (7) 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, (8) ensure retail electric service consumers protection against

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unreasonable sales practices, market deficiencies, and market power, and (9) facilitate the state's effectiveness in the global economy.

Although the act does not amend the wording of objective (1), its change in the regulatory framework for retail electric service prices, discussed below, provides a different pricing context for implementing the objective's concept of "reasonably priced retail electric service." In addition, the act changes the state policy objectives by adding five new objectives and modifying three of the objectives listed above. Specifically, objective (4) is changed to read: "encourage innovation and market access for cost-effective retail electric service, *including, but not limited to, demand-side management, time-differentiated pricing, and implementation of advanced metering infrastructure.*"

Objective (5) is changed to read: "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.*"

Objective (7) is changed to read: "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.*"

The act adds the following new objectives to the state electric services policy: (1) 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, (2) provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates, (3) encourage implementation of distributed generation across customer classes through regular review and updating of rules governing critical issues such as interconnection standards, standby charges, and net metering, (4) protect at-risk populations, including when considering the implementation of any new advanced energy or renewable energy resource, and (5) encourage the education of small business owners in Ohio regarding the use of energy efficiency programs and alternative energy resources in their businesses and encourage that use.

"Self-generator"

(R.C. 4928.01(A)(7) and (32))

Under prior law, a "self-generator" was described as an entity in Ohio that owns an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to retail electric service providers, whether the facility is installed or operated by the owner or by an agent under a contract. That term is significant primarily for two purposes relating to the scope of the Electric Restructuring Law of S.B. 3 and an electric utility's duty to provide back-up electricity supply to any such

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entity. The act modifies prior law's definition of that term to provide, in effect, that a self-generator can host, but need not own, a generating asset that produces electricity on its premises. This broadens the concept of "self-generator" and thus broadens who is excluded as an electric light company under that law and, consequently, not subject to state utility regulation as to electricity it produces.

In addition, the act removes an undefined term--"retail electric service providers"--from the definition of "self-generator" and replaces it with the term "entity," thereby recognizing that a self-generator can sell excess electricity to anyone, not just to persons engaged in the retail sale of electric service.

Special contracts

(R.C. 4905.31 and 4928.05(A)(1))

Continuing Electric Restructuring Law specifies the scope of the PUCO's authority regarding a competitive retail electric service (generation service), by enumerating specific provisions of public utility rate-making law (R.C. Chapters 4905. and 4909.) that continue to apply to that service notwithstanding that the service is offered competitively in Ohio. The act includes a reference to special contract law (R.C. 4905.31), thereby permitting that law to be enforced for the purposes of the Electric Restructuring Law.

Continuing special contract law in effect authorizes any public utility to file a rate schedule or enter into any reasonable arrangement with another public utility or with its customers, consumers, or employees. The law describes a number of types of those schedules or arrangements, concluding with the general description of any financial device that may be practicable or advantageous to the parties. The act states that, in the case of an electric distribution utility, such a financial device may include a device to recover costs incurred in conjunction with (1) any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program, (2) any development and implementation of peak demand reduction and energy efficiency programs under the act's energy efficiency requirements (see "Energy efficiency," below), (3) any acquisition and deployment of advanced metering, including the costs of any meters prematurely retired as a result of advanced metering implementation, and (4) compliance with any government mandate.

The act removes obsolete references in that list to schedules or arrangements relating to emissions fees.

Additionally, the act authorizes a mercantile customer of an electric distribution utility or a group of those customers to establish a reasonable arrangement with that utility by filing an application with the PUCO.

The act does not specify the standards the PUCO will use to approve a schedule or reasonable arrangement under the special contract law. The act does require that every schedule or arrangement is posted on the PUCO's docketing information system and is accessible through the internet.

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Generation service

General SSO requirement

(R.C. 4928.141(A), 4928.142(B) and (F), 4928.143(A), 4928.145, 4928.146, and 4928.17(A))

The act requires that, beginning January 1, 2009, each electric distribution utility in Ohio must make available a standard service offer (SSO) within its exclusive, certified distribution territory. It provides that, until a utility's first SSO under the act is approved, the rate plan currently in effect for the utility will continue. It additionally states that the act's provisions do not affect the legal validity or force and effect of any such rate plan, including any cost recovery provisions.

The act removes prior law's requirement that an SSO be "market-based," but under both prior law and the act, a utility's SSO generally must be an offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service, and be offered on a comparable and nondiscriminatory basis. The act preserves the requirement that each utility's SSO be the default service for a customer, but changes the statutory nature and process for PUCO approval of an SSO.

Under the act, an SSO must be either a market rate option (MRO) or electric security plan (ESP). An SSO application can include both an ESP and an MRO proposal or be only an ESP or an MRO proposal, but, if a utility's first SSO application is for an MRO, that application must include an ESP proposal as well. Once an MRO is approved for any distribution utility, its SSO must always be an MRO: the utility cannot, and cannot be required to, file an ESP.

A utility can file an MRO or ESP before the effective date of the PUCO rules required under the act, but, as the PUCO determines necessary, must immediately conform its filing to the rules upon their taking effect.

Further, the act expressly requires that an MRO or ESP exclude any previously authorized allowances for transition costs, with that exclusion being effective on and after the date that the allowance is scheduled to end under the utility's current rate plan.

In connection with an MRO or ESP, the act modifies the corporate separation law with a phrase that states that law applies to an electric utility "except as otherwise provided in" the MRO and ESP provisions of the act. Although this change may be read as possibly allowing an MRO or ESP to provide for corporate separation other than as required by statute (R.C. 4928.17), it may be intended to preclude the PUCO's exercise of authority in authorizing an MRO or ESP from being challenged on the grounds that the PUCO lacked the authority to do so in light of the statutory corporate separation requirement.

Additionally, the act requires that, in any MRO, ESP, or rate or price phase-in (see "Rate or price phase-ins/nonbypassable surcharge," below) proceeding, and upon
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submission of an appropriate discovery request, an electric distribution utility must make available to the requesting party every contract or agreement that is relevant to the proceeding and is between the utility or any of its affiliates and a party to the proceeding, consumer, electric services company, or political subdivision. This requirement, however, is subject to such protection for proprietary or confidential information as the PUCO determines appropriate.

Additionally, the act states that the authority continuing law confers on the PUCO to supervise or regulate a competitive retail electric service (currently only generation service) must not be construed to limit the PUCO's authority under the act's SSO and rate or price phase-in provisions.

The act also expressly states that its provisions do not preclude or prohibit an electric distribution utility providing competitive retail electric service to electric load centers within the certified territory of another such utility.

SSO variations

(R.C. 4928.01(A)(33), 4928.141(A), 4928.142(D), and 4928.143(D))

The act's SSO provisions reflect differences among the distribution utilities. Specifically, Dayton Power & Light (DP&L) is the only utility with a current rate plan that is scheduled to expire at the end of 2010, instead of 2008 as the other utilities. Additionally, the First Energy operating utilities reportedly are the only distribution utilities that do not directly own or control generating facilities; rather, First Energy generating assets are owned by an affiliate of those distribution utilities. Every other distribution utility transferred its generating assets to a subsidiary of the utility.

Under the act, all electric distribution utilities are required to file new SSOs with the PUCO in the form of an MRO or ESP. In the case of DP&L, however, the act requires that, regardless of the term of DP&L's initial ESP, the unexpired portion of its current rate plan will be incorporated into its ESP and must constitute its ESP until the end of 2010. Also, the act authorizes DP&L to apply for supplemental authority under its first ESP (see "Nature of an ESP," below). Nothing in the act prohibits DP&L from also simultaneously filing an MRO for its initial SSO, which filing must be accompanied by an ESP proposal.

