Supreme Court of Ohio Clerk of Court - Filed January 20, 2015 - Case No. 2014-1505

In The
SUPREME COURT OF OHIO

Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel,	:	Case No. 14-1505
Appellants,	:	On appeal from the Public Utilities Commission of Ohio, Case Nos. 12-426-EL-SSO, *et al.*, *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

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

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SECOND MERIT BRIEF
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INTRODUCTION

The General Assembly has determined that the electric industry in Ohio should operate on a competitive basis to the extent possible. To this end a complete revamp of the basic business model is necessary. No longer should companies be vertically integrated, that is to say, owning generating and distribution assets. These should be separated into different companies. The orders below lay out the plan by which the very last vertically integrated electric company, Dayton Power & Light (DP&L or the company) in Ohio will move to the new structure. This is the next step in the evolution the General Assembly requires.

The move is neither immediate nor simple. It requires a charge to assure that the company remains financially stable. It requires many business changes and equipment upgrades by the company. It will however get to the competitive end that the General Assembly wants sooner and more effectively than the alternative method under R.C. 4928.142.

The Commission has done its job and should be affirmed.

STATEMENT OF THE FACTS AND CASE

DP&L filed its application for approval of an electric security plan (ESP) pursuant to R.C. 4928.143 on October 5, 2012. This filing was subsequently amended on December 12, 2012 to correct a number of errors and it is this amended proposal that the Public Utilities Commission (Commission) considered below.

Local public hearings were held in Dayton in January 2013 to take input from the public regarding DP&L's proposal. Members of the public appeared both supporting and opposing the plan. Members of the public also submitted letters to the Commission regarding the proposal. Some of the writers supported and some opposed the plan.

In addition to the public input, 34 parties intervened in the case and the Commission's own Staff participated. Extensive discovery was completed.

The evidentiary hearing began March 18, 2013. A large number of witnesses provided direct testimony: eleven for DP&L; ten for the Commission Staff; and twenty three for the various intervenors. Three additional witnesses were presented on rebuttal. After

the close of the hearing briefs and reply briefs were filed by the parties, DP&L and the Commission Staff.

The record developed at the hearing revealed significant problems at DP&L. Although the policy of the state has been pro-competition for years, DP&L retained ownership of its generating assets. It remained a vertically integrated utility. The structure of its debt made it virtually impossible to spin off the generating assets until 2016. *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al*. (*ESP Case*) (Opinion and Order at 15) (Sep. 4. 2013), IEU App. at 23.[1] Further the company is in a quickly deteriorating financial situation. This problem arises because of a number of simultaneous factors: increased switching to alternative suppliers; declining market prices for energy; and declining capacity prices. *Id*. at 17, IEU App. at 25. In several years the company would, without some rate relief, experience losses. *Id*. at 20, IEU App. at 28. These losses could prevent DP&L from providing stable, reliable, or safe retail electric service. *Id*. at 21-22, IEU App. at 29-30. The facts show that financial relief was necessary for DP&L to continue to provide the distribution service that all parties rely upon.

On September 4, 2013 the Commission issued an Opinion and Order in the case. Because of a clerical error, the Order issued was not the Order the Commission intended.

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[1] References to the appendix of appellant Industrial Energy Users-Ohio are denoted "IEU App. at ___;" references to appellee's attached appendix are denoted "App. at ___;" and, references to appellee's supplement are denoted "Supp. at ___."

The error was recognized quickly and an Order *Nunc Pro Tunc* was issued on September 6, 2013. This was followed by five rounds of Applications for Rehearing and Rehearing Orders. This appeal ensued.

ARGUMENT

Proposition of Law No. 1:

> **The Commission's decision approving the Service Stability Rider was reasonable, lawful, and adequately supported by the evidence of record.**

A. The Service Stability Rider is authorized by R.C. 4928.143(B)(2)(d). [IEU-OH Prop (A)(1), OCC Prop 2].

The Commission found that the Service Stability Rider satisfied the provisions of R.C. 4928.143(B)(2)(d), which provides that an Electric Security Plan (ESP) may provide for:

> 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.

The statutory language is extremely broad, and affords the Commission considerable latitude in authorizing allowable charges. The statute requires three distinct inquiries, and the Commission found, as a matter of fact, that all three were met.

1. The Service Stability Rider is a charge.

First, the Service Stability Rider must be a term, condition, or charge. The Commission found that "it is essentially undisputed that the SSR is a term, condition, or charge; therefore, the first criterion of Section 4928.143(B)(2)(d), Revised Code, is satisfied." *ESP Case* (Opinion and Order at 21) (Sep. 4, 2013), IEU App. at 29. Neither appellant disputes this finding.

2. The Service Stability Rider relates to bypassability and default service.

Second, the Service Stability Rider must relate 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." R.C. 4928.143(B)(2)(d), App. at 18. The Commission found that, the Service Stability Rider ("SSR") related both to bypassability and default service. Specifically, the Commission found that:

> The SSR is a nonbypassable stability charge for the purpose of maintaining DP&L's financial integrity so that it may continue to provide default service. DP&L is required under Section 4928.141, Revised Code, to provide an SSO for customers in its service territory. The SSO is the default service provided by the electric utility * * * Therefore, we find that Section 4928.143(B)(2)(d), Revised Code, authorizes a financial integrity charge to the extent that such charge is necessary to ensure stability and certainty for the provision of SSO service.

ESP Case (Opinion and Order at 21) (Sep. 4, 2013), IEU App. at 29.

Although not defined by statute, "bypassability" occurs when a consumer shops or bypasses a utility's standard service and instead elects to secure service from a competitive supplier. Certain charges may be bypassable for those consumers that shop. Bypassable charges result in revenue losses for the utility when consumers choose to fulfill their energy needs elsewhere.

The Service Stability Rider, however, is a nonbypassable charge. This means that all consumers, including those who shop, will pay this charge. The Commission recognized that financial losses, including avoidance of an SSR charge, could "impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service." *Id*. at 21, IEU App. at 29. Consequently, it is self-evident that the Service Stability Rider relates to bypassability.

It is equally clear that the Service Stability Rider relates to default service. Appellant OCC incorrectly claims that "default service" is legislatively defined in R.C. 4928.14. OCC argues that default service is "the provision of service by the utility where the non-utility supplier (marketer) fails to provide service to customers." OCC Merit Brief at 29. Appellant OCC's argument that there is "no ambiguity" in this is simply absurd. A simple reading of R.C. 4928.14 demonstrates that the phrase "default

service" does not even appear.[2] In fact, just as was true of "bypassability," there is no statutory definition of "default service."

Appellant OCC further confuses the utility's obligation to serve as the provider of last resort (POLR) with the recovery of POLR costs. The revenue to be generated by the Service Stability Rider is not intended to recover POLR costs. Even appellant IEU acknowledges that the Service Stability Rider does not recover DP&L's costs of satisfying its POLR obligation. IEU Merit Brief at 13. Service Stability Rider charges are intended to provide financial stability to ensure that the utility can meet its ongoing obligations and provide adequate and reliable service. As such, they do not need to be justified as recovering actual costs to serve as the provider of last resort.

A utility's obligation to serve as the provider of last resort (POLR) clearly relates to default service. But there is no definition of default service that limits it to consumers once served by as non-utility supplier but who return, for whatever reason, as non-shoppers. Nor could or should there be such a definition. All reasonable persons would agree that a consumer that never elects to shop receives the utility's default service.

The statutory scheme recognizes this. All electric distribution utilities must provide "a standard service offer of all competitive retail electric services necessary to maintain electric service to consumers, including a firm supply of electric generation service."

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[2] R.C. 4928.14 defines when a supplier can be deemed to have failed to provide retail electric generation service. The statute merely states that such failure "shall result in the supplier's customer . . . defaulting to the utility's standard service offer." R.C. 4928.14, App. at 12. It could hardly be clearer that the General Assembly intended that the SSO be the "default service" referenced in R.C. 4928.143(B)(2)(d).

R.C. 4928.141(A), App. at 13. A standard service offer is a default service that must be offered to current and future non-shopping customers, including returning customers, during the entire ESP term.

Appellant OCC's argument that "a standard service offer cannot mean the same as default service"[3] is without basis. The Commission has never said, as appellant OCC argues, that "default service" is synonymous with "standard offer service." The statute clearly states that the charge need only *relate* to default service. Because the Service Stability Rider is intended to maintain DP&L's financial stability, to allow it to continue to function and "so that it may continue to provide default service," it most certainly "relates" to default service. *ESP Case* (Opinion and Order at 21) (Sep. 4, 2013), IEU App. at 29.

3. The Service Stability Rider has the effect of stabilizing or providing certainty regarding retail electric service.

Finally, the statute requires that the Service Stability Rider must also "have the effect of stabilizing or providing certainty regarding retail electric service." R.C. 4928.143(B)(2)(d), App. at 18. The Commission found, as a matter of fact, that the Service Stability Rider promotes retail stability and certainty because "[b]oth shopping and non-shopping customers benefit from the existence of the standard service offer,

[3] OCC Merit Brief at 31.

which is available even if market conditions become unfavorable for retail shopping customers over the term of the ESP." *ESP Case* (Opinion and Order at 21) (Sep. 4, 2013), IEU App. at 29. The Commission further found, as a matter of fact, that "the SSR will provide stable revenue to DP&L for the purpose of maintaining its financial integrity." *Id*. at 22, IEU App. at 30.

There was, of course, conflicting evidence in the record as to whether the Service Stability Rider would "have the effect of stabilizing or providing certainty regarding retail electric service." But the Court will not reverse factual determinations of the Commission unless they are against the manifest weight of the evidence or so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty. *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.*, 88 Ohio St.3d 549, 555, 728 N.E.2d 371, 376 (2000) quoting *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 268, 527 N.E.2d 777, 780 (1980). The Court has consistently refused to substitute its judgment for that of the Commission on evidentiary matters. *See, e.g. Payphone Ass'n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 849 N.E.2d 4, 2006-Ohio-2988. The appellant bears the burden of showing that the Commission's decision is against the manifest weight of the evidence or clearly unsupported by the evidence. *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 765 N.E.2d 862, 2002-Ohio-1735.

The Commission's finding that the Service Stability Rider promotes retail stability and certainty is adequately supported by the evidence in the record. The record demonstrates that DP&L's financial situation had been deteriorating. OCC Ex. 3 (Standard & Poor's Ratings Direct), Supp. at 1-13; OCC Ex. 4 (Fitch Ratings), Supp. at 14-17; and,

OCC Ex. 5 (Moody's Investor's Service), Supp. at 18-33. The record also demonstrates that DP&L would experience significant financial losses in the absence of a Service Stability Rider. Tr. I at 221-222, Supp. at 38-39. While the Commission acknowledged that DP&L's financial instability may be attributable to its generation business, it specifically found that "the entire company's financial integrity is at risk," including its distribution operations. *ESP Case* (Second Entry on Rehearing at 7) (Mar. 19, 2014), IEU App. at 78. The Commission specifically relied on testimony from DP&L witnesses Jackson (Tr. I at 241-242, Supp. at 40-41) and Malinak (Tr. XI at 2804, Supp. at 46). It also relied on the testimony of appellant OCC's witness Duann (OCC Ex. 28 at 28, Supp. at 35). Commission Staff witness Choueiki testified that if DP&L could not maintain its financial integrity then all of its services – including distribution service – would be negatively affected. Tr. VII at 1865-1866, Supp. at 43-44. More than adequate record evidence supports the Commission's decision.

Indeed, the evidence in this case does more than merely satisfy the statutory requirement that the charge "have the effect" of providing stability and certainty. Significantly, R.C. 4928.143(B)(2)(d) does not require that the Service Stability Rider make retail electric service *more* stable or certain. Rather, the statute authorizes charges that "would *have the effect* of" stabilizing or providing certainty regarding retail electric service. R.C. 4928.143(B)(2)(d), App. at 18. Charges may have the effect of stabilizing or providing certainty regarding service without making the service more certain or probable. This Court has ruled that a finding of necessity for such a charge is not needed to satisfy the requirements of R.C. 4928.143(B)(2)(d). *In re Application of Columbus S.*

Power Co., 138 Ohio St.3d 448, 2014-Ohio-462 at ¶26. But credible record evidence demonstrates that such a charge is *necessary* to provide stability and certainty in this case. The Commission explicitly found, again as a matter of fact, that the Service Stability Rider "is necessary to ensure the Company's financial integrity." *ESP Case* (Opinion and Order at 25) (Sep. 4, 2013), IEU App. at 33.

