

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company to Update Its)	Case No. 12-1046-EL-RDR
Transmission Cost Recovery Rider.)	

**INDUSTRIAL ENERGY USERS-OHIO'S
APPLICATION FOR REHEARING
AND MEMORANDUM IN SUPPORT**

Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph E. Olikier
Matthew R. Pritchard
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
Telephone: (614) 469-8000
Telecopier: (614) 469-4653
sam@mwncmh.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

November 21, 2012

Attorneys for Industrial Energy Users-Ohio

TABLE OF CONTENTS

	PAGE
I. BACKGROUND	3
II. ARGUMENT.....	5
A. The TCRR Order is unlawful and unreasonable because it retroactively authorizes the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.....	5
B. The TCRR Order is unlawful and unreasonable because it violates the Commission's precedent without a lawful and reasonable justification for its change in direction. The Commission's precedent requires the true-up of a bypassable rider to also be bypassable.....	10
C. The TCRR Order is unlawful and unreasonable because the Commission cannot rely on its phase-in authority contained in Section 4928.144, Revised Code, to authorize the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.....	14
III. CONCLUSION	17

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company to Update Its)	Case No. 12-1046-EL-RDR
Transmission Cost Recovery Rider.)	

**INDUSTRIAL ENERGY USERS-OHIO'S
APPLICATION FOR REHEARING**

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") respectfully submits this Application for Rehearing of the Finding and Order ("TCRR Order") issued by the Public Utilities Commission of Ohio ("Commission") on October 24, 2012, which granted Ohio Power Company's ("AEP-Ohio") Application to adjust its Transmission Cost Recovery Rider ("TCRR") rates. The TCRR Order is unlawful and unreasonable in the following respects:

- 1. The TCRR Order is unlawful and unreasonable because it retroactively authorizes the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.**
- 2. The TCRR Order is unlawful and unreasonable because it violates the Commission's precedent without a lawful and reasonable justification for its change in direction. The Commission's precedent requires the true-up of a bypassable rider to also be bypassable.**
- 3. The TCRR Order is unlawful and unreasonable because the Commission cannot rely on its phase-in authority contained in Section 4928.144, Revised Code, to authorize the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.**

As discussed in additional detail in the memorandum in support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing.

Respectfully submitted,

/s/ Matthew R. Pritchard
Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph E. Olier
Matthew R. Pritchard
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
sam@mwnmch.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of)	
Ohio Power Company to Update Its)	Case No. 12-1046-EL-RDR
Transmission Cost Recovery Rider.)	

MEMORANDUM IN SUPPORT

I. BACKGROUND

On March 22, 2012 AEP-Ohio initiated this proceeding and requested a modification to the Commission's schedule for filing its annual update to its TCRR.¹ By Commission rule, the TCRR is updated on an annual basis; and as established by prior Commission Entry, that filing is to be done by April 16th of each year with rates effective July 1st.² AEP-Ohio's request was granted on April 11, 2012.

On June 15, 2012, AEP-Ohio filed its annual application ("Application") to update its TCRR. On July 11, July 24, and August 16, 2012, AEP-Ohio filed updates to its Application. In total, AEP-Ohio requested the Commission increase its TCRR by \$36 million reflecting updated rates for transmission charges billed to AEP-Ohio from PJM Interconnection, L.L.C. ("PJM") and reflecting a \$36 million under-recovery (the "under-recovery balance") during the prior annual TCRR period. AEP-Ohio requested the

¹ Request to Modify Ohio Power Company's Schedule for Filing Updates to its Transmission Cost Recovery Rider and Request for Expedited Treatment at 1 (Mar. 22, 2012).

² *Id.* (citing *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17, and 4905.31, Revised Code, as Amended by Amended Substitute Senate Bill 221*, Case No. 08-777-EL-ORD, Entry at 1 (Apr. 15, 2009)); Rule 4901:1-36-03(B), O.A.C.

Commission authorize AEP-Ohio to collect the \$36 million under-recovery balance over three years on a non-bypassable basis.