The act also provides "transitional MROs"--the name this analysis gives to the first MRO filed by any distribution utility that owns or controls generating assets that had been used and useful in Ohio (in other words, any distribution utility except the First Energy utilities). Under such an MRO, the act provides that the utility will transition to the market, in the sense that the utility can bid out only a certain portion of its electric load during a prescribed period (see "Transitional MROs," below).

General filing process

(R.C. 4928.141(B))

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The act requires the PUCO to provide a hearing on an MRO or ESP application, 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 distribution territory. The PUCO must adopt rules regarding MRO and ESP filings.

Market rate offers

Nature of an MRO (R.C. 4928.142(A)). Under the act, an MRO must be determined through a competitive bidding process that provides for all of the following: (1) open, fair, and transparent competitive solicitation, (2) clear product definition, (3) standardized bid evaluation criteria, (4) oversight by an independent third party that will design the solicitation, administer the bidding, and ensure that the foregoing requirements are met, and (5) evaluation of the submitted bids prior to the selection of the least-cost bid winner or winners. The PUCO must modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of bidders, which rules must foster supplier participation and be consistent with (1) through (5) above. But, no generation supplier can be prohibited from participating in the bidding process.

Transitional MROs (R.C. 4928.142(D)). The first MRO filed by an electric distribution utility that, as of the act's effective date, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in Ohio must provide that a portion of that utility's SSO load for the first five years of the MRO be competitively bid as follows: 10% of the load in year one, not less than 20% in year two, not less than 30% in year three, not less than 40% in year four, and not less than 50% in year five. The act requires the PUCO, consistent with those percentages, to determine the actual percentages for each year of years one through five.

MRO application (R.C. 4928.142(B)). An MRO application must detail the electric distribution utility's proposed compliance with the requirements described under "Nature of an MRO" (above) for the competitive bidding process and with the PUCO rules.

Additionally, the application must demonstrate that all of the following requirements are met: (1) the utility or its transmission service affiliate belongs to at least one FERC-approved RTO, or there otherwise is comparable and nondiscriminatory access to the electric transmission grid, (2) any such RTO has a market-monitor function and the ability to take actions to identify and mitigate market power or the 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, and (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.

MRO approval process (R.C. 4928.142(B)). The PUCO must initiate a proceeding and, within 90 days after the application's filing date, determine by order whether the utility and its MRO has demonstrated the items required in the application, as enumerated in (1) to

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(3) immediately above. If the finding is positive, the utility can initiate its competitive bidding process. If it is negative as to one or more requirements, the PUCO in the order must direct the utility regarding how any deficiency may be remedied in a timely manner to the PUCO's satisfaction; otherwise, the utility must withdraw the application. However, if such remedy is made and the subsequent finding is positive, and also if the utility made a simultaneous filing of an ESP application, the utility cannot initiate its competitive bid until at least 150 days after the filing date of those applications.

MRO generation price (R.C. 4928.142(C) and (D)). Upon the completion of the competitive bidding process, the PUCO must select the least-cost bid winner or winners of that process. The selected bid or bids, as prescribed as retail rates by the PUCO, are then the utility's SSO unless the PUCO, by order issued before the third calendar day following the conclusion of the bidding process, determines that (1) any portion of the bidding process was not oversubscribed, such that the amount of supply bid upon was not greater than the amount of the load bid out, (2) there were fewer than four bidders, or (3) at least 25% of the load was not bid upon by one or more persons other than the utility itself.

In addition, the act requires that all costs that are incurred by the utility as a result of or related to the competitive bidding process or to procuring generation service to provide the MRO, 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, be timely recovered through the SSO price. For that purpose, the act requires the PUCO to approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

Transitional MRO generation price (R.C. 4928.142(D) and (E)). In the case of a Transitional MRO, the act requires that the SSO price for electric generation service will be a proportionate blend of the bid price and the generation service price for the utility's remaining SSO load. The latter price must equal the utility's most recent SSO price, adjusted upward or downward as the PUCO determines reasonable, relative to the jurisdictional portion of any known and measurable changes from the level of one or more of the following as reflected in that most recent SSO price: (1) the 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 Ohio's supply and demand portfolio requirements, including renewable energy resource and energy efficiency requirements, and (4) its costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. (Derating refers to a reduction in a generating unit's net dependable capacity due to an equipment or other component failure that requires repair, whether immediately or otherwise.)

In making any such price adjustment to the most recent SSO price, the PUCO must include the benefits that may become available to the utility as a result of or in connection with the costs included in the adjustment, including the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits. Accordingly, the PUCO may impose conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility.

The PUCO also must determine how such SSO price adjustments will affect the utility's return on common equity that may be achieved by those adjustments. The PUCO cannot apply its consideration of the return on common equity to reduce any adjustment unless the adjustment will cause the 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 adjustments for capital structure as appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur is on the electric distribution utility.

Additionally, the PUCO can adjust the utility's most recent SSO price by a just and reasonable amount as it 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 MRO is not so inadequate as to result, directly or indirectly, in a taking of property under the Ohio Constitution (Article I, Section 19).

Too, the act authorizes the PUCO, beginning in the second year of a blended price under a Transitional MRO and notwithstanding any other requirement concerning MROs, to alter, prospectively, the proportions constituting a blended price, to mitigate any effect of an abrupt or significant change in the utility's SSO price that would otherwise result in general or with respect to any rate group or rate schedule if not for the alteration. Any such alteration cannot be made more often than annually, and the PUCO cannot, by altering those proportions and in any event, including because of the length of time taken to approve the MRO as allowed under the act, cause the duration of the blending period to exceed ten years as counted from the approved MRO's effective date. Additionally, any such alteration must be limited to an alteration affecting the prospective proportions used during the blending period and cannot affect any blending proportion previously approved and applied by the PUCO pursuant to the act.

A utility has the burden of demonstrating that any adjustment to its most recent SSO price is proper under the act's Transitional MRO provisions.

ESPs

Nature of an ESP (R.C. 4928.143(B) and (D)). The act states that, with few exceptions, any contrary provision of public utility law (R.C. Title 49) does not apply to an ESP. This means, for example, that the act authorizes a utility's distribution rates to be determined under an ESP in a manner different from the traditional rate-making requirements that previously applied to those rates and that will continue to apply to a utility with an approved MRO.

The act prescribes what an ESP application must contain and also enumerates certain things that, at the utility's discretion, it can contain. But, any discretionary items in an ESP are not limited to the items the act enumerates. Essentially, an ESP must contain provisions related to the supply and pricing of electric generation service. If the proposed ESP has a term longer than three years, it can include provisions to permit the PUCO to test the plan as

described in "Testing an ESP," below, as well as any transitional conditions that the utility would want the PUCO to adopt if the PUCO were to terminate the ESP after such a test.

As alluded to above in "SSO variations," in its initial ESP application DP&L can request PUCO approval of provisions for the incremental recovery or the deferral of any of the following costs that are not being recovered under its current rate plan and that it incurs during that rate plan continuation period under the ESP: (1) costs to comply with the act's SSO/default service requirements, (2) costs to comply with the act's alternative energy requirements (see "Alternative energy requirements," below), and (3) costs to comply with the act's energy efficiency requirements (see "Energy efficiency," below).

As explained immediately below, enumerated items that the act authorizes any utility to request in an ESP include the following: provisions for or regarding (1) automatic cost recovery, (2) a construction work in progress (CWIP) allowance/nonbypassable surcharge, (3) a nonbypassable surcharge for a competitively bid generating facility, (4) rate stabilization, (5) automatic price adjustments, (6) securitization, (7) transmission and related services, (8) distribution service, and (9) economic development and energy efficiency.