Appellant OCC's argument that the statute only relates to stability and certainty regarding retail electric service, and not utility earnings, attempts to separate two inextricably intertwined objectives. Absent financial integrity, there is no assurance of reliable service. Appellant OCC did not, and could not, dispute the Commission's finding that, if DP&L's financial integrity "becomes further compromised, it may not be able to provide stable or certain retail electric service." *Id*. at 21, IEU App. at 29.

Appellant IEU similarly argues that the Commission's rationale was limited to earnings stability rather than physical supply of service, and that the rider was therefore improperly approved. IEU Merit Brief at 13. The statute does not limit stability or certainty to physical delivery. Indeed, the statute specifies that carrying charges, amortization periods, and accounting deferrals can all have the effect of providing stability and certainty. Since none of these have anything to do with the physical supply of service, appellant IEU's interpretation is too restrictive. A utility's financial integrity clearly affect the certainty of retail service. To read the statute otherwise would render it meaningless.

Deference should be shown to Commission determinations in matters, like here, where the Commission applies its specialized expertise and discretion. *Cincinnati Bell*

Tel. Co. v. Pub. Util. Comm., 92 Ohio St.3d 177, 180, 749 N.E.2d 262, 2001-Ohio-132 *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17-18, 734 N.E.2d 775, 2000-Ohio-491 (citation omitted). The Commission's determination that the Service Stability Rider charge relates to default service and bypassability, and, is necessary to promote retail stability and certainty, is adequately supported by the evidence in the record, and is entitled to this Court's deference.

B. The Service Stability Rider does not constitute an unlawful or unreasonable subsidy. [IEU-OH Prop (A)(3), (4) & (5); OCC Prop I(C), (D)].

Appellant IEU erroneously claims that the Commission failed to address its argument that the Service Stability Rider provides DP&L's generation business with an unlawful competitive advantage, preference, and subsidy. IEU Merit Brief at 24. Numerous parties raised various arguments relating to the possible subsidization of DP&L's competitive generation business. The Commission described those arguments, including appellant IEU's, and the reasons why those arguments were rejected. *ESP Case* (Opinion and Order at 18-22) (Sep. 4, 2013), IEU App. at 26-30. The Commission noted that, "[a]lthough generation, transmission, and distribution rates have been unbundled, DP&L is not a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility." *Id*. at 22, IEU App. at 30.

The Commission further addressed cross-subsidization arguments on rehearing, specifically noting that the Service Stability Rider is necessary for DP&L to provide stable and reliable distribution, transmission, and generation service. *ESP Case* (Entry on Rehearing at 3-5) (Oct. 23, 2013), IEU App. at 68-70; *ESP Case* (Second Entry on Rehearing at 3-5) (Mar. 19, 2014), IEU App. at 74-76. The Commission's orders are well-reasoned, and adequately support its finding that the Service Stability Rider is not unduly discriminatory and does not constitute an unlawful or unreasonable subsidy.

1. The Service Stability Rider is not an anti-competitive subsidization of DP&L's generation business.

IEU argues that R.C. 4928.02(H) prohibits the collection of generation-related costs through a non-bypassable rider (distribution rates). However, the Service Stability Rider does not collect generation-related costs.

As the Commission repeatedly noted in it orders, the Service Stability Rider is not a generation charge. *ESP Case* (Second Entry on Rehearing at 3) (Mar. 19, 2014), IEU App. at 74. In contrast to the *Sporn* plant closure case relied on by IEU[4], the Service Stability Rider does not recover any cost associated with generation service. Rather, it is a "financial integrity charge" intended to ensure the Company's ongoing viability. *Id*.

[4] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR (Finding and Order at 1-2) (Jan. 11, 2012), App. at 33-34.

Because it does not collect generation-related costs, it does not violate any provision of R.C. 4928.02(H).

The generation side of DP&L's integrated business may have been responsible for its financial instability, and, thus, for the need for the Service Stability Rider. But the Commission noted that generation is included in the definition of retail electric service, and it stated:

> [E]ven assuming, arguendo, that the SSR is a generation-related charge, the Supreme Court has held that the Commission may approve a generation-related charge to allow a utility to provide stable retail electric service because generation is included in the definition of retail electric service pursuant to R.C. 4928.01(A)(27). *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2014-Ohio-462 at ¶32.

ESP Case (Second Entry on Rehearing at 3) (Mar. 19, 2014), IEU App. at 74.

Appellant IEU also overstates its argument when it claims that the Commission violated its rules when it authorized DP&L to make financial integrity payments to its generation business. This would be in violation of Commission rules that provide that "[a]n electric utility shall not enter into any agreement with terms under which the electric utility is obligated to commit funds to maintain the financial viability of an affiliate." Ohio Adm. Code 4901:1-37-04(C)(2), App. at 30. But there is nothing in the Commission's orders that authorize, or even permit, DP&L to make any payments or commit any funds to its generation affiliate. Quite to the contrary, the Commission specifically ordered "that all SSR revenues should remain with DP&L, and not be transferred to any of DP&L's current or future affiliates through dividends or any other means." *ESP Case* (Opinion and Order) (Sep. 4, 2013), IEU App. at 34.

While the statute and Commission rules would prohibit contractual commitments to affiliated businesses, R.C. 4928.143(B)(2)(d) does permit utilities to assess charges that support generation functions. Specifically, that section authorizes charges that would have the effect of stabilizing or providing certainty with respect to retail electric service. And R.C. 4928.01(A)(27) provides that "retail electric service includes * * * generation service * * * ." R.C. 4928.01(A)(27), App. at 5. The fact is that the Service Stability Rider is permissibly intended to support all of DP&L's businesses in providing retail electric service, including its generation business.

Because the Service Stability Rider does not recover generation-related costs, it does not violate the policy contained in R.C. 4928.02(H). Moreover, that policy provision must be read in conjunction with the other policies articulated in R.C. 4928.02. The rules of statutory construction are clear that "it is presumed that the entire statute is intended to be effective." R.C. 1.47(B), App. at 1. Indeed, R.C. 4928.02 states that "[i]t is the policy of this state to do the following throughout the state," not merely one or some of the policies listed.

Specifically, the very first objective listed is that it is the policy of the state to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service." R.C. 4928.02(A), App. at 11. The Commission found that the Service Stability Rider was necessary for DP&L to provide stable and reliable distribution, transmission, and generation service. *ESP Case* (Entry on Rehearing at 3-5) (Oct. 23, 2013), Supp. at 49-50; *ESP Case* (Second Entry on Rehearing at 3-5) (Mar. 19, 2014), IEU App. at 74-76. The Commission's orders not only fulfilled

the policies outlined by the General Assembly – and *all* of them – but were necessary in order to do so.

2. Because the Commission's order benefits both shopping and non-shopping customers while appropriately compensating DP&L, it was appropriate to approve the Service Stability Rider as a non-bypassable charge.

The Commission found that all customers, both shopping and non-shopping, would benefit from the Service Stability Rider, and that it was therefore appropriate to make it non-bypassable. *ESP Case* (Opinion and Order at 21) (Sep. 4, 2013), IEU App. at 29. For non-shopping customers, the Order provides service stability and certainty. For shopping customers, the Order makes available a reasonably-priced SSO, even in the event market prices increase. All customers have the ability to shop and return at fixed base generation rates. Because all customers will benefit, the Commission determined that all customers should share in the charge, and approved the Service Stability Rider as a non-bypassable rider. *Id*.

Appellant IEU claims that R.C. 4928.143(B)(2) only permits non-bypassable charges in two instances: sub-paragraphs (b) and (c). Since paragraph (d) does not include such a specific provision, it argues, the Commission may not approve a rider under that subsection as non-bypassable. IEU Merit Brief at 24. But nothing in R.C. 4928.143(B)(2)(d), nor in any other provision in Chapter 4928, prohibits the Commission from approving the Service Stability Rider on a non-bypassable basis. This is not a situation where the doctrine of *inclusio unius est exclusion alterius* applies. Both

paragraph (b) and (c) *require*, rather than merely permit, the surcharges authorized by those subsections to be non-bypassable. R.C. 4928.143 does not prohibit the Commission from making the Service Stability Rider non-bypassable. There is neither proscription nor restriction contained in paragraph (d), and the Commission properly determined that non-bypassability was appropriate.

This Court has frequently acknowledged that decisions about how rates are designed – including which customers pay and under what circumstances – are matters within the discretion of the Commission. *Green Cove Resort Owners' Ass'n v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, ¶ 21 (recognizing the Commission's "unique rate design expertise"); *Citywide Coalition for Util. Reform v. Pub. Util. Comm.*, 67 Ohio St.3d 531, 533 (1993) (the Court affords the Commission "considerable discretion" in matters of rate design). R.C. 4928.143(B)(2)(d) allows for the establishment of terms, conditions, or charges relating to limitations on customer shopping for retail generation service, as well as accounting or deferrals, so long as they would have the effect of stabilizing or providing certainty regarding retail electric service.

C. The Commission has not authorized the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in R.C. 4928.31 to 4928.40, and it has not done so. R.C. 4928.38, App. at 28. [IEU-OH Prop (A)(2); OCC Prop (1)(A), (B)].

Appellants claim that the Commission has authorized the collection of transition revenues in violation of R.C. 4928.38. Appellants are incorrect.

Transition revenues were a facet of the restructuring that occurred in 2000 when electricity competition was first permitted in Ohio. The then-existing rates were to be broken up, "unbundled", into components: transmission, distribution, and generation. R.C. 4928.34(A), App. at 23-26. Customers who chose to purchase power from an alternative supplier would no longer pay the generation component of their bill to the electric distribution utility ("EDU").

The General Assembly recognized that this system would allow shopping customers to avoid paying what were termed "stranded costs." These were the amounts invested by the EDUs in reliance upon the continuation of a regulated market for electricity which the EDUs would not be able to recoup from retail customers in the new, unregulated electricity market. To remedy this problem, the General Assembly authorized the Commission to identify amounts that might be stranded, terming them "transition costs," and allowing the imposition of "transition charges" on retail customers to collect them. R.C. 4928.37, 4928.39, App. at 26-28, 28-29. Specifically, under SB 3, electric utilities were given an opportunity to recover transition revenues via retail rates where:

(A) The costs were prudently incurred.

(B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.

(C) The costs are unrecoverable in a competitive market.

(D) The utility would otherwise be entitled an opportunity to recover the costs.

R.C. 4928.37(A)(1), App. at 26-27. Thus, the EDU's investment would not be stranded and it would have an "…opportunity to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market." R.C. 4928.37(A), App. at 26-28.

As should be fairly plain from the express language of these sections, transition charges were intended to collect *historic costs*, specifically those historic costs incurred by utilities prior to the introduction of competition in Ohio. It is equally plain that such historic costs have nothing to do with the Service Stability Rider. The Service Stability Rider is entirely related to future solvency. The Service Stability Rider is not intended to collect any cost, rather it is structured to maintain the financial stability of the utility to allow it to continue to function and provide reliable service. History, in the sense of historic cost, is not relevant to this goal and was not used in its determination.

DP&L has not made any claim that it either did not or could not recover its stranded costs during or since the market development period. The Commission specifically noted that DP&L had not argued that its Electric Transition Plan ("ETP") did not provide it with sufficient revenues. *ESP Case* (Opinion and Order at 22) (Sep. 4, 2012), IEU App. at 30.

The Commission rejected the claim that the Service Stability Rider allows for the collection of inappropriate transition revenues or stranded costs that should have been collected prior to December 2010 pursuant to SB 3. It found that DP&L did not seek transition revenues below. *Id*. The case below had nothing to do with transition costs. The claim that the charges set below are "transition charges" has no basis whatsoever.

But even were that not the case, the plain language of R.C. 4928.143(B) makes it very clear that an Electric Security Plan can include a subsection (2)(d) charge, like the SSR, "*[n]otwithstanding* any other provision of Title XLIX of the Revised Code to the contrary." R.C. 4928.143(B), App. at 17-19. Although there are exceptions noted, none apply in this case, nor have appellants shown that any such exception should apply. Appellants' transition charge arguments fail by the very language of the statute authorizing the Electric Security Plan.