Although the Commission's rules require a utility to file an interim update application before the annual filing is due if the utility projects that a significant under-recovery will occur (to minimize carrying costs and rate impacts), AEP-Ohio did not file such an application and, as stated above, requested an extension which further amplified the under-recovery and caused a further synchronization problem of properly assigning the collection of costs to those customers causing those costs.³ And AEP-Ohio's delay occurred at the same time when AEP-Ohio was claiming that significant increases in the levels of customer switching had occurred and would continue to occur in its service area.⁴ Thus, AEP-Ohio was well aware that there could or would be an under-recovery of its TCRR.

Commission Staff ("Staff") ultimately filed a review and recommendation and supported AEP-Ohio's proposal to recover the under-recovery balance through a new non-bypassable charge. Over the objections of IEU-Ohio, on October 24, 2012, the

³ Rule 4901:1-36-03(E), O.A.C.

⁴ TCRR Order at 7 (shopping assumption built into the last annual update to the TCRR was 9%); *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, Ohio Rev. Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 54 (Aug. 8, 2012) (hereinafter "*AEP ESP II*") (by December 14, 2012 shopping in AEP-Ohio's territory was approaching or had exceeded 21%); *AEP ESP II*, Direct Testimony of William A. Allen at 4, Exhibit WAA-2 (Mar. 23, 2012) (as of March 1, 2012 customer shopping had increased to 36.71% and AEP-Ohio projected that by the end of 2012 customer switching would increase to 65% for residential customers, 80% for commercial customers, and 90% for industrial customers). AEP-Ohio and the Commission have cited to increases in shopping as a cause of AEP-Ohio's under-recovery balance and justified the non-bypassable TCRR charge on the basis that it would be fair to require shopping customers to help pick up the under-recovery tab since the under-recovery was partially attributed to those customers that had recently began shopping; however, there is no evidence in this proceeding that increases in shopping are directly correlated to the under-recovery balance. While it is true that the revenue AEP-Ohio collects through bypassable charges such as the TCRR decrease as customers leave the SSO, the transmission charges assessed to AEP-Ohio by PJM also decrease as customers leave.

Commission approved a non-bypassable charge that will recover the \$36 million under-recovery balance over a three-year period. The TCRR Order results in shopping customers paying twice for transmission service; having paid their competitive retail electric service (“CRES”) provider for the transmission service the CRES provider procured from PJM to serve the customer throughout the past year, and will now also be required to compensate AEP-Ohio for the transmission service AEP-Ohio procured from PJM to serve its non-shopping customers. The TCRR Order has retroactively made shopping customers responsible for AEP-Ohio’s costs to serve non-shopping customers. As demonstrated below, the TCRR Order is unlawful and unreasonable.

II. ARGUMENT

A. The TCRR Order is unlawful and unreasonable because it retroactively authorizes the collection of AEP-Ohio’s under-recovery balance on a non-bypassable basis.

The TCRR Order is unlawful and unreasonable because it authorizes AEP-Ohio to retroactively increase its compensation from shopping customers through the new non-bypassable portion of the TCRR that will collect AEP-Ohio’s \$36 million under-recovery balance. This is prohibited by law and therefore the Commission must grant rehearing to remedy the unlawful and unreasonable effects of the TCRR Order.

Section 4928.05(A)(2), Revised Code, provides the Commission “authority to provide for the recovery, through a reconcilable rider on an electric distribution utility’s distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory

commission.” By rule, the Commission has provided that transmission costs are to be collected through a rider that is reconciled annually.⁵ The rider is to include all costs and off-setting revenues charged or credited to the electric distribution utility (“EDU”) to the extent that those costs and revenues are not included in any other schedule or rider of the EDU’s tariffs.⁶ Finally, “[t]he transmission cost recovery rider shall be avoidable by all customers who choose alternative generation suppliers and the electric utility no longer bears the responsibility of providing generation and transmission service to the customers.”⁷

Until the Commission issued the TCRR Order in this proceeding, AEP-Ohio had collected its PJM-related transmission costs through a bypassable rider that was reconciled for any under- or over-recovery annually from non-shopping customers. AEP-Ohio did not have a tariff that authorized it to collect any transmission-related costs from shopping customers.

The TCRR Order, however, authorized AEP-Ohio to collect the \$36 million under-recovery balance with carrying charges at AEP-Ohio’s long-term cost of debt over a three-year period through a non-bypassable rider.⁸ Subsequently, AEP-Ohio filed tariffs applicable to shopping customers that will permit it to bill and collect a portion of the under-recovery balance.⁹

As a result of the TCRR Order, AEP-Ohio will collect approximately \$12.1 million annually under the terms of the non-bypassable rider. Based on the information

⁵ Rule 4901:1-36-04(A), O.A.C.