ESP application (R.C. 4928.143(B)). Automatic cost recovery. An ESP can include provisions for the automatic recovery of any of the following, prudently incurred, costs of the utility (meaning, recovery without further PUCO authorization): (1) fuel used to generate the electricity supplied under the SSO, (2) purchased power supplied, including the cost of energy and capacity, and including purchased power acquired from an affiliate, (3) emission allowances, and (4) federally mandated carbon or energy taxes.

CWIP allowance/nonbypassable surcharge. An ESP can include a request for a reasonable CWIP for any of the utility's cost of constructing a generating facility or for an environmental expenditure for any such facility of the utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. The act requires that any such CWIP allowance be subject to the CWIP limitations of public utility law (R.C. 4909.15, not in act), except that the PUCO can authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure, rather than when the facility is at least 75% complete, as under prior law. However, the act prohibits such a CWIP allowance unless the PUCO first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the utility. Further, no CWIP allowance can be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the PUCO can adopt rules.

Under the act, any authorized CWIP allowance must be established as a nonbypassable surcharge for the life of the facility.

Nonbypassable surcharge for a competitively bid generating facility. An ESP can request the establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the utility, was sourced through a competitive bid process subject to any rules as the PUCO adopts under the act's CWIP provisions (see "CWIP allowance/nonbypassable surcharge," above), and is newly used and useful on or after

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January 1, 2009. The surcharge must cover all of the utility's costs specified in the application, excluding costs recovered through a surcharge authorized for a CWIP allowance described above. But, no surcharge can be authorized unless the PUCO first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the utility.

Additionally, if the surcharge is authorized for such a facility pursuant to plan approval and as a condition of the continuation of the surcharge, the utility must dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the PUCO authorizes such a surcharge, it can consider the effects, as applicable, of any decommissionings, deratings, and retirements.

Rate stabilization. An ESP can include terms, conditions, or charges that both would have the effect of stabilizing or providing certainty regarding retail electric service and relate to (1) limitations on customer shopping for retail electric generation service, (2) bypassability, (3) standby, back-up, or supplemental power service, (4) default service, (5) carrying costs, (6) amortization periods, and (7) accounting or deferrals, including future recovery of such deferrals.

Automatic price adjustments. Under the act, an ESP can include provisions for automatic increases or decreases in any component of the SSO price.

Securitization. An ESP can request approval of provisions for the utility to securitize any rate phase-in of its ESP price (see "Rate or price phase-ins/nonbypassable surcharge," below), as well as provisions for the recovery of the utility's cost of securitization.

Transmission and related services. An ESP can include provisions relating to transmission, ancillary, congestion, or any related service required for the SSO, including provisions for the recovery of any cost of such service that the electric distribution utility incurs pursuant to the SSO.

Distribution service. An ESP can include provisions regarding the utility's distribution service, including, without limitation, and notwithstanding any provision of public utility law (R.C. Title 49) 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 utility. The infrastructure and modernization provisions can include a long-term energy delivery infrastructure modernization plan for the 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. In determining whether to allow an ESP to include any provisions regarding distribution service, the PUCO must examine the reliability of the utility's distribution system and ensure that customers' and the utility's expectations are aligned and that the utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

Economic development and energy efficiency. An ESP can include provisions under which the electric distribution utility can implement economic development, job retention, App. Appx. 000363

and energy efficiency programs. Those provisions can allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

ESP approval process (R.C. 4928.143(C)). The burden of proof in an ESP proceeding is on the applicant utility. The PUCO must issue an order approving, modifying and approving, or disapproving an initial ESP application not later than 150 days after the application's filing date and within 275 days for later applications. The PUCO must disapprove the application unless it finds that the ESP, 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 an MRO. If it makes that finding, the PUCO can approve or modify and approve the ESP. Additionally, if the ESP provides a nonbypassable surcharge for CWIP or a competitively sourced generating facility as authorized under the act, the PUCO must 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.

If the PUCO modifies and then approves an ESP application, the utility can withdraw the application, thereby terminating it. If the utility does so, or if the PUCO disapproves the ESP application, the PUCO must issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent ESP or MRO is authorized under the act.

Testing an ESP (R.C. 4928.143(E) and (F)). Regarding an ESP that has a term, exclusive of phase-ins or deferrals, of longer than three years, the act requires the PUCO to test that plan in its 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 an MRO. Additionally, the PUCO must determine the *prospective* effect of the ESP, to determine if that effect will result in "excessive earnings," that is, if the effect is substantially likely to provide the 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 is on the utility.

If the comparability test results are in the negative or earnings are determined to be prospectively excessive, the PUCO may terminate the ESP, but must 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 ESP. Before terminating the ESP, the PUCO must provide interested parties with notice and an opportunity to be heard. The PUCO can 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.

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Further, after the end of each annual period of an ESP (except DP&L's first ESP in which its current rate plan has been grandfathered), the PUCO must determine if any price adjustments granted under the plan resulted in excessive earnings for the utility as measured on the same basis as described above. But, in making that determination, the PUCO cannot consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company. The act also requires that consideration be given to the capital requirements of future committed investments in Ohio. The burden of proof is on the utility.

If the PUCO finds that the adjustments, in the aggregate, did result in significantly excessive earnings, it must require the utility to return to consumers the amount of the excess by prospective adjustments, subject to the proviso that, upon making those prospective adjustments, the utility has the right to terminate the ESP and to file an MRO application immediately. If the utility so terminates the ESP, the PUCO must issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent SSO, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent ESP or MRO is authorized. Further, the PUCO must 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 the terminated ESP.

Rate or price phase-ins/nonbypassable surcharge

(R.C. 4928.144 and 4928.20(I))

As it considers necessary to ensure rate or price stability for consumers, the PUCO by order can authorize, inclusive of carrying charges, any just and reasonable phase-in of any electric distribution utility rate or price established under an ESP or MRO. The order also must 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.

Under continuing law, "regulatory assets" are the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the PUCO or pursuant to generally accepted accounting principles as a result of a prior PUCO rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent PUCO action. They include all deferred demand-side management costs; all deferred percentage of income payment plan (PIPP) arrears; post-in-service capitalized charges and assets recognized in connection with statement of Financial Accounting Standards No. 109 (receivables from customers for income taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the commission in the electric utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the PUCO. (R.C. 4928.01(A)(26).)

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Additionally, under the act, a PUCO rate or price phase-in order must authorize the collection of those deferrals through a nonbypassable surcharge on any rate or price established for the utility by the PUCO. However, customers that are part of a governmental aggregation are responsible only for that portion of the phase-in surcharge that is proportionate to the benefits, as determined by the PUCO, that the governmental aggregation's customers as an aggregated group receive. The proportionate surcharge so established will apply to each customer of the governmental aggregation while the customer is part of that aggregation. If a customer ceases being such a customer, the otherwise applicable surcharge will apply. The act expressly states that its provisions regarding the proportionate surcharge must not result in less than the utility's full recovery of a rate or phase-in surcharge.

Transmission service

Distribution surcharge for transmission cost recovery

(R.C. 4928.05(A)(2))

The act expressly allows the PUCO to authorize an electric distribution utility to collect from its customers a reconcilable rider on its electric distribution rates to recover all of the utility's transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged by the FERC or by an RTO, independent transmission operator, or similar organization approved by the FERC.