D. The Federal Power Act does not preempt the Commission from approving a Service Stability Rider. [IEU-OH Prop (A)(1), OCC Prop 2].

Federal law does not prohibit the Commission from approving the Service Stability Rider. The Federal Power Act, 16 U.S. Code Chapter 12, in relevant part, prescribes federal regulatory authority over electric transmission and wholesale energy and capacity rates and services. DP&L's Service Stability Rider is not a generation charge, and neither establishes nor affects wholesale rates or prices. The Commission explicitly found that "the SSR is a financial integrity charge authorized pursuant to R.C. 4928.143(B)(2)(d) and is not a generation charge." *ESP Case* (Second Entry on Rehearing at 3) (Mar. 19, 2014), IEU App. at 74. Consequently, the Commission's actions are not prohibited by federal law.

The United States Court of Appeals, Fourth Circuit, recently held that Maryland's scheme to subsidize generators participating in the PJM markets[5] was preempted under the Federal Power Act. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014). At issue in *Nazarian* was an order issued by the Maryland Public Service Commission that required electric utilities to enter into long-term purchase power agreements with generators. *Id*. at 473. In these long-term contracts ("contracts for differences" or "CfDs"), the generators were required to sell energy and capacity in the PJM market. The CfDs provided a guaranteed revenue stream to the generators, so long as the energy and capacity cleared the PJM markets. The CfDs did not require the generator to actually sell any energy or capacity to the electric utilities. In addition, the electric utilities would pass the differences between the PJM market revenues and the "contract price" on to rate-payers as charges or credits. *Id*. at 473-474. The court held that Maryland's order was unlawful because "it functionally sets the rate that [the generator] receives for sales into the PJM market." *Id*. at 476.

The Third Circuit Court of Appeals reached a similar decision in a case involving a New Jersey program that required utilities to enter into CfDs with generators. *PPL Energy Plus, LLC v. Solomon*, 766 F.3d 241 (3rd Cir. 2014). The court there held that the New Jersey Board of Public Utilities was preempted by the Federal Power Act from

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[5] PJM is a regional transmission organization that coordinates the continuous buying, selling and delivery of wholesale electricity for the area that encompasses all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.

requiring utilities to pay generators for development costs in excess of wholesale market prices.

These cases hold that states are preempted by the Federal Power Act from ordering utilities to sign contracts with wholesale generators that establish a wholesale rate. Neither case has any relevance to the Commission's actions here.

Both the *Nazarian* and *Solomon* cases involved the establishment of *wholesale* energy and capacity sales. By contrast, the Service Stability Rider does not fix the monetary value of wholesale generation-related capacity and energy services provided by DP&L. The revenues that DP&L receives from the Service Stability Rider are from *retail* rates, and are for the express purpose of maintaining the integrity of all of its integrated businesses. "Adopting an ESP in which DP&L sources a portion of its SSO load from the wholesale energy and capacity markets is not equivalent to setting wholesale energy and capacity rates." *ESP Case* (Second Entry on Rehearing at 3) (Mar. 19, 2014), IEU App. at 74.

There is simply no substitution of a state-determined wholesale price for a federally-determined price in this case. The Service Stability Rider is not a "contract for differences" – the rates established by the Commission are intended to ensure an overall level of return on equity for the Company as a whole. Those retail rates remain fixed regardless of what may be occurring in the wholesale markets.

The *Nazarian* court explained that Maryland's scheme had the "potential to seriously distort the PJM auction's price signals, thus "interfer[ing] with the method by which the federal statute was designed to reach its goals." *Nazarian* at 478. There is

absolutely nothing in this record, and IEU points to none, to demonstrate that the Service Stability Rider will have any impact or influence on "the method by which" the Federal Power Act is designed to reach its goals.

Moreover, it is incumbent on IEU to demonstrate that any such impact is not merely indirect or incidental. As the *Nazarian* court concluded, its preemption ruling was:

> narrow and focused upon the program before us. Obviously, not every state regulation that incidentally affects federal markets is preempted. Such an outcome "would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish..., and would render Congress' specific grant of power to the States to regulate production virtually meaningless." *Nw. Cent. Pipeline Corp*., 489 U.S. at 515, 109 S.Ct. 1262. The Generation Order, however, is simply a bridge too far. It presents a direct and transparent impediment to the functioning of the PJM markets, and is therefore preempted.

Nazarian at 479-480. The Solomon court echoed that conclusion when it stated that the Federal Energy Regulatory Commission's "authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates." *Solomon* at 255.

IEU has merely argued that the Service Stability Rider will increase DP&L's compensation. It has not shown that the rider either establishes wholesale rates or prices or that it will have any impact whatsoever on the PJM market. The Federal Power Act simply does not preempt the action taken by the Commission in this case.

Proposition of Law No. II:

> **No party shall in any court urge or rely on any ground for reversal, vacation, or modification not set forth in an application for rehearing. R.C. 4903.10, App. at 1-2.**

OCC argues that DP&L's Application for Rehearing of the Commission's Second Entry on Rehearing was not specific and therefore violated R.C. 4903.10 and denied the Commission the ability to act on that application. OCC is both factually and legally incorrect.

First it should be pointed out that DP&L's Application for Rehearing of the Commission's Second Order on Rehearing was perfectly clear. Although the assignments of error are rather conclusory, that is their purpose, the company provided nine pages of explanation in the supporting memorandum. The explanation is that there was simple confusion about the meaning of a DP&L filing. In its original order the Commission had established a date for when DP&L would have to transfer ownership of its generating assets and the portions of its load that would be subject to the auctions during the period of the plan. As the result of a filing DP&L made in another case, the Commission believed that the date and the portions could be moved up and it made these changes in the Second Entry on Rehearing. *ESP Case* (Second Entry on Rehearing at 17-18) (Mar. 19, 2014), IEU App. at 88-89. DP&L believed that the Commission had misunderstood the import of the other case filing and explained this in the memorandum in support. Ultimately the Commission agreed and restored the original requirements. *ESP Case* (Fourth Entry on Rehearing at 5-6) (Jun. 4, 2014), IEU App. at 110-111. There was no lack of specificity and OCC is simply incorrect.

Second, even if OCC were correct and DP&L had failed to provide sufficient detail to explain its objection, the argument misstates the consequence. As is plain from the words of the statute, the consequence of a failure to argue a point with specificity in an application for rehearing is that a *party cannot later raise that issue on appeal*. This Court does not have the ability to hear such an issue. *Ohio Partners for Affordable Energy v. Pub. Util. Comm.*, 115 Ohio St.3d 208, 2007-Ohio-4790. The purpose of this rule is quite simple, it is to save the Court's time. This Court's time should only be taken up with consideration of matters that have been fully vetted before the Commission. As is obvious in this very case, the matters with which the Commission is concerned are complex and coming to a final conclusion may entail adjustment and readjustment through multiple rehearings. Working through this process assures that this Court need only consider the Commission's final word on an issue.

OCC misconstrues this sensible, practical system to create some limitation on the Commission's authority. Nothing of the sort exists in law. The exact opposite is the case. When the Commission is "…of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same…" R.C. 4903.10, App. at 1-2. That is what happened here. DP&L filed an application for rehearing arguing that a Commission order was based on a mistaken understanding and should be modified. The Commission considered the argument, agreed and altered the order. This is exactly what the statute calls for and, thus, OCC is legally incorrect.

Proposition of Law No. III:

> **The Commission by order shall approve or modify and approve an application filed for an electric security plan if it finds that the 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 a market rate offer. R.C. 4928.143(C)(1), App. at 19-20.**

When the Commission is presented with a proposed ESP that is more favorable if modified, than the estimated results of a market rate offer (MRO), if there were one, the Commission must modify and approve that ESP. R.C. 4928.143(C)(1), App. at 19-20. This is exactly what happened below. *ESP Case* (Opinion and Order at 53, Finding 7) (Sep. 4. 2013), IEU App. at 61.

To make this statutory determination, the Commission must consider the entire plan as modified by the Commission itself as the law requires. Appellants argue that this is to be a mere mathematical exercise but they are wrong. The statute says the ESP must be "more favorable" not "cheaper". There is much more at play in these cases than mere addition. The Commission must consider both quantitative and qualitative matters in making this determination. *In re Columbus Southern Power*, 128 Ohio St.3d 402, 2011-Ohio-958.

This must be so for R.C. 4928.143 to have legal meaning. An MRO merely arranges an electricity supply. An ESP does this as well, but also may include all manner of components that are not permitted under an MRO. These include construction work in progress recovery, generating facility costs, infrastructure development plans, and economic development plans, to name a few. All of these components of an ESP add readily

quantifiable costs but have benefits that are broad, diffuse and impossible to quantify. Further there are the overarching policy requirements that the General Assembly created in R.C. 4928.02. The Commission should not place a dollar value on ensuring the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service. Nor should the Commission place a dollar amount on providing consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs. The costs to achieve these goals may be easy to measure but the benefits are not. Because an ESP does much more than an MRO, it will virtually always cost more than an MRO on a strictly quantitative basis. If appellants were correct, no ESP could ever be approved. Appellants' arguments would read R.C. 4928.143 effectively out of the Code.

This Court has rejected appellants' reasoning before. It has stated:

> R.C. 4928.143(C)(1). Moreover, while it is true that the commission must approve an electric security plan if it is "more favorable in the aggregate" than an expected market-rate offer, *id*., *that fact does not bind the commission to a strict price comparison*. On the contrary, in evaluating the favorability of a plan, the statute instructs the commission to consider "pricing and all other terms and conditions." (Emphasis added.) *Id*. *Thus, the commission must consider more than price in determining whether an electric security plan should be modified*.

In re Columbus Southern Power 128 Ohio St.3d 402, 2011-Ohio-958 (emphasis added). The Commission did exactly this, it considered all terms and conditions and found the ESP was much more favorable than an MRO would have been. *ESP Case* (Opinion and

Order at 52), (Sep. 4. 2013), IEU App. at 60. These benefits are numerous and discussed in the following.

A key benefit of the ESP is that it moves the standard service offer to market level pricing much more quickly than would be the case through an MRO, at least two years sooner. *Id*. at 50, IEU App. at 59. Moving the electric industry to a regime in which market forces set generation prices rather than regulation is really the basic point of the entirety of the restructuring the General Assembly has been pursuing since 1999. Moving DP&L's standard service offer to market-based pricing years earlier furthers the General Assembly's goals to:

> (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;

R.C. 4928.02, App. at 11-12. While it is impossible to fully capture the value this movement to market-based pricing will have for customers[6], this is a fundamental policy choice made by the General Assembly. Compliance with it is mandatory. *Elyria Foundry v. Pub. Util. Comm.* 114 Ohio St.3d 305, 2007-Ohio-4164.

It is argued that there is no benefit from this earlier move to market but this is incorrect. The General Assembly has determined that the electric industry should be as

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[6] Although the benefit from other auctions has been large and it is hoped the same will be true here as well.

competitive as possible. Moving to market pricing is good. Indeed, the whole point of an MRO is to move to market-based pricing, albeit more slowly than is achieved through these orders. The ESP is better than an MRO, if there were one, because it achieves the benefits of market-based pricing sooner. Getting something that is good sooner, must be better. To argue otherwise is really to say that the industry should not move to market-based pricing at all, which conflicts with the General Assembly's determination. Appellant's argument is really with the General Assembly.

An additional non-quantifiable benefit of the ESP is that it will allow DP&L to improve its billing system, which is a boon to retail competition. The Commission reasoned:

> Moreover, the Commission has modified the ESP to provide DP&L with incentives to modernize its billing system. As discussed above, at the hearing, witness testimony indicated that DP&L's billing system is essentially antiquated and incapable of supporting rate ready billing and percentage off PTC pricing (Constellation Ex. 1 at 49-54; FES Ex. 17 at 19-26). The billing system modernization will allow CRES providers to offer a more diverse range of products to customers consistent with the provisions of Section 4928.02(B), Revised Code.

