In The
Supreme Court of Ohio

In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	:	Case No. 2019-0020
In the Matter of the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	:	On appeal from the Public Utilities Commission of Ohio, Case Nos. 16-0395-EL-SSO, 16-0396-EL-ATA, and 16-0397-EL-AAM
In the Matter of the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority Pursuant to Ohio Rev. Code § 4905.13.	:	

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

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INTRODUCTION

The Public Utilities Commission of Ohio (Commission) order should be affirmed. Appellant Ohio Consumers' Counsel (OCC or Appellant) raises two meritless arguments.

First, there is no preemption. All that happened below was that the Commission set a distribution rate, an entirely jurisdictional act, indeed the purpose for which the agency was established. This has nothing to do with the Federal Power Act, which controls wholesale rates.

Second, the Commission determined that in a future case, examining the earnings of Dayton Power and Light Company (DP&L) pursuant to R.C. 4928.143(F)[1], Appellant's App. at 165, (SEET), it will not include certain funds associated with a particular rider. This issue is clearly not ripe for consideration at this time as the decision has no impact until the SEET is applied in a future case, if then. Even if the issue were ripe, the Commission was correct in its decision as the SEET does not apply to that rider.

STATEMENT OF THE FACTS AND CASE

DP&L filed an application for approval of a standard service offer in the form of an electric security plan (ESP) pursuant to R.C. 4928.143, Appellant's App. at 165, on February 22, 2016. This application was amended on October 11, 2016.

On January 30, 2017, a stipulation and recommendation resolving all the issues in the case, but not involving all the parties, was filed. An amended stipulation and recommendation including more parties was filed on March 14, 2017.

A hearing began on April 3, 2017 and lasted for eight days. Nineteen witnesses testified. Two rounds of briefs were submitted by the parties.

On October 20, 2017, the Commission issued a decision in the case modifying and approving the amended stipulation. Although this Order did many things, only two are at issue here. The Commission established a retail charge called the distribution modernization rider (DMR) and indicated that the monies provided to DP&L by the

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[1] References to Appellee's appendix attached to this brief are denoted "App. at ___"; references to Appellant's appendix are denoted "Appellant's App. at ___."

DMR would not be considered in a future case where the Commission was applying the significantly excessive earnings test (SEET) under R.C. 4928.143(F), App. at 4.

Several rounds of rehearing were had, and the notice of appeal that initiated this case was filed on January 7, 2019.

ARGUMENT

Proposition of Law No. I:

> **The Commission's authority to create the Reconciliation Rider is not preempted by the Federal Power Act.**

The Commission had the authority to create the Reconciliation Rider (RR) Rider in this case. That authority was not preempted by federal law. Appellant's arguments to the contrary are not supported either by the language of the federal statutory scheme or by decisions of the federal courts.

At the outset, it is worth noting that this is no less than the fifth time that OCC has raised this very argument before this Court. Although this Court has not specifically ruled on the preemption argument, it has found an equivalent to be lawful, and has affirmed the Commission decision to approve it, both implicitly and explicitly. *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4697; *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4698. OCC nonetheless continues to advance its same arguments, nearly verbatim. The Commission reiterates that the RR Rider is a retail rate, not preempted by federal law, authorized by R.C. 4928.143(B)(2)(d), App. at 2, and is, therefore, a permissible provision of an ESP.

Congress did not preempt the states from regulating retail rates. The Federal Power Act (FPA), 16 U.S.C. § 824, et seq., asserts federal jurisdiction over the wholesale sale of electric energy but reserves to the States jurisdiction over "any other sale of electric energy." *FERC v. Electric Power Supply Assn.*, 136 S. Ct. 760, 577 U.S. ___, 2016 U.S. LEXIS 853 (2016). Specifically, it "leaves to the States alone, the regulation of [retail electricity sales]." *Id.*

The significant distinction for purposes of preemption is between state "'measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at' subjects left to the States to regulate." *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 575 U.S. __, (2015) (quoting *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 94 (1963)). If the state action is aimed directly at wholesale sales or rates, it is preempted by the FPA. If, as here, the state action in question is aimed directly at retail sales or rates, it is not preempted.