RTO operating requirements

(R.C. 4928.09)

The act extends to a FERC-approved RTO that is responsible for maintaining electric system reliability in all or part of Ohio requirements that apply under continuing law to electric utilities, electric services companies, and billing and collection agents. Those requirements consist of (1) consenting to the jurisdiction of the Ohio courts and service of process in Ohio and (2) designating an agent authorized to receive that service of process, by filing with the PUCO a document designating that agent.

Federal Energy Advocate

(R.C. 4928.24)

The act requires the PUCO to employ a Federal Energy Advocate. The advocate must examine the value of the participation of Ohio electric utilities in RTOs and submit a report to the PUCO on whether their continued participation is in the interest of retail electric consumers. Additionally, under the act, the PUCO employee must monitor the activities of FERC and other federal agencies and, represented by the Attorney General, must advocate on behalf of the interests of Ohio retail electric service consumers. As a matter of information, this advocacy is in addition to that provided under continuing law by the Ohio Consumers' Counsel, who advocates on both the state and federal levels, on behalf of the residential

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consumers of electric, gas, natural gas, and certain other public utilities (R.C. Chapter 4911., not in act) and to that provided by the PUCO itself as a potential party to federal proceedings.

Municipal customer charge prohibition

(R.C. 4928.69)

The act provides that, notwithstanding any provision of the Electric Restructuring Law and except as otherwise provided in an agreement under special contract law (R.C. 4905.31), an electric distribution utility cannot charge any person that is a customer of a municipal electric utility in existence on or before January 1, 2008, any surcharge, service termination charge, exit fee, or transition charge.

Line extensions

(R.C. 4928.02 and 4928.151)

Continuing law requires that an electric utility's distribution rate schedule must include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with PUCO rules, policy, precedents, or orders (R.C. 4928.15(A), not in act)).

The act requires the PUCO, in carrying out the state electric services policy (see "State electric services policy," above), to consider rules as they apply to the costs of electric distribution infrastructure, including line extensions, for the purpose of development in Ohio. It also requires the PUCO adopt and enforce rules prescribing a uniform, statewide policy regarding electric transmission and distribution line extensions and requisite substations and related facilities that are requested by nonresidential customers of electric utilities, so that, on and after the effective date of the initial rules so adopted, all such utilities apply the same policies and charges to those customers. Initial rules must be adopted not later than six months after the act's effective date. The rules must address the just and reasonable allocation to and utility recovery from the requesting customer or other customers of the utility of all costs of any such line extension and any requisite substation or related facility, including the costs of necessary technical studies, operations and maintenance costs, and capital costs, including a return on capital costs.

Governmental aggregation

(R.C. 4928.20(D), (H), (J), and (K))

Continuing law authorizes the electric load of electric customers to be aggregated for the purpose of purchasing retail electric generation (R.C. 4928.03, not in act). Aggregators performing that function include governmental aggregators, specifically, municipalities, townships, and counties that can aggregate the electric load of customers within their respective jurisdictions. Various requirements and limitations apply to a governmental aggregation, including, for instance, the requirement of a popular vote on the question of

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whether the local government can aggregate load without first obtaining the individual permission of each customer.

Opting out

The act changes prior law's limitation that, in the case of such an "automatic" governmental aggregation, the local government must allow any person that is so enrolled in the aggregation an opportunity to opt out of the aggregation every *two* years, without paying a switching fee. Under the act, a customer can opt-out *up to every three years* without paying a switching fee.

Further, the act changes a provision of law that states that any person enrolled in an aggregation and that properly opts out of the aggregation will then default to the SSO of the person's electric distribution utility until the person chooses an alternative supplier. The act makes this default provision apply to a person that opts out of the aggregation *before the commencement of the aggregation*. It is not clear whether the change means that a person can opt out of an aggregation only before its "commencement" or whether such a post-commencement opt-out is just not contemplated in default SSO situations. Under prior statute, a person could opt out of a governmental aggregation at any time, but the local government had to allow the person an opportunity every two years to opt out without paying a switching fee.

Refusal of standby service

The act allows a legislative authority, on behalf of the customers that are part of its governmental aggregation, to choose not to receive standby service from an electric distribution utility in whose certified territory the governmental aggregation is located and that operates under an approved ESP. The act incorrectly references R.C. 4928.143(B)(2)(e), instead of (B)(2)(d), assigning meaning to the term "standby service" for the purpose of making this decision. "Standby service" is not defined in statute but is distinguished in the act from back-up or supplemental power service. Regardless, upon the filing of that notice, the electric distribution utility cannot charge any such customer to whom electricity is delivered under the governmental aggregation for the standby service.

Under the act, a customer of a governmental aggregation that has so refused standby service and that leaves the aggregation and returns to the utility for competitive retail electric service must pay the market price of power incurred by the utility to serve that consumer plus any amount attributable to the utility's cost of compliance with the act's alternative energy resource provisions to serve the consumer (see "Alternative energy requirements," below). That market price will include capacity and energy charges; all charges associated with the provision of that power supply through the RTO, including transmission, ancillary services, congestion, and settlement and administrative charges; and all other costs incurred by the utility that are associated with the procurement, provision, and administration of that power supply, as such costs may be approved by the PUCO. The period of time during which the market price and alternative energy resource amount will be so assessed on the consumer will be from the time the consumer returns to the utility until the expiration of the utility's ESP.

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However, if that period of time is expected to be more than two years, the PUCO can reduce the time period to a period of not less than two years.

Exempted customers

A governmental aggregator is expressly prohibited from including in its aggregation the accounts of types of customers described in statute, including a customer that is in contract with a certified "competitive retail electric services provider." The act replaces that undefined term with its equivalent, defined term, "electric services company."

Large-scale governmental aggregation

The act requires the PUCO to adopt rules to encourage and promote "large-scale" governmental aggregation in Ohio. For that purpose, the PUCO must conduct an immediate review of any rules it has already adopted. Further, within the context of a utility's ESP, the PUCO must consider the effect on large-scale governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan, with the exception of any nonbypassable generation charge that relates to a cost incurred by the utility, the deferral of which was authorized by the PUCO before the act's effective date.

Repeals

(R.C. 4928.20, 4928.31, 4928.34, 4928.35, 4928.41, 4928.42, 4928.431, and 4928.44)

The act removes prior law's definition of "small electric generation facility" as a generation plant and associated facilities designed for, or capable of, operation at a capacity of less than two megawatts. The term continues to appear in a provision of the Electric Restructuring Law that requires that certification standards the PUCO adopts must allow flexibility for electric services companies that exclusively provide installation of small electric generation facilities, to provide ease of market access (R.C. 4928.08(C), not in act).

The act repeals four sections of the Electric Restructuring Law: R.C. 4928.41, regarding electric cooperative transition revenues; R.C. 4928.42, regarding transitional requirements for electric consumer education; R.C. 4928.431, regarding an obsolete Electric Employee Assistance Advisory Board created under S.B. 3; and R.C. 4928.44, regarding service offering for nonfirm electric service customers. Accordingly, the act amends R.C. 4928.20, 4928.31, 4938.34, and 4938.35 to remove references to those repealed sections.

Natural gas

Revenue decoupling

(R.C. 4929.01 and 4929.051; Section 4)

Continuing Ohio law generally affirms PUCO authority to regulate the commodity sales service, distribution service, and ancillary service of a natural gas utility (R.C. 4929.03, not in act; see R.C. 4929.01 for definitions). Under continuing law, a natural gas utility can

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apply for PUCO approval of an alternative rate plan for its commodity sales service or ancillary service (R.C. 4929.05, not in act). Such a plan would establish a different method for determining the rates and charges for the service than ordinarily would occur under the traditional rate-making provisions of continuing law (R.C. 4909.15, not in act). Those provisions, for the purpose of setting the utility's rate schedule (tariff), require determination of the revenue requirement of the utility necessary to cover its identified operating costs and receive a fair and reasonable rate of return on its investment in plant used and useful in rendering the service.