⁶ Rule 4901:1-36-04(C), OAC.

⁷ Rule 4901:1-36-04(B), OAC.

⁸ TCRR Order at 6-7.

⁹ Compliance Tariffs PUCO No. 20 (Oct. 26, 2012).

provided in AEP-Ohio's compliance filing, the estimated effect of the non-bypassable rider is to shift in the first year between \$8.4 million and \$9.1 million (of the \$12.1 million) onto shopping customers. If the Commission's authorization has similar effects for the second and third years of the non-bypassable rider, the total three-year shift of costs to shopping customers is estimated to be between \$25.2 million and \$27.3 million.¹⁰

By shifting the revenue responsibility for a part of the under-recovery balance to shopping customers, the Commission has retroactively increased their rates. AEP-Ohio was not authorized to bill and collect from shopping customers a transmission-related charge. Thus, for all shopping customers, the TCRR Order increases their electricity rates to retroactively recover a portion of the under-recovery balance from the prior annual period. While shopping customers are being held responsible to pay for their own transmission service (through their contracts with their CRES providers), they will now also be held responsible to pay for the transmission service AEP-Ohio procured from PJM to serve non-shopping customers.

The increase of shopping customers' rates to collect the under-recovery balance results in retroactive ratemaking. "A rate increase making up for revenues lost due to regulatory delay is precisely the action that [the Supreme Court] found contrary to law in *Keco*."¹¹ In this instance, the under-recovery balance is a function of the delay inherent in the annual review process, and the fact that AEP-Ohio did not avail itself of the interim procedure in the Commission's Rules that allow (and require) an EDU to seek to

¹⁰ Letter from Yazem Alami to Betty McCauley and attachments (Oct. 26, 2012).

¹¹ *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶ 11 (citing *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957)).

reconcile the TCRR prior to the annual review.¹² And AEP-Ohio further amplified the problem by seeking a delay in the annual update process. Thus, the Commission's authorization of a non-bypassable charge will result in a rate increase to make up revenue lost due to regulatory delay.

Unless a different result is statutorily authorized, retroactive ratemaking to increase or decrease a utility's authorized rate is prohibited. As the Supreme Court recently stated, "[b]y approving rates that recouped losses due to past regulatory delay, the commission violated this court's case law on retroactive ratemaking"¹³ "[U]tility ratemaking by the Public Utilities Commission is prospective only."¹⁴

The prospective nature of utility ratemaking is not absolute. Under some limited circumstances, the Commission may authorize a rate or charge to allow recovery of previously deferred revenues. In this instance, the TCRR is authorized under Section 4928.05(A)(2), Revised Code, which provides that the Commission may authorize a reconcilable rider. Thus, the Commission clearly has some authority to increase or decrease the TCRR to reconcile an EDU's collections with the federally authorized transmission costs that it incurs.

That statutory authorization, however, does not include authority to invent a new and previously unauthorized reconciliation mechanism. As the Supreme Court stated in

¹² Rule 4901:1-36-03(E), O.A.C., provides:

If at anytime during the period between annual update filings, the electric utility or staff determines that costs are or will be substantially different than the amounts authorized as the result of the electric utility's previous application, the electric utility should file, on its own initiative or by order of the commission, an interim application to adjust the transmission cost recovery rider in order to avoid excessive carrying costs and to minimize rate impacts for the following update filing.

¹³ *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 at ¶¶ 10-11.

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

Lucas County,¹⁵ the Commission's authority to reconcile a rate for past under- or over-recovery must be incorporated in the initial rate approved by the Commission.¹⁶ In the previously approved TCRR, consistent with the Commission's rule,¹⁷ there was no provision for reconciliation through a new non-bypassable charge. Because the existing TCRR did not provide for a non-bypassable reconciliation mechanism, the Commission has no lawful basis to assign a revenue responsibility to shopping customers through the non-bypassable charge in this case.

Thus, the Commission engaged in unlawful retroactive ratemaking when it authorized AEP-Ohio to bill and collect the \$36 million under-recovery balance through a non-bypassable charge. The non-bypassable charge recoups amounts from the prior annual TCRR period that went uncollected and increases the revenue responsibility of

¹⁵ 80 Ohio St.3d at 348.