ESP Case (Opinion and Order at 51) (Sep. 4. 2013), IEU App. at 60 (citations in original). This is clearly beneficial for the functioning of the competitive market and it is highly sought after by DP&L's competitors. The costs of such an upgrade are easy to determine but the benefits are difficult. These benefits make it easier for competitors to participate in the market but the value of this to customers, although real and important, cannot be specified. It is impossible to place a cash value but the benefit is real. There is

no mechanism to accomplish this through an MRO. Again, the modified ESP creates benefits simply not available under the MRO construct and not quantifiable.

The modified ESP creates significant retail competitive enhancements. The Commission noted:

> The numerous competitive retail enhancements include the elimination of the minimum stay and return-to-firm provisions, a web-based portal for CRES providers, an autocancel feature to DP&L's billing system, removal of the enrollment verification, support for historical interval usage data (HIU) data requests, and a standardized sync list provided to CRES providers (DP&L Ex. 9 at 13-15). Additionally, the Commission has also required DP&L to implement those competitive retail enhancements that have been adopted by every other EDU[7] in Ohio. These competitive retail enhancements *include rate-ready percentage off PTC billing, elimination of the per bill fee for consolidated or dual billing, elimination of the charges to register rate codes, permitting CRES providers to pay the switching fee, raising the interval meter threshold, and requiring an identifier on the eligibility file* (FES Ex. 17 at 19-26; RESA Ex. 6 at 14-15). Each of the competitive retail enhancements will further develop the competitive retail electric market in DP&L's service territory, and provide substantial qualitative benefits of the authorized ESP.

ESP Case (Second Entry on Rehearing at 28-29) (Mar. 19, 2014), IEU App. at 99-100 (citations in original) (emphasis added). Each of these items will enhance the competitive environment in Ohio and further the General Assembly's goals.

An additional advantage offered through an ESP that is not available through an MRO is the ability of the Commission to require divestiture of the company's generating assets. This fundamental restructuring of the company's business is pivotal to achieving

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[7] Electric Distribution Utility (EDU).

the open, competitive market that the General Assembly has directed. The Commission has required divestiture by January 1, 2017, the earliest date that the company's debt structure will allow. The Company's generating plant is pledged as security for its debt. The plant cannot be transferred without the agreement of the debt holders. *ESP Case* (Fourth Entry on Rehearing at 5-6) (Jun. 4, 2014), IEU App. at 110-111. Until there is a legal divestiture of the generating assets, the distribution and generation businesses remain financially tied. If the one side runs into financial difficulty, it takes the other side down with it. No corporate separation plan, no matter how well crafted, can eliminate this reality. Only legal divestiture will address this situation and it can only be ordered through an ESP.

The General Assembly's desire to bring competition to the electric industry is the potential that an incumbent electric company might use its control over the distribution system to leverage advantages for the sale of electricity from its generating stations. This would hurt the development of a competitive market. The General Assembly anticipated this problem and required rules in the form of a corporate separation plan under R.C. 4928.17. All electric distribution utilities have had such plans since the initial restructuring in 2000. DP&L has operated under such a plan providing for functional separation. This is to say that, although DP&L still owns and operates both generating and distribution assets, it is required to maintain what is essentially a "Chinese wall" between these functions. While this is an adequate approach to reduce the possibility of the abuse of the control of the distribution plant, the better system is the legal separation of the generating assets into a separate corporation, first as an affiliate, and then as an

entirely unrelated entity. This is what is being achieved in this case. DP&L is the last electric distribution utility in Ohio to reach this level of restructuring. With this decision, the entire electric industry in Ohio will finally be restructured in line with the General Assembly's plan.

It is claimed that the Commission has violated R.C. 4903.09 by not explaining the basis for its determination that the ESP is more favorable in the aggregate than an MRO. The argument should be rejected. The Commission explained its analysis, describing in considerable detail the qualitative factors it viewed as determinative and the steps it took in analysis. Specifically the Commission laid out the steps in its analysis:

> (1) analyze the modifications made to the ESP proposal by the Commission;
>
> (2) analyze the expected results of an MRO;
>
> (3) compare #1 and #2 to determine a quantitative benefit or cost for the ESP;
>
> (4) weigh the qualitative benefits of the ESP; and,
>
> (5) decide whether the ESP is more favorable in the aggregate.

ESP Case (Opinion and Order at 48-52) (Sep. 4. 2013), IEU App. at 57. The Commission implemented those steps. *Id.*

The crux of appellant's argument is that the Commission did not do the impossible, it did not quantify that which cannot be quantified, the qualitative benefits of the modified ESP. The Commission reasoned:

> Nonetheless, the Commission finds that the qualitative benefits of the ESP make it more favorable in the aggregate than the expected results that would otherwise apply. DP&L and FES request that the Commission identify the specific dollar amount that the qualitative benefits overcome the quantitative shortcomings of the ESP, yet a dollar amount cannot be calculated because the qualitative benefits are non-quantifiable. Therefore, the Commission must compare the non-quantifiable benefits and determine if they overcome the quantifiable difference between the ESP and the expected results that would otherwise apply. In this case, the Commission found in the Order that they do. Order at 52. Further, the Commission notes that, in this Second Entry on Rehearing, we have further accelerated DP&L's implementation of full market rates by modifying the CB blending schedule, which enhances the qualitative benefits of the ESP. Thus, although the ESP fails the quantitative analysis the qualitative benefits overcome and far surpass this shortfall in the quantitative analysis.

ESP Case (Second Entry on Rehearing at 27-28) (Mar. 19, 2014), IEU App. at 98-99. That a specific dollar value cannot be placed on an effect does not mean the effect has no value. What value has the rule of law? It is easy to calculate the cost of maintaining the rule of law, these amounts appear in government budgets across the land but what value should we assign to the product itself? Clearly it cannot be done, just as it is in this case.

The General Assembly has determined that the electric industry in Ohio should operate on a competitive basis to the extent feasible. The Commission has taken sensible steps to implement this directive. It has weighed this directive in making its statutory

determination in this case and it has weighed it in the only way possible. The Commission has done its duty and it should be affirmed.

Proposition of Law No. IV:

> **While the Commission is not a judicial tribunal, it nevertheless exercises quasi judicial functions and has continuing power over its records and authority to make them speak the truth, and in any proceeding before the Commission where an order has been made but the same has not been entered on the record in consequence of inadvertence or omission on the part of the Commission or any ministerial officer thereof, the Commission has power to direct that its order be entered *nunc pro tunc* upon satisfactory proof of the fact of its rendition. *Helle v. Pub. Util. Comm.*, 118 Ohio St. 434 (1928) (Syllabus). *See* also *Blue Bus Co. v. Marshall*, 116 Ohio St. 116, 119 (1927).**

The Commission has the ability to issue entries *nunc pro tunc*. *Helle v. Pub. Util. Comm.*, 118 Ohio St. 434 (1928) (Syllabus). *See* also *Blue Bus Co. v. Marshall*, 116 Ohio St. 116, 119 (1927). The purpose of a *nunc pro tunc* entry is to fix ministerial errors. This Court long ago noted:

> The office of a *nunc pro tunc* entry is not to change what the court or the commission in fact did and recorded, but is to record that which was in fact done, but was not recorded.

Grubb v. Pub. Util. Comm., 119 Ohio St. 264 (1928). The Commission made just such a mistake below, it inadvertently signed the wrong entry. The Commission explained:

> In the present case, the Commission immediately recognized that a clerical error had been made and issued the Entry *Nunc Pro Tunc* a mere two days after the Order was issued. No additional evidence was considered and only two days had

> elapsed before the Commission issued the Entry *Nunc Pro Tunc* to correct the clerical error.

ESP Case (Second Entry on Rehearing at 31) (Mar. 19, 2014), IEU App. at 101. This is a classic case were *nunc pro tunc* is appropriate and the Commission used it appropriately.

Even if there were some problem with the use of *nunc pro tunc*, there is no possibility of harm. There were multiple rounds of rehearing after the *nunc pro tunc* entry was made and, in fact some of the corrections made in the *nunc pro tunc* order were themselves changed in subsequent entries on rehearing. *See* for example *Id*. Thus there is no possibility of harm to any party and this Court will not reverse a Commission decision without a showing of harm. *Holladay v. Pub. Util. Comm.*, 162 Ohio St.2d 335 (1980).

CONCLUSION

The Commission's orders move DP&L to the next stage of competition as mandated by the General Assembly while ensuring the financial integrity so that it may provide reliable and stable electric service. The Orders move the company to market-based pricing as quickly as feasible without destabilizing it in the process. This is the Commission's job and it has done it. The Commission's order is practical and lawful and should be affirmed.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Second Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 20th day of January, 2015.

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1.47 Presumptions in enactment of statutes.

In enacting a statute, it is presumed that:

(A) Compliance with the constitutions of the state and of the United States is intended;

(B) The entire statute is intended to be effective;

(C) A just and reasonable result is intended;

(D) A result feasible of execution is intended.

4903.09 Written opinions filed by commission in all contested cases.

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

4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the

application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

(1) ”Ancillary service” means any function necessary to the provision of electric transmission or distribution service to a retail customer and includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service.

(2) ”Billing and collection agent” means a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under section 4928.08 of the Revised

Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) ”Certified territory” means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code.

(4) ”Competitive retail electric service” means a component of retail electric service that is competitive as provided under division (B) of this section.

(5) “Electric cooperative” means a not-for-profit electric light company that both is or has been financed in whole or in part under the “Rural Electrification Act of 1936,” 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.

(6) “Electric distribution utility” means an electric utility that supplies at least retail electric distribution service.

(7) “Electric light company” has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.

(8) “Electric load center” has the same meaning as in section 4933.81 of the Revised Code.

(9) “Electric services company” means an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. “Electric services company” includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.

(10) “Electric supplier” has the same meaning as in section 4933.81 of the Revised Code.

(11) “Electric utility” means an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. “Electric utility” excludes a municipal electric utility or a billing and collection agent.

(12) “Firm electric service” means electric service other than nonfirm electric service.

(13) “Governmental aggregator” means a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority conferred under section 4928.20 of the Revised Code.

(14) A person acts “knowingly,” regardless of the person’s purpose, when the person is aware that the person’s conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist.

(15) “Level of funding for low-income customer energy efficiency programs provided through electric utility rates” means the level of funds specifically included in an electric utility’s rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, for the purpose of improving the energy efficiency of housing for the utility’s low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract.

(16) “Low-income customer assistance programs” means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(17) “Market development period” for an electric utility means the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) “Market power” means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) “Mercantile customer” means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) “Municipal electric utility” means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) “Noncompetitive retail electric service” means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) “Nonfirm electric service” means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility.

(23) “Percentage of income payment plan arrears” means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) “Person” has the same meaning as in section 1.59 of the Revised Code.

(25) ”Advanced energy project” means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity or energy and that reduce or support the reduction of energy consumption or support the production of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users, including, but not limited to, advanced energy resources and renewable energy resources. “Advanced energy project” also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) ”Regulatory assets” means 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 public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission 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 commission action. “Regulatory assets” includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan 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 commission.

(27) ”Retail electric service” means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following “service components”: generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.

(28) “Starting date of competitive retail electric service” means January 1, 2001.

(29) “Customer-generator” means a user of a net metering system.

(30) “Net metering” means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator that is fed back to the electric service provider.

(31) “Net metering system” means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator’s premises;

(c) Operates in parallel with the electric utility’s transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator’s requirements for electricity.

(32) “Self-generator” means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner’s consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) “Rate plan” means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

(34) “Advanced energy resource” means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration technology;

(c) 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 standard D5142 of that society, or clean coal

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;

(d) 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;

(e) 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;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, 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 waste reduction model (WARM);

(g) Demand-side management and any energy efficiency improvement;

(h) Any new, retrofitted, refueled, or repowered generating facility located in Ohio, including a simple or combined-cycle natural gas generating facility or a generating facility that uses biomass, coal, modular nuclear, or any other fuel as its input;

(i) Any uprated capacity of an existing electric generating facility if the uprated capacity results from the deployment of advanced technology.

"Advanced energy resource" does not include a waste energy recovery system that is, or has been, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(35) "Air contaminant source" has the same meaning as in section 3704.01 of the Revised Code.

(36) "Cogeneration technology" means technology that produces electricity and useful thermal output simultaneously.