As stated, an alternative rate plan allows other methods of determining the rate schedule of the utility than the previously described cost/rate of return method. The definition of "alternative rate plan" specifies two, actual alternative mechanisms: (1) an automatic adjustment in rates based on a specified index or changes in a specified cost or costs and (2) a mechanism that tends to assess the costs of any natural gas service or goods to the entity, service, or goods that cause such costs to be incurred (R.C. 4929.01). In addition, continuing alternative regulation law authorizes the PUCO to allow "any automatic adjustment mechanism or device in a [utility's] rate schedules that allows [the] rates or charges for a regulated service or goods to fluctuate automatically in accordance with changes in a specified cost or costs" (R.C. 4929.11, not in act). Otherwise, continuing law specifies as allowable methods what are actually possible outcomes of alternative ratemaking. Those methods can include rate-setting methods that will (3) provide adequate and reliable natural gas services and goods in Ohio, (4) minimize the costs and time expended in the regulatory process, (5) afford rate stability, (6) promote and reward efficiency, quality of service, or cost containment, and (7) provide sufficient flexibility and incentives to the natural gas industry to achieve high quality, technologically advanced, and readily available natural gas services and goods at just and reasonable rates and charges.

Under the act, an alternative rate plan could newly include (8) a revenue decoupling mechanism, which the act defines as a rate design or other cost recovery mechanism that provides recovery of the fixed costs of service and a fair and reasonable rate of return, irrespective of "system throughput" (the amount of gas entering the transmission/distribution system) or volumetric sales.

Continuing law prescribes the process for obtaining PUCO approval of an alternative rate plan. It states that there must be notice, investigation, and hearing of an alternative rate plan. The approval process authorizes the request for approval of an alternative rate plan as part of an application filed under rate-making law (R.C. 4909.18, not in act) that governs applications by utilities to establish new, or change existing, rates and charges for service. That law prescribes certain timelines for filing such an application and the information the application must contain. It also requires that, if the PUCO believes the application may be unjust or unreasonable, it must hold hearings on the matter. This could apply, for instance, when a utility was asking for a rate increase. However, if the PUCO determines an application is *not for an increase in rates*, the PUCO can permit the filing of the rate schedule and set the date it is to take effect; no hearing is required.

The act provides that an alternative rate plan filed by a natural gas company under R.C. 4929.05 of continuing law (not in act) and proposing a revenue decoupling mechanism can be an application "not for an increase in rates" if both of the following apply: (1) the rates, joint rates, tolls, classifications, charges, or rentals the plan proposes are based upon the billing determinants and revenue requirements authorized by the PUCO in the utility's most recent rate case proceeding and (2) the plan also establishes, continues, or expands an energy efficiency or energy conservation program (R.C. 4929.051).

Regarding any alternative rate plan that was filed before the act's effective date under R.C. 4929.05 and that proposes a revenue decoupling mechanism and meets the two conditions described immediately above, uncodified law in the act expressly prohibits the act being applied in favor of (that is, construed as supporting) a claim or finding that the application *is* an application to increase rates (and therefore generally subject to hearing under traditional rate-making law).

State natural gas policy

(R.C. 4929.02)

Continuing Ohio law articulates a state policy that lists eleven objectives regarding natural gas service and requires the PUCO to follow that policy when carrying out the alternative natural gas rate-making statute (R.C. Chapter 4929.). Aside from authorizing approval of alternative rate plans as described above, that law also establishes the conditions under which the PUCO can deregulate natural gas commodity sales and ancillary services upon a filing by a utility and certify governmental aggregators of natural gas and retail natural gas suppliers to operate in Ohio.

The act adds a twelfth objective to the state policy: to promote an alignment of natural gas company interests with consumer interest in energy efficiency and energy conservation. It also requires both the PUCO and OCC to follow the state policy in exercising their respective authorities relative to the alternative natural gas rate-making statute.

Energy price risk management contracts

(R.C. 9.835)

The act newly authorizes a state official (an elected or appointed official or that person's designee, charged with the management of a state entity) or the legislative or other governing authority of a political subdivision (county, city, village, township, park district, or school district) to enter into an energy price risk management contract if it determines that doing so is in the best interest of the state entity or such political subdivision, and subject to, respectively, state or local appropriation to pay amounts due. The act defines a "state entity" as the General Assembly, the Supreme Court, the Court of Claims, the office of an elected state officer, or a state department, bureau, board, office, commission, agency, institution, or other instrumentality established by Ohio law to exercise any function of state government.

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"State entity" excludes a political subdivision, an institution of higher education, all the state retirement systems, and the City of Cincinnati retirement system.

Under the act, an "energy price risk management contract" is a contract that mitigates for the term of the contract the price volatility of energy sources, including natural gas, gasoline, oil, and diesel fuel, and that is a budgetary and financial tool only and not a contract for the procurement of an energy source. Under the act, money received pursuant to such a contract entered into by a state official must be deposited to the credit of the state General Revenue Fund, and, unless otherwise provided by ordinance or resolution enacted or adopted by the legislative authority of the political subdivision authorizing any such contract, money received under the contract must be deposited to the credit of the general fund of the political subdivision.

II. Energy sources

Corporate separation

(R.C. 4928.17(E))

Prior statute allowed (but did not require) an electric utility to divest itself of any generating asset without prior PUCO approval, subject to the provisions of public utility law (R.C. Title 49) relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset. The act focuses divestiture policy on electric distribution utilities specifically, thereby removing any limitation on divestiture by an electric utility that is not a distribution utility. Additionally, the act prohibits an electric distribution utility divesting a generating asset at any time without prior PUCO approval.

Alternative energy requirements

(R.C. 4928.01 and 4928.64)

The act requires an electric distribution utility, by 2025 and thereafter, to provide from "alternative energy resources" a portion of the electricity supply required for its requisite SSO, and an electric services company to provide a portion of its Ohio retail electricity supply, from alternative energy resources.

Under the act, an alternative energy resource means an advanced energy resource or renewable energy resource that has a placed-in-service date of January 1, 1998, or after; or a mercantile customer-sited advanced energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided in the energy efficiency provisions of the act (see "Energy efficiency," below). The act specifically includes as an "alternative energy resource" (1) a resource that has the effect of improving the relationship between real and reactive power, (2) a resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer, (3) storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics, (4) electric generation

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equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource, and (5) any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility. Additionally, under the act and as it considers appropriate, the PUCO can classify any new technology as such an advanced energy resource or a renewable energy resource. Under continuing law, a "mercantile customer" is a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than 700,000 kilowatt hours per year or is part of a national account involving multiple facilities in one or more states (R.C. 4928.01(A)(19)).

"Advanced energy resource"

The act defines an "advanced energy resource" as (1) any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of any electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility, (2) any distributed generation system consisting of customer cogeneration of electricity and thermal output simultaneously, primarily to meet the energy needs of the customer's facilities, (3) clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American Society of Testing and Materials Standard D1757A or a reduction of metal oxide emissions in accordance with the Society's Standard D5142, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the PUCO must adopt by rule and be based on economically feasible best available technology or, in the absence of a determined best available technology, be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion, (4) advanced nuclear energy technology consisting of generation III technology as defined by the Nuclear Regulatory Commission; other, later technology; or significant improvements to existing facilities, (5) any fuel cell used in the generation of electricity, including a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell, (6) advanced solid waste or construction and demolition debris conversion technology, including advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions as calculated pursuant to the United States Environmental Protection Agency's (EPA's) waste reduction model (WARM), and (7) demand-side management and any energy efficiency improvement.