¹⁶ *Id.* at 348.

¹⁷ The unbundled component of the retail electric service was set by tariffs rates determined by the Federal Energy Regulatory Commission ("FERC"). Section 4928.34(A)(1), Revised Code. CRES providers were responsible for transmission costs as a result of initial restructuring and provisions were incorporated in the Electric Transition Plan ("ETP") Settlement to accommodate the change. *In the Matter of the Applications of Columbus Southern Power Company and Ohio Power Company for Approval of Their Electric Transition Plan and for Receipt of Transition Revenues*, Case Nos. 99-1729-EL-ETP, *et al.*, Stipulation and Recommendation at 5-6 (May 8, 2000). The Commission authorized a reconciliation mechanism for changes in FERC-approved rates and charges as part of the Rate Stabilization Plan ("RSP"). *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of a Post-Market Development Period Rate Stabilization Plan*, Case No. 04-169-EL-UNC, Opinion and Order at 30-31 (Jan. 26, 2005) ("RSP Case"). Subsequently, the Commission approved the combination of the transmission component of each company's standard service tariff with the TCRR reconciliation mechanism the Commission approved in the RSP Case. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Adjust the Transmission Component of Each Company's Standard Service Tariff and to Combine that Component with its Transmission Cost Recovery Rider*, Case No. 06-273-EL-UNC, Application at 1-2 (Feb. 3, 2006) and Finding and Order at 4-5 (May 26, 2006). When the Commission reviewed AEP-Ohio's first ESP application, it approved AEP-Ohio's request to retain its then-current TCRR. *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 49 (Mar. 18, 2009). As noted above, the ESP II Order likewise approved AEP-Ohio's request to retain the existing TCRR structure subject to a change that combined the mechanisms of Columbus Southern Power Company and Ohio Power Company. ESP II Order at 63-64.

shopping customers to AEP-Ohio through a reconciliation mechanism that was not authorized in the previous distribution tariffs applicable to shopping customers. The result of the retroactive increase is that shopping customers are being billed twice for transmission service: once for their own transmission service through their CRES provider, and once to pay a portion of the cost AEP-Ohio incurred to serve non-shopping customers, which will be collected through the non-bypassable TCRR charge. Because the Commission has no authority to authorize the retroactive recovery of the under-recovery balance through a non-bypassable charge, the Commission should grant rehearing and direct that the collection of the under-recovery balance be through a lawful bypassable rider.

B. The TCRR Order is unlawful and unreasonable because it violates the Commission's precedent without a lawful and reasonable justification for its change in direction. The Commission's precedent requires the true-up of a bypassable rider to also be bypassable.

The TCRR Order is unlawful and unreasonable because it violates the Commission's precedent without a substantively reasonable and lawful explanation for such deviation. According to the Supreme Court, the Commission should:

respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law, including administrative law. This does not mean that the commission may never revisit a particular decision, only that if it does change course, it must explain why. The new course also must be substantively reasonable and lawful.¹⁸

As discussed below, the Commission's precedent requires AEP-Ohio's TCRR to remain fully bypassable. The Commission, however, has not explained its change in position relative to the precedent discussed below (that was brought to the Commission's

¹⁸ *In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011-Ohio-1788 at ¶ 52 (internal citation omitted).

attention through IEU-Ohio's comments in this proceeding¹⁹). Further, as demonstrated herein, the Commission's deviation from its precedent is not substantively reasonable or lawful, and therefore the Commission's precedent must control the outcome of this proceeding.

In Duke Energy Ohio, Inc.'s ("Duke") recent Market Rate Offer ("MRO") proceeding, Duke requested authority to conduct a final true-up of two of its ESP riders that would terminate once Duke's proposed MRO began.²⁰ One of the two riders was avoidable, and the other was conditionally avoidable; the preponderance of the cost eligible for recovery and reconciliation through the riders to be reconciled was fully avoidable by shopping customers.²¹

Duke also requested authority to transform its proposed supplier cost reconciliation rider ("Rider SCR") from a bypassable to non-bypassable rider if the under-recovery reached a certain threshold. In support, Duke claimed that if the rider did not become non-bypassable it would "drive[] up the SSO price and encourage[] additional customer switching. In that case, ... there would be fewer customers and less load in succeeding billing periods to recover the SCR deferral balance."²² Duke also suggested that this would more appropriately match the recovery of costs with those customers that caused them.²³

¹⁹ Comments of IEU-Ohio at 4 (July 25, 2012); Supplemental Comments of IEU-Ohio in Response to Commission Staff's October 15, 2012 Review and Recommendation at 6 (Oct. 19, 2012).