(37)

(a) "Renewable energy resource" means any of the following:

(i) Solar photovoltaic or solar thermal energy;

(ii) Wind energy;

(iii) Power produced by a hydroelectric facility;

(iv) Power produced by a run-of-the-river hydroelectric facility placed in service on or after January 1, 1980, that is located within this state, relies upon the Ohio river, and operates, or is rated to operate, at an aggregate capacity of forty or more megawatts;

(v) Geothermal energy;

(vi) Fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion;

(vii) Biomass energy;

(viii) Energy produced by cogeneration technology that is placed into service on or before December 31, 2015, and for which more than ninety per cent of the total annual energy input is from combustion of a waste or byproduct gas from an air contaminant source in this state, which source has been in operation since on or before January 1, 1985, provided that the cogeneration technology is a part of a facility located in a county having a population of more than three hundred sixty-five thousand but less than three hundred seventy thousand according to the most recent federal decennial census;

(ix) Biologically derived methane gas;

(x) Heat captured from a generator of electricity, boiler, or heat exchanger fueled by biologically derived methane gas;

(xi) 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.

“Renewable energy resource” 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 acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state’s territorial waters of Lake Erie; methane gas emitted from an abandoned coal mine; waste energy recovery system placed into service or retrofitted on or after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly, September 10, 2012, except that a waste energy recovery system described in division (A)(38)(b) of this section may be included only if it was placed into service between January 1, 2002, and December 31, 2004; storage facility that will promote the

better utilization of a renewable energy resource; or distributed generation system used by a customer to generate electricity from any such energy.

"Renewable energy resource" does not include a waste energy recovery system that is, or was, on or after January 1, 2012, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(b) As used in division (A)(37) of this section, "hydroelectric facility" means 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 this state or within or bordering an adjoining state and meets all of the following standards:

(i) The facility 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.

(ii) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(iii) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromous fish.

(iv) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(v) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(vi) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(vii) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar

requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(viii) The facility 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.

(38) “Waste energy recovery system” means either of the following:

(a) A facility that generates electricity through the conversion of energy from either of the following:

(i) Exhaust heat from engines or manufacturing, industrial, commercial, or institutional sites, except for exhaust heat from a facility whose primary purpose is the generation of electricity;

(ii) Reduction of pressure in gas pipelines before gas is distributed through the pipeline, provided that the conversion of energy to electricity is achieved without using additional fossil fuels.

(b) A facility at a state institution of higher education as defined in section 3345.011 of the Revised Code that recovers waste heat from electricity-producing engines or combustion turbines and that simultaneously uses the recovered heat to produce steam, provided that the facility was placed into service between January 1, 2002, and December 31, 2004.

(39) ”Smart grid” means capital improvements to an electric distribution utility’s distribution infrastructure that improve reliability, efficiency, resiliency, or reduce energy demand or use, including, but not limited to, advanced metering and automation of system functions.

(40) ”Combined heat and power system” means the coproduction of electricity and useful thermal energy from the same fuel source designed to achieve thermal-efficiency levels of at least sixty per cent, with at least twenty per cent of the system’s total useful energy in the form of thermal energy.

(B) For the purposes of this chapter, a retail electric service component shall be deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

4928.02 State policy.

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

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

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

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

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

4928.14 Failure of supplier to provide service.

The failure of a supplier to provide retail electric generation service to customers within the certified territory of an electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer under 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 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:

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

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

(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.

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

4928.141 Distribution utility to provide standard service offer.

(A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

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

4928.142 Standard generation service offer price - competitive bidding.

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

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

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

(b) Clear product definition;

(c) Standardized bid evaluation criteria;

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

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

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

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

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

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

(3) A published source of information is available publicly or through subscription that identifies pricing information for traded electricity on- and off-peak energy products that are contracts for delivery beginning at least two years from the date of the publication and is updated on a regular basis. The commission shall initiate a proceeding and, within

ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric 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.

4928.143 Application for approval of electric security plan - testing.

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

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

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

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

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including

the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

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

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

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

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

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

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

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

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

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

(C)

(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including

its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)

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

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

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

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

ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

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

and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

4928.17 Corporate separation plans.

(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 commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission pursuant to a rule it shall adopt under division (A) of section 4928.06 of the Revised Code, and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, including, but not limited to, utility resources such as trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training, without compensation based upon fully loaded embedded costs charged to the affiliate; and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail electric service. No such utility, affiliate, division, or part shall extend such undue preference. Notwithstanding any other division of this section, a utility's obligation under division (A)(3) of this section shall be effective January 1, 2000.

(B) The commission may approve, modify and approve, or disapprove a corporate separation plan filed with the commission under division (A) of this section. As part of the code of conduct required under division (A)(1) of this section, the commission shall adopt rules pursuant to division (A) of section 4928.06 of the Revised Code regarding corporate separation and procedures for plan filing and approval. The rules shall include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also shall include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the commission shall address in its final order. Prior to commission approval of the plan, the commission shall afford a hearing upon those aspects of the plan that the commission determines reasonably require a hearing. The commission may reject and require refiling of a substantially inadequate plan under this section.

(C) The commission shall issue an order approving or modifying and approving a corporate separation plan under this section, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements of division (A) of this section and will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code. However, for good cause shown, the commission may issue an order approving or modifying and approving a corporate separation plan under this section that does not comply with division (A)(1) of this section but complies with such functional separation requirements as the commission authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the policy specified in section 4928.02 of the Revised Code.

(D) Any party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances.

(E) No electric distribution utility shall sell or transfer any generating asset it wholly or partly owns at any time without obtaining prior commission approval.

4928.34 Determinations for approval or prescribing of plan.

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

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

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

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

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

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

(6) Subject to division (A)(5) of this section, the total of all unbundled components in the rate unbundling plan are capped and shall equal during the market development period, except as specifically provided in this chapter, the total of all rates and charges in effect under the applicable bundled schedule of the electric utility pursuant to section 4905.30 of the Revised Code in effect on the day before the effective date of this section, including the transition charge determined under section 4928.40 of the Revised Code, adjusted for any changes in the taxation of electric utilities and retail electric service under Sub. S.B. No. 3 of the 123rd General Assembly, the universal service rider

authorized by section 4928.51 of the Revised Code, and the temporary rider authorized by section 4928.61 of the Revised Code. For the purpose of this division, the rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the commission under section 4905.31 of the Revised Code is, for the term of the arrangement, the total of all rates and charges in effect under the arrangement. For any rate schedule filed pursuant to section 4905.30 of the Revised Code or any arrangement subject to approval pursuant to section 4905.31 of the Revised Code, the initial tax-related adjustment to the rate cap required by this division shall be equal to the rate of taxation specified in section 5727.81 of the Revised Code and applicable to the schedule or arrangement. To the extent such total annual amount of the tax-related adjustment is greater than or less than the comparable amount of the total annual tax reduction experienced by the electric utility as a result of the provisions of Sub. S.B. No. 3 of the 123rd general assembly, such difference shall be addressed by the commission through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the electric utility or its shareholders. Any adjustments in the rate of taxation specified in 5727.81 of the Revised Code section shall not occur without a corresponding adjustment to the rate cap for each such rate schedule or arrangement. The department of taxation shall advise the commission and self-assessors under section 5727.81 of the Revised Code prior to the effective date of any change in the rate of taxation specified under that section, and the commission shall modify the rate cap to reflect that adjustment so that the rate cap adjustment is effective as of the effective date of the change in the rate of taxation. This division shall be applied, to the extent possible, to eliminate any increase in the price of electricity for customers that otherwise may occur as a result of establishing the taxes contemplated in section 5727.81 of the Revised Code.

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

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

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

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

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

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

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

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

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

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

4928.37 Receiving transition revenues.

(A)

(1) Sections 4928.31 to 4928.40 of the Revised Code provide an electric utility the opportunity to receive transition revenues that may assist it in making the transition to a fully

competitive retail electric generation market. An electric utility for which transition revenues are approved pursuant to sections 4928.31 to 4928.40 of the Revised Code shall receive those revenues through both of the following mechanisms beginning on the starting date of competitive retail electric service and ending on the expiration date of its market development period as determined under section 4928.40 of the Revised Code:

(a) Payment of unbundled rates for retail electric services by each customer that is supplied retail electric generation service during the market development period by the customer's electric distribution utility, which rates shall be specified in schedules filed under section 4928.35 of the Revised Code;

(b) Payment of a nonbypassable and competitively neutral transition charge by each customer that is supplied retail electric generation service during the market development period by an entity other than the customer's electric distribution utility, as such transition charge is determined under section 4928.40 of the Revised Code. The transition charge shall be payable by each such retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved and shall be billed on each kilowatt hour of electricity delivered to the customer by the electric distribution utility as registered on the customer's meter during the utility's market development period as kilowatt hour is defined in section 4909.161 of the Revised Code or, if no meter is used, as based on an estimate of kilowatt hours used or consumed by the customer. The transition charge for each customer class shall reflect the cost allocation to that class as provided under bundled rates and charges in effect on the day before the effective date of this section. Additionally, as reflected in section 4928.40 of the Revised Code, the transition charges shall be structured to provide shopping incentives to customers sufficient to encourage the development of effective competition in the supply of retail electric generation service. To the extent possible, the level and structure of the transition charge shall be designed to avoid revenue responsibility shifts among the utility's customer classes and rate schedules.

(2)

(a) Notwithstanding division (A)(1)(b) of this section, the transition charge shall not be payable on electricity supplied by a municipal electric utility to a retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved, if the municipal electric utility provides electric transmission or distribution service, or both services, through transmission or distribution facilities singly or jointly owned or operated by the municipal electric utility, and if the municipal electric utility was in existence, operating, and providing service as of January 1, 1999.

(b) The transition charge shall not be payable on electricity supplied or consumed in this state except such electricity as is delivered to a retail customer by an electric distribution utility and is registered on the customer's meter during the utility's market development

period or, if no meter is used, is based on an estimate of kilowatt hours used or consumed by the customer. However, no transition charge shall be payable on electricity that is both produced and consumed in this state by a self-generator.

(3) The transition charge shall not be discounted by any party.

(4) Nothing prevents payment of all or part of the transition charge by another party on a customer's behalf if that payment does not contravene sections 4905.33 to 4905.35 of the Revised Code or this chapter.

(B) The electric utility shall separately itemize and disclose, or cause its billing and collection agent to separately itemize and disclose, the transition charge on the customer's bill in accordance with reasonable specifications the commission shall prescribe by rule under division (A) of section 4928.06 of the Revised Code.

4928.38 Commencing and terminating transition revenues.

Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

4928.39 Determining total allowable transition costs.

Upon the filing of an application by an electric utility under section 4928.31 of the Revised Code for the opportunity to receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, the public utilities commission, by order under section 4928.33 of the Revised Code, shall determine the total allowable amount of the transition costs of the utility to be received as transition revenues under those sections. Such amount shall be the just and reasonable transition costs of the utility, which costs the commission finds meet all of the following criteria:

(A) The costs were prudently incurred.

(B) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state.

(C) The costs are unrecoverable in a competitive market.

(D) The utility would otherwise be entitled an opportunity to recover the costs. Transition costs under this section shall include the costs of employee assistance under the employee assistance plan included in the utility's approved transition plan under section 4928.33 of the Revised Code, which costs exceed those costs contemplated in labor contracts in effect on the effective date of this section. Further, the commission's order under this section shall separately identify regulatory assets of the utility that are a part of the total allowable amount of transition costs determined under this section and separately identify that portion of a transition charge determined under section 4928.40 of the Revised Code that is allocable to those assets, which portion of a transition charge shall be subject to adjustment only prospectively and after December 31, 2004, unless the commission authorizes an adjustment prospectively with an earlier date for any customer class based upon an earlier termination of the utility's market development period pursuant to division (B)(2) of section 4928.40 of the Revised Code. The electric utility shall have the burden of demonstrating allowable transition costs as authorized under this section. The commission may impose reasonable commitments upon the utility's collection of the transition revenues to ensure that those revenues are used to eliminate the allowable transition costs of the utility during the market development period and are not available for use by the utility to achieve an undue competitive advantage, or to impose an undue disadvantage, in the provision by the utility of regulated or unregulated products or services.

4901:1-37-04 General provisions.

(A) Structural safeguards.

(1) Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall function independently of each other.