"Renewable energy resource"

The act defines a "renewable energy resource" as solar photovoltaic or solar thermal energy, wind energy, power produced by a hydroelectric facility, geothermal energy, fuel derived from solid wastes through fractionation, biological decomposition, or other process that does not principally involve combustion, biomass energy, biologically derived methane gas, or energy derived from nontreated by-products of the pulping process or wood

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manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors. The term includes any fuel cell used in the generation of electricity, including a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; any wind turbine located in the state's territorial waters of Lake Erie; any storage facility that will promote the better utilization of a renewable energy resource that primarily generates off peak; or distributed generation system used by a customer to generate electricity from any such energy.

As used here, "solid wastes" means "such unwanted residual solid or semisolid material as results from industrial, commercial, agricultural, and community operations, excluding earth or material from construction, mining, or demolition operations, or other waste materials of the type that normally would be included in demolition debris, nontoxic fly ash and bottom ash, including at least ash that results from the combustion of coal and ash that results from the combustion of coal in combination with scrap tires where scrap tires comprise not more than 50% of heat input in any month, spent nontoxic foundry sand, and slag and other substances that are not harmful or inimical to public health, and includes, but is not limited to, garbage, scrap tires, combustible and noncombustible material, street dirt, and debris. 'Solid wastes' does not include any material that is an infectious waste or a hazardous waste." (R.C. 3734.01(E), not in act.)

Additionally, for the purpose of the act's renewable energy resource requirement only, the act defines the term "hydroelectric facility" to mean a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, within or bordering Ohio or an adjoining state and (1) provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility, (2) demonstrates that it complies with the water quality standards of Ohio, which compliance may consist of certification under the federal "Clean Water Act of 1977" and demonstrates that it has not contributed to a finding by the State of Ohio that the river has impaired water quality under that act, (3) complies with mandatory prescriptions regarding fish passage as required by the FERC license issued for the project, regarding fish protection for riverine, anadromous, and catadromus fish, (4) complies with the recommendations of the OEPA and with the terms of the facility's FERC license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility, (5) complies with the federal "Endangered Species Act of 1973," (6) does not harm cultural resources of the area, as shown through compliance with the terms of its FERC license or, if not regulated by FERC, through development of a plan approved by the Ohio Historic Preservation Office, to the extent it has jurisdiction over the facility, (7) complies with the terms of its FERC license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by FERC, complies with similar requirements as are recommended by resource agencies, and provides access to water to the public without fee or charge, and (8) is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

Benchmarks

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The requisite portion of electric supply derived from alternative energy resources must equal 25% of the total number of kilowatt hours of electricity sold by the utility or company to any and all retail electric consumers whose electric load centers are served by the utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within Ohio. The act states, however, that its alternative energy resource provisions do not preclude a utility or company from providing a greater percentage. The baseline for a utility's or company's compliance with the alternative energy resource requirements must be the average of such total kilowatt hours it sold in the preceding three calendar years, except that the PUCO can reduce a utility's or company's baseline to adjust for new economic growth in the utility's certified territory or, in the case of an electric services company, in the company's service area in Ohio.

Of the alternative energy resources implemented by a utility or company, the act provides that half can be generated from advanced energy resources. However, at least half must be generated from renewable energy resources, including 0.5% from solar energy resources, in accordance with the following benchmarks:

<u>By end of year</u>	<u>Renewable energy resources</u>	<u>Solar energy resources</u>
2009	0.25%	0.004%
2010	0.50%	0.010%
2011	1%	0.030%
2012	1.5%	0.060%
2013	2%	0.090%
2014	2.5%	0.12%
2015	3.5%	0.15%
2016	4.5%	0.18%
2017	5.5%	0.22%
2018	6.5%	0.26%
2019	7.5%	0.3%
2020	8.5%	0.34%
2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each calendar year thereafter	12.5%	0.5%

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Further, under the act, at least half of the renewable energy resources implemented by the utility or company must be met through facilities located in Ohio; the remainder must be met with resources that can be shown to be deliverable into Ohio.

The act specifies that all costs incurred by a utility in complying with the act's alternative energy resource requirements are bypassable by any consumer choosing an alternative generation supplier.

The act establishes a cost cap relative to a utility's or company's obligation to comply with a renewable energy resource benchmark. Under the act, a utility or company need not comply with an advanced or renewable (or solar) energy resource benchmark to the extent that its reasonably expected cost of that compliance exceeds by 3% or more its reasonably expected cost of otherwise producing or acquiring the requisite electricity.

Renewable and solar benchmark enforcement

Penalties. The act requires the PUCO to review annually a utility's or company's compliance with the most recent, applicable, renewable energy resource or solar energy resource benchmark and, in the course of that review, identify any undercompliance or noncompliance that the PUCO determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control. If the PUCO determines, after notice and opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, that the utility or company has failed to comply with any such benchmark, it must impose a renewable energy compliance payment on the utility or company.

The compliance payment pertaining to the act's solar energy resource benchmarks must be an amount per megawatt hour of undercompliance or noncompliance in the period under review, starting at \$450 for 2009, \$400 for 2010 and 2011, and similarly reduced every two years thereafter through 2024 by \$50, to a minimum of \$50.

The compliance payment pertaining to the act's renewable energy resource benchmarks must equal the number of additional renewable energy credits (see "**Renewable energy credits.**" below) that the utility or company would have needed to comply with the applicable benchmark in the period under review times an amount that begins at \$45 and must be adjusted annually by the PUCO to reflect any change in the Consumer Price Index, but cannot be less than \$45.

The act prohibits the compliance payment being passed through to consumers. It must be remitted to the PUCO, for deposit to the credit of the Advanced Energy Fund (see "**Advanced Energy Fund assistance.**" below). Payment of the compliance payment will be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under continuing law (R.C. 4905.55 to 4905.60 and 4905.64, not in act).

The act also requires the PUCO to establish a process to provide for at least an annual review of the alternative energy resource market in Ohio and in the service territories of

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RTOs that manage transmission systems located in Ohio. The PUCO must use the study results to identify any needed changes to the act's amount of a renewable energy compliance payment. Specifically, the PUCO may increase the amount to ensure that payment of compliance payments is not used to achieve compliance in lieu of actually acquiring or realizing energy derived from renewable energy resources. However, under the act, if it finds that the amount of the compliance payment should be otherwise changed, the PUCO must present this finding to the General Assembly for legislative enactment.

Force majeure exception

The act authorizes a utility or company to request the PUCO to make a force majeure determination regarding all or part of the utility's or company's compliance with any minimum, renewable energy resource benchmark during the period of compliance review as described above. The PUCO can require the utility or company to make solicitations for renewable energy resource credits as part of its default service before the utility or company can make a force majeure request.

Within 90 days after the filing of such a request, the PUCO must determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the PUCO must consider whether the utility or company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the PUCO must consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM Interconnection RTO or its successor and the Midwest System Operator or its successor.

If the PUCO determines that renewable energy or solar energy resources are not reasonably available to permit the utility or company to comply during the period of review with the applicable minimum benchmark, the PUCO must modify that compliance obligation of the utility or company as it determines appropriate to accommodate the finding. The act provides that such a PUCO modification does not automatically reduce the obligation for the utility's or company's compliance in subsequent years, and the PUCO can require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation.