²⁰ *In the Matter of Application of Duke Energy Ohio, Inc. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Opinion and Order at 56 (Feb. 23, 2011) ("Duke MRO Order").

²¹ *Id.*

²² *Id.* at 61.

²³ *Id.* at 61-62.

Staff opposed Duke's proposal to use a non-bypassable reconciliation mechanism to address the over/under-collection consequences of the final true-up of Duke's bypassable rider stating that "Duke's generation-related costs should not be attributed to customers not taking generation service from Duke."²⁴ Staff also opposed Duke's proposal to make the SCR non-bypassable if the under-recovery balance reached a certain threshold.²⁵

The Commission adopted Staff's recommendations and held that neither of Duke's riders could not be approved as proposed.²⁶ The Commission held that true-ups of bypassable riders cannot be collected on a non-bypassable basis "under any circumstances" because it "would create an anticompetitive subsidy" in violation of Section 4928.02(H), Revised Code.²⁷ The Commission also held that Duke's costs associated with serving SSO customers "should not be borne by customers who do not take ... service from Duke."²⁸

The Commission's rationale in the TCRR Order, however, is directly in conflict with its past precedent. The TCRR Order states that:

[the Commission] agree[s] with Staff and [AEP-Ohio] that a separate nonbypassable rate is appropriate under the particular circumstances of this case, specifically where the under-recovery occurred during a period of limited customer shopping. As [AEP-Ohio] notes in its reply, the level of shopping increased from less than 10 percent to approximately 40 percent during the past year. It would be unreasonable to require non-shopping customers to shoulder the entire burden of the under-collection, given that the associated costs were incurred for customers that were receiving service from [AEP-Ohio] during the period in which the costs were

²⁴ *Id.*

²⁵ *Id.* at 62.

²⁶ *Id.* at 57.

²⁷ *Id.* at 63.

²⁸ *Id.* at 57.

incurred, but have since decided to switch to an alternative generation supplier.²⁹

Thus, the Commission authorized exactly what it held it could not and should not do in Duke's MRO proceeding. The Commission has authorized the collection of AEP-Ohio's costs incurred to serve SSO customers from customers not served by AEP-Ohio and has done so despite the obvious anticompetitive subsidy that will ensue in violation of Section 4928.02(H), Revised Code.

The TCRR Order is a radical departure from its decision in the Duke MRO case. Despite the Commission's prior determination that it could not and would not permit Duke to reconcile under- or over-recoveries generated from bypassable riders through a non-bypassable rider on the ground that to do so would unlawfully subsidize the SSO, the Commission in this case now authorizes that result for AEP-Ohio. Even if authorization of a non-bypassable rider could be authorized under the statutory and regulatory provisions of Ohio law (and it cannot), the Commission's unexplained deviation from precedent requires the Commission to grant rehearing and reverse its decision authorizing AEP-Ohio to collect its under-recovery balance on a non-bypassable rider basis.

²⁹ TCRR Order at 7-8.

C. The TCRR Order is unlawful and unreasonable because the Commission cannot rely on its phase-in authority contained in Section 4928.144, Revised Code, to authorize the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.

The TCRR Order is unlawful and unreasonable to the extent the Commission has relied upon Section 4928.144, Revised Code, to authorize AEP-Ohio to collect its under-recovery balance on a non-bypassable basis.³⁰ Any use of the phase-in authority under Section 4928.144, Revised Code, must be done in the context of an SSO proceeding, *i.e.* under the Commission's authority in Sections 4928.141 to 4928.143, Revised Code. And the use of such phase-in authority may only be used prospectively and requires an identification of incurred costs.

Section 4928.144, Revised Code, provides that the Commission:

may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.