The Commission took no action here to set or affect wholesale sales or rates. The RR Rider pertains solely to retail rates. It does not impose any obligation or restriction whatsoever on the sale of wholesale capacity or energy. The Commission's order would have no effect on the rates that any generator would receive for its wholesale sales or upon the revenue that DP&L would receive when that power is resold to PJM.

A purchase power agreement, as its name implies, is a bilateral agreement to purchase power. Such contracts transfer title to power from one entity to another. State review of utility power purchases – even those in interstate commerce – is not preempted by federal law. In *Pike Co. Light & Power Co.-Elec. Div. v. Pa. Pub. Util. Comm'n*, 77

Pa. Commw. 268, 465 A.2d 735 (Pa. Commw. Ct. 1983), the court distinguished between the Federal Energy Regulatory Commission's (FERC's) exclusive jurisdiction in regulating interstate rates and a state commission's jurisdiction to review the prudence of a utility's power purchase for determining retail rate recovery. The court stated that:

> The regulatory functions of the FERC and the state commission thus do not overlap, and there is nothing in the federal legislation which preempts the PUC's authority to determine the reasonableness of a utility company's claimed expenses. In fact, we read the Federal Power Act to expressly preserve that important state authority.

Id. at 275 (emphasis added).

The *Pike Co*. doctrine stands for the proposition that state commissions can exercise their jurisdiction by regulating a buyer's actions and examining the buyer's exercise of any rights it had under a wholesale agreement to ensure that the rates charged were consistent with the terms of the agreement – so long as the state commission does not "prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate*.*" *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986).

Such voluntary bilateral contracts are one of the means by which wholesale sales of electricity in the interstate market occur:

> [In] States that have deregulated their energy markets, "load serving entities" (LSEs) purchase electricity at wholesale from independent power generators for delivery to retail consumers. Interstate wholesale transactions in deregulated markets typically occur through (1) bilateral contracting, where LSEs agree to purchase a certain amount of electricity from generators at a certain rate over a certain period of time; and (2) competitive wholesale auctions administered by Regional Transmission Organizations (RTOs) and Independent System Operators (ISOs), nonprofit entities that manage certain segments of the electricity grid.

Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288, 2016 U.S. LEXIS 2797 (2016), syllabus.

An equivalent to the RR Rider was approved by the Commission in an earlier case, and that decision has already been affirmed by the Court. *In re Application of Ohio Power Co.*, Slip Opinion No. 2018-Ohio-4698. The Commission's order in this case merely creates the same kind of rider for DP&L customers that is already enjoyed by Ohio Power customers. There is no difference in the rider or its application. As in that earlier case, its approval here is intended to permit recovery of costs associated with a bilateral purchase power agreement that has existed for years.

FERC has granted sellers of electricity at wholesale the authority to "enter into freely negotiated contracts with purchasers." *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of 10 Snohomish Cty.*, 554 U.S. 527, 537 (2008). Authorized sellers may make wholesale sales at rates determined by bilateral agreement, and FERC will presume that those rates are just and reasonable. *Id.* at 545-546. An LSE, such as DP&L, is not typically compelled to enter into any such agreement. There is no state action in either the negotiation or the voluntary creation of a private power purchase agreement, and, therefore, no state action to be preempted by federal law.

Such was not the case, however, in the cases relied upon by Appellant, where state action was found to be preempted. In those cases, the state did compel LSEs to enter into purchase agreements, and on specified terms. It was that state action, unlike the one taken by the Commission here, that the courts found to be preempted.

OCC relies on *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288, 2016 U.S. LEXIS 2797 (2016) for its proposition that a state commission's order guaranteeing a cost-based wholesale price is preempted by the FPA. *Talen*, however, cannot be read to support any such sweeping holding. The *Talen* court found that the state action there was preempted because it "adjust[ed] an interstate wholesale rate." *Talen*, paragraph four of the syllabus. The nature of the program disapproved in *Talen* is pivotal. The Maryland Public Service Commission (Maryland PSC) enacted a program that provided subsidies, through state-mandated contracts, to a specific new generator. That is, the Maryland PSC required its load-serving entities, its electric distribution utilities, to enter into 20-year pricing contracts, so-called "contracts for differences," with a specific generator. By contrast, the Ohio Commission has not compelled, in this or in any case, any utility to enter into such a contract with any generator.