(2) Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall not share facilities and services if such sharing in any way violates paragraph (D) of this rule.

(3) Cross-subsidies between an electric utility and its affiliates are prohibited. An electric utility's operating employees and those of its affiliates shall function independently of each other.

(4) An electric utility may not share employees and/or facilities with any affiliate, if the sharing, in any way, violates paragraph (D) of this rule.

(5) An electric utility shall ensure that all shared employees appropriately record and charge their time based on fully allocated costs.

(6) Transactions made in accordance with rules, regulations, or service agreements approved by the federal energy regulatory commission, securities and exchange commission, and the commission, which rules the electric utility shall maintain in its cost allocation manual (CAM) and file with the commission, shall provide a rebuttable presumption of compliance with the costing principles contained in this chapter.

(B) Separate accounting.

Each electric utility and its affiliates shall maintain, in accordance with generally accepted accounting principles and an applicable uniform system of accounts, books, records, and accounts that are separate from the books, records, and accounts of its affiliates.

(C) Financial arrangements.

Unless otherwise approved by the commission, the financial arrangements of an electric utility are subject to the following restrictions:

(1) Any indebtedness incurred by an affiliate shall be without recourse to the electric utility.

(2) An electric utility shall not enter into any agreement with terms under which the electric utility is obligated to commit funds to maintain the financial viability of an affiliate.

(3) An electric utility shall not make any investment in an affiliate under any circumstances in which the electric utility would be liable for the debts and/or liabilities of the affiliate incurred as a result of actions or omissions of an affiliate.

(4) An electric utility shall not issue any security for the purpose of financing the acquisition, ownership, or operation of an affiliate.

(5) An electric utility shall not assume any obligation or liability as a guarantor, endorser, surety, or otherwise with respect to any security of an affiliate.

(6) An electric utility shall not pledge, mortgage, or use as collateral any assets of the electric utility for the benefit of an affiliate.

(D) Code of conduct.

(1) The electric utility shall not release any proprietary customer information (e.g., individual customer load profiles or billing histories) to an affiliate, or otherwise, without the

prior authorization of the customer, except as required by a regulatory agency or court of law.

(2) On or after the effective date of this chapter, the electric utility shall make customer lists, which include name, address, and telephone number, available on a nondiscriminatory basis to all nonaffiliated and affiliated certified retail electric service providers transacting business in its service territory, unless otherwise directed by the customer. This provision does not apply to customer-specific information, obtained with proper authorization, necessary to fulfill the terms of a contract, or information relating to the provision of general and administrative support services. This information shall not be used by the certified retail electric service providers for any other purpose than the marketing of electric service to the customer.

(3) Employees of the electric utility's affiliates shall not have access to any information about the electric utility's transmission or distribution systems (e.g., system operations, capability, price, curtailments, and ancillary services) that is not contemporaneously available, readily accessible, and in the same form and manner available to a nonaffiliated competitors providing retail electric service.

(4) An electric utility shall treat as confidential all information obtained from a competitive retail electric service provider, both affiliated and nonaffiliated, and shall not release such information, unless a competitive retail electric service provider provides authorization to do so or unless the information was or thereafter becomes available to the public other than as a result of disclosure by the electric utility.

(5) The electric utility shall not tie (or allow an affiliate to tie), as defined by state and federal antitrust laws, or otherwise condition the provision of the electric utility's regulated services, discounts, rebates, fee waivers, or any other waivers of the electric utility's ordinary terms and conditions of service, including but not limited to tariff provisions, to the taking of any goods and/or services from the electric utility's affiliates.

(6) The electric utility shall 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.

(7) The electric utility, upon request from a customer, shall provide a complete list of all competitive retail electric service providers operating on the system, but shall not endorse any competitive retail electric service providers, indicate that an electric services company is an affiliate, or indicate that any competitive retail electric service provider will receive preference because of an affiliate relationship.

(8) The electric utility shall use reasonable efforts to ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power and the electric utility's compliance officer shall promptly report any such unreasonable sales practices, market deficiencies, and market power to the director of the utilities department (or their designee).

(9) Employees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated electric services company.

(10) The electric utility shall provide comparable access to products and services related to tariffed products and services and specifically comply with the following:

(a) An electric utility shall be prohibited from unduly discriminating in the offering of its products and/or services.

(b) The electric utility shall apply all tariff provisions in the same manner to the same or similarly situated entities, regardless of any affiliation or nonaffiliation.

(c) The electric utility shall not, through a tariff provision, a contract, or otherwise, give its affiliates or customers of affiliates preferential treatment or advantages over nonaffiliated competitors of retail electric service or their customers in matters relating to any product and/or service.

(d) The electric utility shall strictly follow all tariff provisions.

(e) Except to the extent allowed by any applicable law, regulation, or commission order, the electric utility shall not be permitted to provide discounts, rebates, or fee waivers for any retail electric service.

(11) Shared representatives or shared employees of the electric utility and affiliated electric services company shall clearly disclose upon whose behalf their public representations are being made when such representations concern the entity's provision of electric services.

(E) Emergency.

(1) Notwithstanding the foregoing, in a declared emergency situation, an electric utility may take actions necessary to ensure public safety and system reliability.

(2) The electric utility shall maintain a log of all such actions that do not comply with this chapter, and such log shall be subject to review by the commission and its staff.

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider.	)))))	Case No. 10-1454-EL-RDR

FINDING AND ORDER

The Commission finds:

(1) Ohio Power Company (OP or the Company) is a public utility and an electric light company within the definitions of Sections 4905.02 and 4905.03(A)(3), Revised Code, and, as such, is subject to the jurisdiction of this Commission pursuant to Sections 4905.04, 4905.05, and 4905.06, Revised Code.

(2) On October 1, 2010, OP filed an application requesting that the Commission approve the closure of Unit 5 of the Philip Sporn Generating Station (Sporn Unit 5) to the extent such approval is required by Sections 4905.20 and 4905.21, Revised Code. OP explains that the plant is located on the Ohio River and is comprised of five generation units placed into service between 1950 and 1960. OP states that it owns Sporn Units 2, 4, and 5, while Appalachian Power Company, which operates the plant, owns Sporn Units 1 and 3. According to OP, Sporn Unit 5 is an early supercritical unit that currently has a winter capability of 450 megawatts.

OP further requests that the Commission simultaneously approve the establishment of a Plant Closure Cost Recovery Rider (PCCRR) to collect the costs associated with the closure of Sporn Unit 5. As proposed by OP, the nonbypassable distribution rider would enable the Company to recover incurred closure costs as of December 2010, which include the unamortized plant balance remaining on OP's books (approximately $56.1 million) and unique materials and supplies that cannot be used at other plants (approximately

$2.6 million). The proposed PCCRR would also permit OP to recover closure costs incurred after December 2010, which are expected to include any legally required asset retirement obligations (such as asbestos removal, fly ash pond closure, and disposal of transformer-rectifier set fluids) and any net salvage to be incurred related to the Sporn Unit 5 assets (such as unique materials and supplies). OP requests accounting authority to record the future costs in a regulatory asset/liability account, with such costs being included in the PCCRR when incurred. OP further requests that a weighted average cost of capital carrying charge on the future cost deferrals be recovered through the PCCRR. Finally, OP proposes that the PCCRR rate be implemented outside of the rate caps established in the case approving, as modified, the Company's electric security plan (ESP 1) for 2009 through 2011 (ESP 1 Case).[1]

If the Commission should determine that it is appropriate to mitigate the rate impact of the PCCRR, OP alternatively requests that the Commission amortize recovery of the Sporn Unit 5 closure costs over a 36-month period, with carrying charges being included over the extended recovery period.

(3) In support of its application, OP states:

(a) Effective December 10, 2007, a New Source Review (NSR) Consent Decree, resolving all complaints related to NSR requirements filed against American Electric Power (AEP) and its affiliates, including OP, was entered with the United States Department of Justice. As part of the NSR Consent Decree, Sporn Unit 5 is required to be retired, repowered, or retrofitted by December 31, 2013. AEP's plan to comply with the NSR Consent Decree included retirement of Sporn Unit 5 at the end of 2013.

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1 *In the Matter of the Application of Ohio Power Company for Approval of its Electric Security Plan; and an Amendment to its Corporate Separation Plan*, Case No. 08-918-EL-SSO, Opinion and Order (March 18, 2009) (ESP 1 Order).

(b) Aside from the planned retirement at the end of 2013, AEP's integrated resource planning process had projected the retirement and removal of Sporn Unit 5 as a capacity resource in 2010. As a result, AEP did not bid Sporn Unit 5 into the PJM Interconnection, LLC (PJM) base residual capacity auction for the 2010-2011 planning year, which was conducted in early 2008. Sporn Unit 5 was thus no longer a PJM capacity resource as of June 1, 2010, but was expected to be available to produce power for the PJM energy market through the end of 2013.

(c) During the period prior to OP's ESP 1 application, revenues from Sporn Unit 5, less all operating and maintenance expenses, resulted in an approximately $36.3 million contribution to other costs of the Company and were expected to continue to be available to produce such contributions during the term of ESP 1. Current projections based on economic conditions, however, indicate operating losses of $8.4 million and $6.8 million for 2011 and 2012, respectively, for Sporn Unit 5. The results for 2013 are expected to be similar. For this reason, OP plans to close Sporn Unit 5 earlier than previously expected, contingent upon Commission approval.

(d) In the ESP 1 Case, the Commission approved OP's request for authority to come before the Commission during the term of ESP 1 to determine the appropriate treatment for accelerated depreciation and other net early closure costs in the event it becomes necessary to close a generation plant earlier than previously anticipated.[2] OP submits that the ESP 1 Order thus specifically contemplated the Company's recovery of early closure costs.

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2 ESP 1 Order at 52-53.

(e) Noting that Sporn Unit 5 has served and benefitted OP's ratepayers during the life of the asset, the Company asserts that shareholders should not be expected to absorb the early closure costs, which represent dollars invested during a regulatory regime in which OP was permitted to recover all prudently incurred costs, including plant closure costs. OP further contends that it would have absorbed such early closure costs, if it had been permitted to transition to market-based generation rates by 2006, as originally contemplated under Amended Substitute Senate Bill 3 (SB 3). Therefore, OP believes that it is reasonable under the circumstances for the Company to recover the costs associated with the early closure of Sporn Unit 5.

(4) Motions to intervene were filed on various dates by Ohio Partners for Affordable Energy (OPAE); Industrial Energy Users-Ohio (IEU-Ohio)[3]; Ohio Consumers' Counsel (OCC); Ohio Environmental Council (OEC); Ohio Energy Group (OEG); Wal-Mart Stores East, LP and Sam's East, Inc. (jointly, Walmart); Sierra Club of Ohio (Sierra Club); and OMA Energy Group (OMAEG). No memoranda contra were filed. The Commission finds that the motions to intervene are reasonable and should be granted.

(5) On October 5, 2010, and December 17, 2010, respectively, motions for admission *pro hac vice* were filed on behalf of David C. Rinebolt for OPAE and Holly Rachel Smith for Walmart.[4] No memoranda contra were filed. The Commission finds that the motions for admission *pro hac vice* are reasonable and should be granted.

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[3] On February 18, 2011, IEU-Ohio filed a motion to consolidate this case with numerous other cases pending before the Commission. This finding and order does not address IEU-Ohio's motion to consolidate.

[4] The motions to practice *pro hac vice* were filed prior to the recent amendment of Rule XII, Section 2 of the Government of the Bar of Ohio, which provides new procedures for requesting *pro hac vice* admission.

(6) By entry of March 9, 2011, the Commission established a procedural schedule for the filing of comments and reply comments.

(7) Upon the filing of its application, OP provided PJM, as required, an advance 90-day notification of the planned closure of Sporn Unit 5, contingent upon Commission approval. Subsequently, on March 30, 2011, OP filed notice with the Commission that it was informed by PJM on October 29, 2010, that PJM had identified no reliability violations resulting from the proposed shutdown and that Sporn Unit 5 could be deactivated at any time from PJM's perspective. OP further reported that Monitoring Analytics, LLC, which is known as the Market Monitoring Unit in PJM's Open Access Transmission Tariff, notified the Company on February 1, 2011, that it had identified no market power issue with respect to the proposed closure of Sporn Unit 5.