Annual report

The act requires the PUCO to submit an annual report to the General Assembly describing the compliance of utilities and companies with the act's alternative energy resource requirements and any strategy for utility and company compliance or for encouraging the use of alternative energy resources in supplying Ohio's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts. The PUCO must allow and consider public comments on the report prior to submission. The act

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states that nothing in the report is binding on any person, including any utility or company for the purpose of its compliance with any alternative energy resource benchmark or the enforcement of a benchmark requirement.

Alternative Energy Advisory Committee

The act requires the Governor, in consultation with the PUCO chairperson, to appoint an Alternative Energy Advisory Committee. The committee must examine available technology for and related timetables, goals, and costs of the act's alternative energy resource requirements and submit to the PUCO a semiannual report of its recommendations.

Solar ready school buildings

(R.C. 3318.112)

The act expressly confers on the Ohio School Facilities Commission (OSFC) the authority to adopt rules prescribing standards for solar ready equipment in school buildings under its jurisdiction. "Solar ready" means capable of accommodating the eventual installation of roof top, solar photovoltaic energy equipment. The OSFC rules must include standards regarding roof space limitations, shading and obstruction, building orientation, roof loading capacity, and electric systems.

Under the act, a school district can seek a waiver from part or all of the solar ready standards and the OSFC to grant the waiver for good cause shown.

Advanced Energy Fund assistance

(R.C. 4928.01(A)(25), 4928.61, and 4928.621)

The act adds revenue sources for continuing law's Advanced Energy Fund, which is administered by DOD to provide grants, contracts, loans, loan participation agreements, linked deposits, and energy production incentives for advanced energy projects, and revises the definition of "advanced energy project."

Revenue sources

The act adds two new revenue sources for the Advanced Energy Fund: renewable energy compliance payments imposed by the PUCO pursuant to the act (see "Renewable and solar benchmark enforcement," above) and forfeitures assessed by the PUCO for violations of the act's energy efficiency provisions (see "Energy efficiency," above). The fund will continue under the act to receive revenue from the sources currently authorized by law: namely, a surcharge on all customers of electric distribution utilities and any participating municipal electric utilities and electric cooperatives; payments, repayments, and income from funded projects; and interest earnings on the fund. (As a matter of information, under continuing law, surcharge remittances continue only until December 31, 2011, or until the fund reaches \$100 million, whichever is first.)

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"Advanced energy project"

Under law retained in part by the act, an "advanced energy project" is any technology, product, activity, or management practice or strategy that facilitates the generation or use of electricity and reduces or supports the reduction of energy consumption or supports the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users. Such energy expressly includes wind power; geothermal energy; solar thermal energy; and energy produced by micro turbines in distributed generation applications with high electric efficiencies, by combined heat and power applications, by fuel cells powered by hydrogen derived from wind, solar, biomass, hydroelectric, landfill gas, or geothermal sources, or by solar electric generation, landfill gas, or hydroelectric generation. Instead of listing specific types of projects included as "advanced energy projects," the act provides that an "advanced energy project" includes advanced energy resources and renewable energy resources, the definitions for which appear in the "Alternative energy requirements," section of this analysis, above.

Additionally, expressly without intending to limit who otherwise can apply for or receive state assistance for advanced energy projects, the act makes all of the following eligible for funding as an "advanced energy project":

(1) Any Edison Technology Center, for the purposes of creating an Advanced Energy Manufacturing Center in Ohio that will provide for the exchange of information and expertise regarding advanced energy, assisting with the design of advanced energy projects, developing workforce training programs for such projects, and encouraging investment in advanced energy manufacturing technologies for advanced energy products and investment in sustainable manufacturing operations that create high-paying jobs in Ohio;

(2) Any university or group of universities in Ohio that conducts research on any advanced energy resource as defined by the act (see "Advanced energy resources," above) or any not-for-profit corporation formed to address issues affecting the price and availability of electricity and having members that are small businesses, for the purpose of encouraging research in Ohio that is directed at innovation in or the refinement of those resources or for the purpose of educational outreach regarding those resources;

(3) Any independent group located in Ohio, the express objective of which is to educate Ohio small businesses regarding renewable energy resources and energy efficiency programs;

(4) Any small business located in Ohio electing to utilize an advanced energy project or participate in an energy efficiency program.

The act requires a university, university group, or not-for-profit corporation in (2) above to use the funding to establish such a program of research or education outreach and requires that any such educational outreach be directed at an increase in, innovation regarding, or refinement of access by or of application or understanding of Ohio businesses and consumers regarding, advanced energy resources.

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Renewable energy credits

(R.C. 4928.65)

The act authorizes an electric distribution utility or electric services company to use renewable energy credits any time in the five calendar years following the purchase or acquisition of such credits from any entity, including a mercantile customer or an owner or operator of a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering Ohio or an adjoining state, for the purpose of complying with the act's renewable energy and solar energy resource requirements (see "**Alternative energy requirements**," above). The PUCO must adopt rules specifying that one unit of credit equals one megawatt hour of electricity derived from renewable energy resources. The rules also must provide for Ohio a system of registering renewable energy credits by specifying which of any generally available registries must be used for that purpose and not by creating a registry. That selected system of registering renewable energy credits shall allow such a hydroelectric generating facility to be eligible for obtaining renewable energy credits and shall allow customer-sited projects or actions the broadest opportunities to be eligible for obtaining renewable energy credits.

Energy efficiency**General requirements**

(R.C. 4928.66(A))

The act requires electric distribution utilities to implement energy efficiency programs. Such programs expressly can include demand-response programs, customer-sited programs, and transmission and distribution infrastructure improvements that reduce line losses. The act requires that its energy efficiency provisions must be applied to include facilitating efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the PUCO pursuant to special contract law (R.C. 4905.31).

The act also prohibits any such program or improvement to conflict with any statewide building code adopted by the Board of Building Standards.

Energy savings benchmarks

(R.C. 4928.66(A)(1)(a) and (2)(a))

Under the act, beginning in 2009, an electric distribution utility must implement energy efficiency programs that achieve energy savings equivalent to at least 0.3% of the total, annual average, and normalized kilowatt-hour sales of the electric distribution utility during the preceding three calendar years to its Ohio customers. The savings requirement, using such a three-year average, must increase to an additional 0.5% in 2010, 0.7% in 2011, 0.8% in 2012, 0.9% in 2013, 1% in years 2014 to 2018, and 2% each year thereafter,

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achieving a cumulative, annual energy savings in excess of 22% by the end of 2025. The baseline for such energy savings will be the average of the total kilowatt hours the utility sold in the preceding three calendar years, except that the PUCO may reduce that baseline to adjust for new economic growth in the utility's certified territory.

Peak demand reduction benchmarks

(R.C. 4928.66(A)(1)(b) and (2)(a))

Beginning in 2009, an electric distribution utility must implement peak demand reduction programs designed to achieve a 1% reduction in peak demand in 2009 and an additional 0.75% reduction each year through 2018. In 2018, the standing committees in the Ohio House and Senate primarily dealing with energy issues must make recommendations to the General Assembly regarding future peak demand reduction targets. The baseline for a peak demand reduction will be the average peak demand on the utility in the preceding three calendar years, except that the PUCO may reduce that baseline to adjust for new economic growth in the utility's certified territory.

Baseline adjustments

(R.C. 4928.66(A)(2)(b) and (c))

The act authorizes the PUCO to amend the energy savings benchmarks and the peak demand reduction benchmarks if, after application by the electric distribution utility, the PUCO determines that the amendment is necessary because the utility cannot reasonably achieve the benchmarks for regulatory, economic, or technological reasons beyond its reasonable control.