The Supreme Court defined the problem with the Maryland program as guaranteeing a generator a certain rate for capacity sales to PJM regardless of the clearing price. *Id.* at 1298-1299. It forced local electric distribution companies to enter into a so called "contract for differences" with a generator. It required that generator to sell its energy and capacity into the PJM market. And it commanded the generator and distribution companies to make payments to each other, depending on the difference between the price set in the contract for differences and the price obtained in the PJM market. By these actions, the State of Maryland dictated a wholesale rate – the amount of compensation that the generator receives from selling its power into the PJM markets. *Id.* at 1297.

OCC's argument that the purchase power agreement costs that DP&L seeks to recover are "[l]ike the Talen 'contract for differences' that the United States Supreme Court held was preempted by the FPA" (OCC Brief at 14) is completely erroneous. OCC can point to no evidence that DP&L was seeking to recover the costs of any contract that the state compelled it to enter into. No such evidence exists because the Commission did not order this. *Talen* simply does not apply.

In a typical power purchase agreement, the parties are private actors who enter into the agreement voluntarily. The Ohio Commission does not decide who will be the seller, nor does it force anyone to be the buyer. The parties choose each other; they are not chosen by the State. Similarly, the parties to the typical power purchase agreement establish their own terms, including the price. The seller receives that price regardless of what the buyer (e.g., DP&L) ultimately does with the power it purchases. Private power purchase agreements are voluntary agreements, while the "contract for differences" in *Talen* was not. That distinction matters, because only state action is subject to preemption.

The *Talen* decision was limited to those impermissible state-dictated contracts for differences. In fact, the decision expressly noted that other types of state action might be permissible. Specifically, the Court said:

> Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures. States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or

> reregulation of the energy sector. Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures "untethered to a generator's wholesale market participation."

Talen, 1299. Moreover, the Talen court found that "States may regulate within their assigned domain even when their laws incidentally affect areas within FERC's domain." *Talen*, paragraph five of the syllabus. Notably, the court said that

> Our opinion does not call into question whether generators and LSEs may enter into long-term financial hedging contracts based on the auction clearing price. Such contracts, also frequently termed contracts for differences, do not involve state action to the same degree as Maryland's program, which compels private actors (LSEs) to enter into contracts for differences – like it or not – with a generator that must sell its capacity to PJM through the auction.

Talen, fn. 12.

The proposal advanced by DP&L in this case, analogous to another proposal previously approved by the Commission and affirmed by this Court, is precisely the type of arrangement that the *Talen* court did not call into question. The RR mechanism was intended as a long-term financial hedging contract based on the auction-clearing price, one that did not compel a load-serving entity such as DP&L to enter into a contract, like it or not.

Federal courts have since recognized this important distinction. The U.S. Court of Appeals for the Second Circuit recently rejected challenges to Connecticut's renewable energy procurement process and renewable energy credit program. *Allco Fin. Ltd. v. Robert J. Klee*, 861 F.3d 82 (2nd Cir. 2017). In doing so, the Second Circuit became the first federal court to apply the Supreme Court's limited ruling in *Talen*.

Allco sought to overturn Connecticut's renewable program on preemption grounds. Under Connecticut's renewable energy procurement process, utilities were to enter into power purchase agreements for energy, capacity and environmental attributes. The utilities in *Allco* were to engage in an RFP process that did not obligate any utility to accept any bid. Winning bidders were to enter into separate contracts with utilities at the discretion of the utilities, which were explicitly responsible for negotiation and execution of any final power purchase agreement. *Allco* at 98. Unlike *Talen*, utilities were not compelled to enter into contracts.

The *Allco* court held that Connecticut's renewable energy solicitation process was a permissible exercise of state power to regulate utilities. Specifically, the court found that, even if Connecticut's actions had an "incidental effect on wholesale prices," such an effect does not constitute a regulation of the interstate wholesale electricity market infringing on FERC's jurisdiction, and was therefore not preempted by the FPA. *Allco* at 101. The Second Circuit distinguished *Talen*, finding that Connecticut's process did not "compel" utilities to enter into contracts in violation of the FPA.