(8) In accordance with the procedural schedule established in this case, timely initial comments were filed by IEU-Ohio, OEG, OCC, OMAEG, OPAE, Walmart, and Staff on April 8, 2011.[5]

(9) On April 14, 2011, OP filed a motion for a four-day extension of the deadline for reply comments, which was granted by the attorney examiner by entry issued April 15, 2011.

(10) On April 20, 2011, OCC filed supplemental comments, as well as a motion for leave to file supplemental comments *instanter*, pursuant to Rule 4901-1-12, Ohio Administrative Code. In support of its motion, OCC states that it seeks to file supplemental comments in light of a recent decision of the Supreme Court of Ohio that impacts this case. Further, OCC notes that its supplemental comments were included with the motion in order to afford the other parties the opportunity to respond in their reply comments. OCC, therefore, concludes that granting its motion will not adversely affect a substantial right of any party. No memoranda contra OCC's motion were

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5 OCC, OEC, and Sierra Club also provided comments on OP's application along with their motions to intervene. Subsequently, OP filed comments in response to OCC and OEC. The Commission will consider these filings in addition to the initial comments and reply comments filed in accordance with the procedural schedule.

filed. The Commission finds that OCC's motion for leave to file supplemental comments *instanter* is reasonable and should be granted.

(11) Timely reply comments were filed by OP on April 21, 2011, and by FirstEnergy Solutions Corp. (FES), IEU-Ohio, and OPAE on April 22, 2011.

Staff Comments

(12) In its comments, Staff argues that the Commission should not approve OP's request for recovery of costs associated with the closure of Sporn Unit 5, as there is no statutory basis for recovery of such costs. Staff asserts that Amended Substitute Senate Bill 221 (SB 221) contains no provision allowing for recovery of costs related to the closure of a generating unit. Staff points out that, although Section 4928.143(B)(2)(c), Revised Code, provides for the establishment of a nonbypassable surcharge for the life of a generating facility if specific conditions are met, those conditions have not been met with respect to Sporn Unit 5, because it was constructed prior to January 1, 2009, not competitively bid, and not subject to a determination of need by the Commission. Staff concludes that the only provision under current law that would permit the sort of charge sought by OP does not apply under the circumstances.

Staff further argues that OP's requested relief would conflict with the mandatory policy provision of Section 4928.02(H), Revised Code, which requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates. Staff notes that generation service is a competitive retail electric service in Ohio pursuant to Section 4928.03, Revised Code; OP seeks to establish a nonbypassable charge that would be collected from all distribution customers; and competitive suppliers cannot collect closure costs from their customers. Staff contends that OP would have a competitive advantage in its generation service business if it were permitted to collect closure costs.

(13) In its reply comments, FES agrees with Staff. OP, however, responds that Section 4928.143, Revised Code, enables the Commission to allow recovery of plant closure costs. Citing Section 4928.143(C)(1), Revised Code, OP argues that the only determination for the Commission to make with respect to a proposed electric security plan (ESP) is whether it is more favorable in the aggregate as compared to the expected results of a market rate offer. OP also disputes Staff's position that SB 221 does not address plant retirement. OP points to Section 4928.143(B)(2)(c), Revised Code, which provides that the Commission may consider, as applicable, the effects of any decommissioning, deratings, and retirements before it authorizes a surcharge pursuant to that provision. OP asserts that this provision is an integral part of attempting to encourage construction of new generating capacity in Ohio. OP submits that, in order to effectively address such construction in a comprehensive manner as envisioned by the General Assembly, the Commission should address the entire investment cycle, including retirement of existing plants, or else capacity will not be built in Ohio. In further support of its request, OP notes that Section 4928.143(B)(2)(d), Revised Code, authorizes recovery of carrying costs and deferrals.

Additionally, OP asserts that, in the ESP 1 Order, the Commission explicitly permitted the Company to request recovery of early plant closure costs during the term of ESP 1.[6] Because no party challenged the Commission's determination on this point, OP states that it is a final and non-appealable order. OP contends that the Commission retains discretion to grant or deny its request, but that no party can reasonably claim that the Commission lacks the legal ability to implement this provision of ESP 1. OP believes that the argument that SB221 precludes recovery of closure costs is a collateral attack on the ESP 1 Order.

Further, OP points out that the Commission has recently represented in comments to the United States Environmental Protection Agency that certain proposed environmental regulations would accelerate the retirement of coal-fired

6 ESP 1 Order at 52-53.

generating plants and that the cost of premature retirements would have a direct impact on rates, in part due to amortization and other closure costs. OP argues that the Commission's comments undercut Staff's position in this case and instead support the Company's policy arguments regarding its request for recovery of early closure costs. OP believes that the Commission has already indicated that ratepayers will pay for early plant retirements and that the Commission may not now claim that such a result is unlawful or unreasonable.

(14) In its comments, Staff further notes that, during the market development period from 2000 through 2005, OP had the opportunity to receive transition revenues, including revenues associated with regulatory assets, to assist the Company in making the transition to a fully competitive retail electric generation market. Staff points out that revenues associated with regulatory assets were to end no later than December 31, 2010, pursuant to Section 4928.40(A), Revised Code, and that, in any event, OP elected to forgo recovery of any stranded generation transition charges pursuant to the stipulation reached in its electric transition plan case.[7]

(15) In its reply comments, FES agrees with Staff, adding that, even if OP's request were timely, the Company has failed to meet the criteria of Section 4928.39, Revised Code. According to FES, these criteria would require that the closure costs be prudently incurred; legitimate, net, verifiable, and directly allocable to retail electric generation service; and unrecoverable in a competitive market; and also require that the Company otherwise be entitled an opportunity to recover the costs.

For its part, OP replies that its request for recovery of the net book value of the plant and other closure costs is not the same as a request for recovery of stranded generation investment. OP further notes that, if it had been permitted to transition to market rates by 2006, it could have absorbed its early plant

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7 *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case No. 99-1729-EL-ETP, *et al.*, Opinion and Order (September 28, 2000), at 15-18.

closure costs through market prices. Because OP was not permitted to transition to market-based generation pricing, the Company submits that it is reasonable under the circumstances to recover its early plant closure costs. OP also maintains that current law allows the Commission to authorize recovery of the Company's early plant closure costs. OP concludes that arguments regarding recovery of stranded investment costs are neither relevant nor dispositive in light of changed factual and legal circumstances.

(16) Additionally, Staff argues that OP has already been compensated for the costs that it seeks to recover, as Sporn Unit 5 should have been fully depreciated in 2010, based on the depreciation rates established in Case No. 94-996-EL-AIR.[8] According to Staff, these rates included 17 percent closure costs and an escalator of 3.6 percent each year to account for increased costs over time.

(17) In reply, OP disagrees with Staff that the Company's investment in Sporn Unit 5 has been full recovered, noting that depreciation rates established more than 15 years ago should not be used to override the Company's accounting books. OP asserts that Staff's position relies on outdated information and does not conform to established regulatory accounting and ratemaking principles regarding updating depreciation rates when circumstances change. OP admits that some partial adjustment to recovery of future closure costs may be appropriate, given that at least a portion of the closure costs may have been reflected in the previously authorized rates. OP contends that it is nevertheless entitled to recovery of the net book value, which is driven by approximately $70 million in capital plant additions that occurred after the distribution rate case in 1994. OP maintains that the closure costs reflected in its depreciation rates substantially underestimated the actual closure costs that apply to Sporn Unit 5, in light of the dramatic intervening increase in environmental regulations that apply to coal-burning power plants.

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8 *In the Matter of the Application of Ohio Power Company for Authority to Amend its Filed Tariffs to Increase the Rates and Charges for Electric Service and Related Matters*, Case No. 94-996-EL-AIR, *et al.*, Opinion and Order (March 23, 1995), at 36-37.

(18) Finally, Staff notes that, in a recent case, the Commission denied a request for recovery of expenses related to several retired generation facilities, rejecting Ohio Edison Company's claim that the plants remained assets of the electric distribution utility, although they were no longer used for generation.[9] OP replies that the case cited by Staff is inapplicable, as the retired generation facilities did not support the distribution service being priced in the case.

Intervenor Comments

Walmart

(19) Walmart argues that, if the Commission determines that the PCCRR is appropriate, it should be bypassable for customers taking generation service from a competitive supplier, because it would be inconsistent with cost-of-service principles to impose OP's generation costs on such customers. In its reply comments, OPAE disagrees, contending that the costs associated with the closure of Sporn Unit 5 were incurred in the past, prior to shopping in OP's service territory.

(20) Walmart further contends that the charge for the PCCRR should be calculated based on the annual kilowatt demand for customer classes with demand meters. OPAE disagrees, asserting that generation in wholesale markets is priced on a per kilowatt hour basis and that cost recovery should follow the market.

(21) Finally, Walmart states that the Commission should accept OP's offer to mitigate the rate impact of the PCCRR by amortizing recovery of closure costs over a 36-month period. OPAE again disagrees, noting that OP's customers are already facing substantial fuel cost deferrals. OPAE suggests that the deferral should be amortized over a single year or the Commission should deny recovery of carrying charges and

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9 *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rates for Distribution Service, Modify Certain Accounting Practices, and for Tariff Approvals*, Case No. 07-551-EL-AIR, *et al.*, Opinion and Order (January 21, 2009), at 14.

amortize recovery over an appropriate period to be determined by the Commission.

OPAE

(22) OPAE argues that, as a result of the deregulation of electric utilities pursuant to SB 3, ratepayers have no legal responsibility for plant closure costs, just as they have no claim on the output of Sporn Unit 5, which OP may utilize as it sees fit. According to OPAE, the fact that Sporn Unit 5 was once used and useful in providing service to OP's distribution customers is no longer relevant because that former regulatory regime no longer exists. OPAE asserts that customers are no longer responsible for financing the generation owned by any utility; rather, they are responsible only for paying for generation at a price set through the market or an ESP. OPAE notes that no provision was made in ESP 1 for the recovery of extraordinary costs such as for the early closure of a plant. In response, OP contends that SB 221 imposed a hybrid form of re-regulation, which includes cost-based rate adjustments in an ESP that are more akin to single issue ratemaking using traditional regulatory principles.

(23) Like Staff, OPAE also points to the fact that retail electric generation is a competitive retail electric service under Section 4928.03, Revised Code, and argues that charging customers for OP's business decision to close Sporn Unit 5 would run afoul of the prohibition against anticompetitive subsidies found in Section 4928.02(H), Revised Code.

(24) Finally, OPAE argues that OP has already been compensated for plant closure costs by way of its recovery of regulatory transition costs during the market development period.

OMAEG

(25) In its comments, OMAEG asserts that OP does not cite any legal authority that would permit recovery of plant closure costs. With respect to OP's argument that Sporn Unit 5 has served ratepayers during the life of the asset and that it would thus be unreasonable to require shareholders to absorb the closure costs, OMAEG states that this argument may be

appropriate under cost-based regulation but that such regulation no longer determines generation rates.

(26) OMAEG also argues that OP has failed to provide evidence of the offsetting positive value of the remainder of its generation fleet, as addressed by the Commission in the ESP 1 Case.[10] Finally, OMAEG contends that OP has been fairly compensated by its customers, citing the Commission's review of the Company's annual earnings for 2009.[11]

OEG

(27) OEG argues that OP cites no statutory provision in support of its request for cost recovery. OEG contends that OP's request to recover depreciation on the undepreciated remainder of Sporn Unit 5 should be denied as it relates to a rate base and regulatory regime that no longer exist. OEG notes that ESP 1 was approved without regard to cost of service.

(28) OEG further asserts that Sporn Unit 5 does not represent a stranded cost for which OP should be compensated and that the time for recovery of such costs is past. OEG believes that OP's attempt to recover the undepreciated value of Sporn Unit 5 from ratepayers is inconsistent with the stipulation in the Company's electric transition plan case, pursuant to which OP agreed that it would not impose lost generation charges on switching customers during the market development period.[12] OEG also maintains that the plant closure costs are generation costs, which should thus not be assessed to shopping customers. In its reply comments, FES agrees with OEG on these points.

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10 ESP 1 Order at 53.

11 *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code,* Case No. 10-1261-EL-UNC, Opinion and Order (January 11, 2011), at 22-23.

12 *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues,* Case No. 99-1729-EL-ETP, *et al.*, Opinion and Order (September 28, 2000), at 15-18.