Additionally, the act requires that a utility's compliance with the energy savings benchmarks and the peak demand reduction benchmarks must be measured by including the effects of all demand-response programs for its mercantile customers and all such mercantile customer-sited energy efficiency and peak demand reduction programs, adjusted upward by the appropriate loss factors. If a mercantile customer commits such existing or new demand-response, energy efficiency, or peak demand reduction capability for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, the utility's baseline must be adjusted to exclude the effects of all such demand-response, energy efficiency, or peak demand reduction programs that may have existed during the period used to establish the baseline. An energy savings or peak demand reduction baseline also must be normalized for changes in numbers of customers, sales, weather, peak demand, and other appropriate factors so that the compliance measurement is not unduly influenced by factors outside the control of the electric distribution utility.

Energy efficiency enforcement

(R.C. 4928.66(B) and (C))

The act requires the PUCO, in accordance with rules it must adopt, to produce and docket an annual report containing the results of its verification of the annual levels of energy efficiency and peak demand reductions achieved by each electric distribution utility as required by the act. A copy of the report must be provided to the Consumers' Counsel.

If it determines, after notice and opportunity for hearing and based upon the report, that an electric distribution utility has failed to comply with an energy efficiency or peak demand reduction requirement established by the act, the PUCO must assess a forfeiture on the utility as provided under continuing law (R.C. 4905.55 to 4905.60 and 4905.64, not in act), either in the amount, per day per undercompliance or noncompliance, relative to the period of the report, equal to that so prescribed for noncompliances (a maximum of \$10,000), or in an amount equal to the then existing market value of one renewable energy credit per megawatt hour of undercompliance or noncompliance. Revenue from any such forfeiture assessed must be deposited to the credit of the Advanced Energy Fund (see "Advanced Energy Fund assistance," above).

Revenue decoupling/energy efficiency cost recovery

(R.C. 4928.66(A)(2)(c) and (D))

The PUCO may establish rules regarding the content of an application by an electric distribution utility for PUCO approval of a revenue decoupling mechanism. The act provides that such a revenue decoupling application is not to be considered an application to increase rates (referring to an application under R.C. 4909.18, which type of application would require a hearing) and that the application may be included as part of a proposal to establish, continue, or expand energy efficiency or conservation programs.

The PUCO can approve the revenue decoupling mechanism if it determines that the mechanism provides for the recovery of revenue that otherwise may be foregone by the utility as a result of or in connection with the utility's implementation of any energy efficiency or energy conservation programs and that the mechanism reasonably aligns the interests of the utility and of its customers in favor of those programs.

However, the act also provides that *any* mechanism designed to recover the cost of the act's energy efficiency and peak demand reduction requirements can exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, provided the PUCO determines that that exemption reasonably encourages such customers to commit those capabilities to those programs.

Energy Advisor report

(Section 5)

The act requires the Governor's Energy Advisor to periodically submit a written report to the General Assembly and report in person to and as requested by the standing committees

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of the Ohio House of Representatives and the Senate that have primary responsibility for energy efficiency and conservation issues regarding initiatives undertaken by the Advisor and state government pursuant to numbered paragraphs 3 and 4 of Executive Order 2007-02S, "Coordinating Ohio Energy Policy and State Energy Utilization." The first written report must be submitted not later than 60 days after the act's effective date. Paragraph 3 pertains to energy efficiency and conservation measures by state agencies and paragraph 4 pertains to measures by state universities and colleges.

Customer information

(R.C. 4928.66(E))

The act requires the PUCO to adopt rules that require an electric distribution utility to provide a customer upon request with two years' consumption data in an accessible form.

Net metering

(R.C. 4928.67)

Generally

Law retained in part by the act requires a retail electric service provider to develop a standard contract or tariff providing for net metering and requires the utility to make this contract or tariff available to customer-generators upon request and on a first-come, first-served basis, but only when the total rated generating capacity used by customer-generators is less than 1% of the provider's aggregate customer peak demand in Ohio. It requires that the contract or tariff be identical in rate structure, all retail rate components, and any monthly charges to the contract or tariff to which the same customer would be assigned if that customer were not a customer-generator.

The act provides that this net metering requirement pertains to electric utilities and removes the reference to a "retail electric service provider." This conforms the statute to PUCO rules. The term being replaced is not defined in the Restructuring Law and has been interpreted in PUCO rules as meaning an electric utility.

In addition, the act removes the limitation that a net metering contract or tariff be made available when the total rated generating capacity used by customer-generators is less than 1% of the provider's aggregate customer peak demand in Ohio.

Hospital net metering

The act newly requires an electric utility to develop a separate standard contract or tariff providing for net metering for a hospital that is also a customer-generator. Such a "hospital" includes a public health center and general, mental, chronic disease, or other type of hospital, and any related facility, such as a laboratory, outpatient department, nurses' home facility, extended care facility, self-care unit, or central service facility operated in connection with a hospital, and also includes an education and training facility for health

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professions personnel operated as an integral part of a hospital, but does not include any hospital furnishing primarily domiciliary care (R.C. 3701.01(C), not in act).

Under the act, a hospital seeking such a contract or tariff need not comply with two requirements that apply to other net metering systems: a hospital's system need not (1) use as its fuel either solar, wind, biomass, landfill gas, or hydropower, or use a microturbine or a fuel cell or (2) be intended primarily to offset part or all of the customer-generator's requirements for electricity.

The act specifies that such a hospital net metering contract or tariff is not limited as to its availability and must be based upon (1) the rate structure, rate components, and any charges to which the hospital would otherwise be assigned if it were not a customer-generator and (2) the market value of the customer-generated electricity at the time it is generated.

The hospital contract or tariff also must allow the hospital customer-generator to operate its electric generating facilities individually or collectively without any wattage limitation on size.

Greenhouse gas emissions

(R.C. 4928.68)

The act requires the PUCO, to the extent permitted by federal law, to adopt rules establishing greenhouse gas emission reporting requirements for each electric generating facility located in Ohio that is owned or operated by a public utility that is subject to PUCO jurisdiction and that emits greenhouse gases, including facilities in operation on the act's effective date. The rules must include participation in the Climate Registry. As a matter of information, a recent federal act requires the U.S. EPA to prescribe mandatory reporting requirements for greenhouse gas emissions and appropriate emission thresholds for particular economic sectors, including electric generation. Draft rules are expected this summer and final rules must be in place in mid-2009. The rules apparently will be issued under existing authority of the federal Clean Air Act. Reportedly, state agencies other than OEPA that wish to enforce such federal rules must petition the federal government for permission.

Carbon dioxide control

(R.C. 4928.68)

The act requires the PUCO, expressly to the extent permitted by federal law, to adopt rules establishing carbon dioxide control planning requirements for each electric generating facility located in Ohio that is owned or operated by a public utility that is subject to PUCO jurisdiction and that emits greenhouse gases, including facilities in operation on the act's effective date. As a matter of information, there are no such federal or Ohio requirements, and none are proposed for the foreseeable future.

HISTORY

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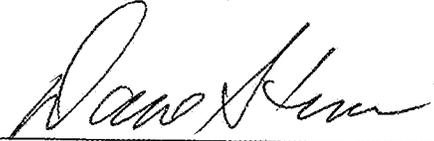
ACTION	DATE
Introduced	09-25-07
Reported, S. Energy & Public Utilities	10-31-07
Passed Senate (32-0)	10-31-07
Reported, H. Public Utilities	04-15-08
Passed House (93-1)	04-22-08
Senate concurred in House amendments (32-0)	04-23-08

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Merit Brief Appendix Volume 2 was served upon the parties of record this 1st day of July 2013, via electronic transmission and regular mail.



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