In addition, while the Maryland program in *Talen* sought to override the terms established by the FERC-approved capacity auction and to require transfer of ownership of the generator's capacity through the auction process, the Connecticut program transferred ownership of electricity through a bilateral contract, independent of any FERC-regulated auction. *Allco* held that traditional bilateral contracts between utilities and generators that are subject to FERC review for justness and reasonableness are "precisely what the Talen court placed outside its limited holding." *Allco* at 99. As it was in the previous cases before this Court, that is precisely the situation in this appeal.

The U.S. Court of Appeals for the Seventh Circuit also similarly rejected preemption challenges to Illinois' "zero-emission credits" legislation where the state did not "compel" the utility by state action to dictate a wholesale rate. *Elec. Power Supply Assn. v. Star*, 904 F.3d 518 (7th Cir. 2018). In *Star*, Illinois enacted legislation subsidizing some of the state's nuclear generation facilities, which the state fears will close. *Id.* at 521. The nuclear generation facilities receive what the state calls "zero-emission credits". *Id.* Generators that use coal or gas to produce power must purchase these credits from the recipients at a price set by the state. *Id.* The Seventh Circuit, like the Second Circuit in the *Allco* case, distinguished *Talen* and recognized that where the utility is not "compelled" by state action to dictate a wholesale rate, the action is not preempted.

The Seventh Circuit explained that in order to receive a zero-emission credit, a firm must generate power, but how it sells that power is up to it. *Id.* at 523. It can sell the power in an interstate auction but need not do so. *Id.* It may choose instead to sell power through bilateral contracts with users (such as industrial plants) or local distribution companies that transmit the power to residences. *Id.* Furthermore, the owner of a zero-emission credit receives the market-clearing price, with none of the adjustments that Maryland law required in *Talen*.

The zero-emissions credit system can influence the auction price only indirectly, by keeping active a generation facility that otherwise might close and by raising the costs that carbon-releasing producers incur to do business. But because states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law. "So long as a State does not condition payment of funds on capacity clearing the [interstate] auction, the State's program [does] not suffer from the fatal defect that renders Maryland's program unacceptable." *Talen* at 1299. Again, DP&L, here, was not compelled to enter into anything. There was no state action to dictate the wholesale rate in either the negotiation or the voluntary creation of a private power purchase agreement, and, therefore, no state action to be preempted by federal law.

In the cases relied upon by Appellant, where state action was found to be preempted, the state did compel LSEs to enter into purchase agreements, and on specified terms. Unlike the cases relied on by OCC, no contracts were created by state action here; no LSE was compelled to do anything. DP&L's proposed RR Rider was intended to recover costs associated with existing bilateral purchase power agreements, contracts that it voluntarily entered into. These agreements transfer ownership of the electricity and capacity from a generator to DP&L pursuant to a contract approved by FERC. Because FERC has the ability to approve the contracts, and DP&L is not compelled to enter into any such agreement, the Company's proposal is not preempted by the FPA. As a voluntary contract for the sale of electricity at wholesale, the typical power purchase agreement is subject to FERC's regulation.

Nothing in the Commission's order infringes on FERC's jurisdiction. OCC's preemption argument should be rejected.

Proposition of Law No. II:

> **A challenge to a potential future action of the Commission regarding the Significantly Excessive Earnings Test (SEET) in a future case should not be heard because it is premature as no possible harm can result currently, or perhaps ever, to any party, presents no justiciable issue, and seeks an improper advisory opinion. *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 402 N.E.2d 1175 (1980), syllabus; *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 161, 378 N.E.2d 480, 484 (1978); *Ohio Edison Co. v. Pub. Util. Comm.*, 173 Ohio St. 478, 184 N.E.2d 70 (1962), ¶ 10 of the syllabus; *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 86 N.E.2d 10 (1949), ¶ 6 of the syllabus; *Ohio Contract Carriers Assn. v. Pub. Util. Comm.*, 140 Ohio St. 160, 42 N.E.2d 758 (1942), syllabus. (OCC 2)**

The Commission determined that it will not consider Distribution Modernization Rider (DMR) revenues in a future SEET decision. Opinion and Order at 58. This future SEET decision does not exist currently and raises no justiciable issue today.