(29) Finally, OEG argues that, if OP is permitted to recover plant closure costs, the Commission will have established a poor precedent that other electric utilities will seek to rely on and that utility rates and shopping will be adversely affected.

OCC

(30) OCC argues that OP should not be permitted to recover plant closure costs because such costs are not recoverable under an ESP. OCC points out that Section 4928.143(B)(2), Revised Code, does not authorize recovery of closure costs for plants that existed before SB 3 was enacted. Additionally, OCC asserts that OP is not entitled to recovery of such costs based on its receipt of regulatory asset transition revenues pursuant to Sections 4928.38 and 4928.40, Revised Code, which more than fully compensated the Company for closure costs of uneconomic plants. OCC maintains that, in receiving transition revenues, OP has forgone any cost recovery after the market development period, which has now ended.

(31) As an additional ground for denying recovery of plant closure costs, OCC states that OP retains, pursuant to ESP 1, all of the profits from off-system sales associated with its nonjurisdictional units, such as Sporn Unit 5, which benefits its shareholders. OCC further argues that OP should show that the value of the rest of its fleet does not offset the loss associated with Sporn Unit 5 before it is permitted to collect closure costs, as addressed by the Commission in the ESP 1 Case.[13] In its reply comments, FES agrees with OCC that OP should offset its profits from its generation fleet and off-system sales. OP responds, however, that OCC improperly attempts to adjust the balance achieved by the package deal adopted in the ESP 1 Order.

(32) Finally, OCC points out that, even if OP were requesting recovery of plant closure costs during the cost-of-service regulatory regime that existed prior to SB 3, it would be unlikely that such cost recovery would be permitted pursuant to Section 4909.15(A), Revised Code, given that Sporn Unit 5 is

[13] ESP 1 Order at 53.

no longer used and useful. OCC notes that the Commission rarely permitted utilities to collect plant closure costs under cost-of-service ratemaking. OP replies that traditional, cost-based regulation principles support its recovery of early plant closure costs. Under such principles, OP contends that, in order to recover any net book value, including additions, on retired property, the net book value of the retired asset, which is included in accumulated depreciation, is included in the next depreciation study in the next rate case and recovered in future rates. OP notes that it is a routine matter of utility accounting and ratemaking that plant-in-service is retired and replaced. OP argues that the Commission should follow these established regulatory accounting and ratemaking principles and authorize recovery of its early plant closure costs.

(33) In its supplemental comments, OCC argues that the Supreme Court of Ohio recently held that, pursuant to Section 4928.143(B)(2), Revised Code, an ESP may include only the items listed in the section.[14] In light of this decision, OCC contends that OP's request for recovery of plant closure costs should be denied, as such costs are not listed within the section. In their reply comments, FES, OPAE, and IEU-Ohio agree with OCC. IEU-Ohio notes that OP has identified no provision under Section 4928.143(B)(2), Revised Code, that allows recovery of plant closure costs. OP responds that the Court's decision cannot be retroactively applied to modify a portion of the ESP 1 Order that was not challenged on rehearing and appeal. According to OP, neither OCC nor the Commission can use the Court's limited remand with respect to the allowance of environmental carrying charges under Section 4928.143(B)(2), Revised Code, to open up other aspects of ESP 1, which were not the subject of rehearing and appeal.

IEU-Ohio

(34) IEU-Ohio comments that neither SB 221 nor ESP 1 provides a basis for cost recovery. Specifically, IEU-Ohio points out that Section 4928.143, Revised Code, provides no legal basis for recovery of plant closure costs. Regarding the ESP 1 Order,

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14 *In re Application of Columbus S. Power Co.* (2011), 128 Ohio St.3d 512.

IEU-Ohio states that, although the Commission offered OP the opportunity to request recovery of plant closure costs, the Commission did not address in the order whether such costs are in fact recoverable. IEU-Ohio argues that, even under cost-of-service regulation, OP's request would be denied pursuant to Section 4909.15(A), Revised Code, because Sporn Unit 5 is not used and useful.

(35) IEU-Ohio further asserts that OP's right to recover stranded costs is long over and that the Company agreed to forgo recovery of stranded generation costs during the market development period pursuant to the stipulation in its electric transition plan case.[15]

(36) Finally, IEU-Ohio contends that OP has failed to show an economic basis for recovery of its closure costs. Although OP reports that Sporn Unit 5 is being operated at a loss, IEU-Ohio notes that the Company does not argue that these operational losses are causing financial distress, nor could it successfully make such an argument given the Commission's review of its annual earnings for 2009.[16]

OEC

(37) OEC argues that recovery of plant closure costs should only be permitted if the generation will be replaced with energy efficiency or alternative energy resources and that cost recovery in the amount requested may not be appropriate if the shutdown of Sporn Unit 5 does not produce air quality or other consumer and environmental benefits.

(38) In response, OP states that it is illogical to presume, from a resource planning perspective, that an equal amount of capacity will need to be replaced upon the retirement of Sporn

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15 *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plans and for Receipt of Transition Revenues*, Case No. 99-1729-EL-ETP, *et al.*, Opinion and Order (September 28, 2000), at 15-18.

16 *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Administration of the Significantly Excessive Earnings Test under Section 4928.143(F), Revised Code, and Rule 4901:1-35-10, Ohio Administrative Code*, Case No. 10-1261-EL-UNC, Opinion and Order (January 11, 2011), at 22-23.

Unit 5. OP contends that the retirement of a given amount of megawatts of capacity does not automatically mean replacement of the same amount of megawatts during the immediate timeframe of the retirement, given that projected load growth or decline is a major factor that drives the need for new capacity. Further, OP argues that it is unreasonable to condition recovery of plant closure costs on the deployment of an equal amount of new alternative energy resource capacity.

Sierra Club

(39) Sierra Club notes that it supports the accelerated closure of Sporn Unit 5, but questions how a 50-year-old plant continues to carry unamortized debt for which ratepayers are responsible.

Conclusion

The Commission has reviewed OP's application, as well as the comments, supplemental comments, and reply comments filed by the parties and Staff. First, OP requests that the Commission approve the closure of Sporn Unit 5 to the extent such approval is required by Sections 4905.20 and 4905.21, Revised Code. Upon consideration of this request, the Commission concludes that the closure of Sporn Unit 5 is not subject to our approval. Pursuant to Sections 4928.03 and 4928.05(A)(1), Revised Code, retail electric generation service is a competitive retail electric service and, therefore, not subject to Commission regulation, except as otherwise provided in Chapter 4928, Revised Code. Just as the construction and maintenance of an electric generating facility are fundamental to the generation component of electric service,[17] we find that so too is the closure of an electric generating facility. Additionally, although there are exceptions in Section 4928.05(A)(1), Revised Code, that permit Commission regulation of competitive services in some circumstances, the enumerated statutory exceptions do not include Sections 4905.20 and 4905.21, Revised Code, which otherwise govern applications to abandon or close certain facilities.

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[17] *Indus. Energy Users-Ohio v. Pub. Util. Comm.* (2008), 117 Ohio St.3d 486 (finding that the classification of a proposed electric generation facility as a distribution-ancillary service, rather than a generation service, was contrary to law).

Further, although Section 4928.17(E), Revised Code, expressly prohibits the sale or transfer of any generating asset owned by an electric distribution utility in the absence of prior Commission approval, we find no similar provision in Chapter 4928, Revised Code, with respect to the closure of generating assets. Accordingly, the closure of Sporn Unit 5 is not subject to approval by the Commission and we thus decline to rule on OP's request for approval of the plant shutdown.

(40) OP also requests approval of a rider to collect the costs associated with the closure of Sporn Unit 5. As discussed above, Section 4928.05(A)(1), Revised Code, generally prohibits Commission regulation of retail electric generation service. However, that section expressly provides that it does not limit the Commission's authority under Sections 4928.141 to 4928.144, Revised Code. Pursuant to one such section, specifically Section 4928.143(B), Revised Code, the Commission is authorized to approve an ESP, which must contain provisions relating to the supply and pricing of electric generation service and may include certain other components. Pursuant to that section, the Commission approved ESP 1 for 2009 through 2011, and recently approved OP's new ESP that took effect on January 1, 2012.[18]

In the ESP 1 Order, we approved OP's request to come before the Commission to determine the appropriate treatment for accelerated depreciation and other net early closure costs in the event the Company finds it necessary to close a generation plant earlier than otherwise expected, as is the case with Sporn Unit 5.[19] In its application and reply comments, OP argues that the Commission specifically contemplated the Company's recovery of early closure costs in the ESP 1 Order. The Commission disagrees. Although we approved OP's request for authority to come before the Commission during the term of ESP 1 to determine the appropriate treatment for accelerated depreciation and other net early closure costs, nothing in the

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18 *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order (December 14, 2011).

19 ESP 1 Order at 52-53.

ESP 1 Order contemplated the Company's recovery of early closure costs or passed upon the legality of such costs, as OP suggests. Rather, the Commission only approved what the Company requested, which was essentially to postpone the issue and address it in a future application.

Having now reviewed that application and the comments in the present case, the Commission finds that there is no statutory basis upon which to grant recovery of the closure costs for Sporn Unit 5. As Staff and most of the intervenors note, the costs associated with the closure of Sporn Unit 5 do not fall within any of the provisions of Section 4928.143, Revised Code. Although OP implies that a broad interpretation of Section 4928.143(B)(2)(c), Revised Code, is warranted, that section provides for the establishment of a nonbypassable surcharge for the life of an electric generating facility, only if certain criteria are met. Upon consideration of these criteria, we find that Section 4928.143(B)(2)(c), Revised Code, does not authorize recovery of costs associated with the closure of Sporn Unit 5. Sporn Unit 5 was constructed long ago and, therefore, was not newly used and useful on or after January 1, 2009, as required by the statute. Neither was Sporn Unit 5 sourced through a competitive bid process or subject to a determination of need by the Commission, which are additional criteria found in Section 4928.143(B)(2)(c), Revised Code.

Although Section 4928.143(B)(2)(c), Revised Code, provides that the Commission may consider the effects of any decommissioning, deratings, and retirements, the Commission is permitted to do so only before a surcharge is authorized pursuant to that section, rather than under any circumstances. We agree with OP that the nonbypassable surcharge authorized in Section 4928.143(B)(2)(c), Revised Code, is a way in which to encourage construction of new generating capacity in the state, and that the entire investment cycle, including retirement, is important. We cannot agree, however, that any provision of Section 4928.143, Revised Code, authorizes recovery of the closure costs for Sporn Unit 5, or that the only determination for the Commission to make with respect to a proposed ESP is whether it is more favorable in the aggregate

than the expected results of a market rate offer. The Commission must also determine whether the costs to be recovered under the ESP are authorized by statute.[20] With respect to the closure costs for Sporn Unit 5, we find no statutory basis within Section 4928.143, Revised Code, or anywhere else in the Revised Code.

Additionally, the Commission notes that OP's recovery of the closure costs would be contrary to the state policy found in Section 4928.02(H), Revised Code. That policy requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. OP seeks to establish a nonbypassable charge that would be collected from all distribution customers by way of the PCCRR. Approval of such a charge would effectively allow the Company to recover competitive, generation-related costs through its noncompetitive, distribution rates, in contravention of the statute. Accordingly, we find that OP's request for cost recovery should be denied.

(41) In light of the Commission's finding that the closure of Sporn Unit 5 is not subject to our approval, and that there is no statutory basis for recovery of the closure costs, we find no need to hold a hearing in this matter and conclude that OP's application should be dismissed.

It is, therefore,

ORDERED, That the motions to intervene filed by various parties be granted. It is, further,

ORDERED, That the motions for admission *pro hac vice* filed on behalf of David C. Rinebolt and Holly Rachel Smith be granted. It is, further,

ORDERED, That OCC's motion for leave to file supplemental comments *instanter* be granted. It is, further,

ORDERED, That OP's application be dismissed. It is, further,

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20 *In re Application of Columbus S. Power Co.* (2011), 128 Ohio St.3d 512.

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

Todd A. Snitchler, Chairman

Paul A. Centolella

Steven D. Lesser

Andre T. Porter

Cheryl L. Roberto

SJP/sc

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JAN 11 2012

Betty McCauley
Secretary