It is well settled that this Court will not reverse an order of the Commission on the basis of an error that did not prejudice the party seeking reversal. *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 402 N.E.2d 1175 (1980); *Akron v. Pub. Util. Comm.*, 55 Ohio St.2d 155, 378 N.E.2d 480 (1978); *Ohio Edison Co. v. Pub. Util. Comm.*, 173 Ohio St. 478, 184 N.E.2d 70 (1962); *Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, 86 N.E.2d 10 (1949). In *Ohio Committee of Central Station Electrical Protection Assn. v. Pub. Util. Comm.*, 50 Ohio St.2d 169, 174, 364 N.E.2d 3 (1977), this Court stated that it "will not reverse an order of the commission . . . without a showing of concomitant harm or prejudice." (Emphasis added). *See also Worthington Hills Civic Assn. v. Pub. Util. Comm.*, 45 Ohio St.2d 11, 12-13, 340 N.E.2d 411 (1976).

Appellant cannot show this prejudice. No one can. What the effect of the exclusion of DMR revenues might have in a future case simply cannot be known now. It may be that the utilities experience no significantly excessive earnings regardless of the DMR. It just cannot be known at this time. Thus, no justiciable issue is presented. *Ohio Edison Co. v. Pub. Util. Comm.*, 63 Ohio St.3d 555, 589 N.E.2d 1292 (1992). There is nothing for the Court to consider here.

Even if the issue were ripe for review, and it is not, the Commission's decision is justified. The Commission adopted the arguments of the utilities. As the Commission observed:

> We affirm our decision in the Opinion and Order to exclude DMR revenues from SEET because failing to exclude the DMR from SEET would add an unnecessary element of risk to DP&L and undermine the purpose of the DMR, which is to allow DP&L and DPL Inc. to improve their financial positions in order to access the capital markets, in the future, for funds to invest in grid modernization (Staff Ex. 2 at 4; Co. Ex. 3 at 10, 18-19).
>
> Further, the Amended Stipulation prevents DMR revenue from flowing to shareholders by precluding dividend payments to AES while the DMR is recovered and by restricting the use of cash flow from the DMR to: (1) pay interest obligations on existing debt at DP&L and DPL Inc.; (2) make discretionary debt prepayments; and (3) position DP&L to make capital expenditures to modernize and maintain DP&L's transmission and distribution infrastructure (Jt. Ex. 1 at 3,5; Co. Ex. 3 at 10).
>
> Accordingly, rehearing on this assignment of error should be denied.

Third Entry on Rehearing at 17, Appellant's App. at 86. Appellants have not shown that any of these reasons identified are wrong. By excluding the DMR revenues from the future SEET case calculations, the Commission is acting consistently and in keeping with its reading of the statute.

Further, even if the issue were ripe for consideration and it is not, the SEET does not apply. The DMR was established pursuant to R.C. 4928.143(B)(2)(h), App. at 2. That section allows the Commission to include in ESPs "(p)rovisions regarding the utility's distribution service, including without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary…" OCC's argument directly contravenes this. OCC wants the SEET to be a limitation on the DMR as authorized pursuant to R.C. 4928.143(B)(2)(h), App. at 2. Taking revenue away from DP&L under the SEET test[2] would work at direct cross-purposes with the Commission's goals in establishing the DMR in the first place. This would make the SEET test a limitation on the DMR, and limitations are barred by statute.

In sum, it is premature to consider anything relating to the SEET test. This must wait until a future decision by the Commission in a SEET case. Only then will the Court have actual facts and an actual determination to review. Even if the question were ripe for consideration, and it is not, the Commission's decision is logical, consistent and in keeping with R.C. 4928.143(B)(2)(h). OCC's argument should be rejected.

[2] It must be assumed that this is what OCC wants to have happen in the future decision when the Commission acts on the SEET test for future periods. Whether some adjustment to revenues would be required in this future SEET decision regardless of the treatment of DMR revenues is entirely conjectural, as there has been no such determination and therefore no facts to consider.

CONCLUSION

Notwithstanding OCC's argument, the decision below has literally nothing to do with any federally jurisdictional rate. Rather, the Commission merely set a distribution rate, a matter entirely divorced from federal regulation. There is no preemption.

Even if the SEET exclusion were ripe for review, the Commission's decision is logical, consistent, and supported by statute.

The Commission should be affirmed.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Merit Brief, submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served via electronic mail upon the following parties of record, this 6th day of May, 2019.

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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.

Amended by 129th General AssemblyFile No.61, HB 364, §1, eff. 3/22/2012.

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