By its terms, Section 4928.144, Revised Code, is only applicable to a "rate or price established under sections 4928.141 to 4928.143 of the Revised Code."³¹ Although Section 4928.143(B)(2)(g), Revised Code, allows an ESP to include "[p]rovisions relating to transmission ... service," the Commission did not authorize the TCRR under this Section; instead, the Commission authorized AEP-Ohio's TCRR under Section

³⁰ The Commission did not state that the TCRR Order relied upon Section 4928.144, Revised Code; however, it rejected IEU-Ohio's argument that the statute did not apply. TCRR Order at 7.

³¹ Section 4928.144, Revised Code.

4928.05, Revised Code.³² Thus, the Commission cannot rely upon its phase-in authority in Section 4928.144, Revised Code, to authorize the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.

Section 4928.144, Revised Code, further requires that a phase-in of "a rate or price established under sections 4928.141 to 4928.143 of the Revised Code" occur in the Commission's order authorizing the underlying rate or price. Neither of the Commission's orders in AEP-Ohio's first and second ESP proceedings, however, authorized a phase-in of AEP-Ohio's TCRR. The Commission cannot retroactively impose such a condition upon shopping customers.³³

Section 4928.144, Revised Code, further requires the Commission to identify, as part of the phase-in accounting, the "incurred costs" that are equated to the revenue not collected. Neither AEP-Ohio nor the Commission have identified the "incurred cost" that must be specified to lawfully proceed with the phase-in authority in Section 4928.144, Revised Code, even if such authority could be used in the case of the TCRR. AEP-Ohio's only attempt to identify its incurred costs is a circular statement lacking any support in its reply comments: "amounts not collected' as contemplated by the phase-in statute are the under-recovery dollars based on incurred costs that have already been

³² *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Opinion and Order at 49 (Mar. 18, 2009) (authorizing AEP-Ohio to retain its TCRR as approved in Case No. 08-1202-EL-UNC which authorized AEP-Ohio to continue its TCRR as approved under AEP-Ohio's RSP in Case No. 04-169-EL-UNC before the enactment of Sections 4928.141 to 4928.143, Revised Code); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company to Update Each Company's Transmission Cost Recovery Rider*, Case No. 11-2473-EL-RDR, Finding and Order at 3 (June 22, 2011); *ESP II*, Opinion and Order at 63 (the Commission authorized AEP-Ohio's TCRR "[p]ursuant to Commission authority, as set forth in Section 4928.05(A)(2), Revised Code").

³³ See Section 4928.144, Revised Code; see also Section II.A. for a discussion of the prohibition on retroactive ratemaking.

accounted for in the Company's filing."³⁴ Clearly this statement is wrong: it confuses revenue with cost, and does not address the cost that must be identified for purposes of the statutory requirements of Section 4928.144, Revised Code.

The only references to "incurred costs" in the TCRR Order are the Commission's summary of IEU-Ohio's argument and the following statement:

The Commission finds no merit in IEU-Ohio's argument that Section 4928.144, Revised Code, is inapplicable, or that [AEP-Ohio] has not sufficiently identified its incurred costs. [AEP-Ohio]'s TCRR was approved as part of its prior ESP, and again as part of its current ESP, consistent with Section 4928.143(B)(2)(g), Revised Code, as well as our authority under Section 4928.05(A)(2), Revised Code.³⁵

This statement, however, fails to identify what incurred costs were not collected as a result of a phase-in under Section 4928.144, Revised Code. Absent the required identification of "incurred costs," there is no means proposed by AEP-Ohio to ensure that the deferral, *i.e.* the under-recovery balance, was necessary to compensate AEP-Ohio for "incurred costs" not collected as a result of a phase-in. This point takes on added significance since transmission rates which are the foundation for the TCRR are subject to the jurisdiction of FERC and are generally set based on a "formula rate" methodology. Because neither the Commission nor AEP-Ohio identified the "incurred costs" that were being phased-in (even if the history described above could be considered a lawful exercise of such phase-in authority), the Commission cannot rely upon its authority in Section 4928.144, Revised Code, to authorize AEP-Ohio to collect its under-recovery balance on a non-bypassable basis.

³⁴ Reply of Ohio Power Company to the Comments of Industrial Energy Users-Ohio at 2 (Aug. 1, 2012).

³⁵ TCRR Order at 7.

In summary, Section 4928.144, Revised Code, cannot be made applicable in this proceeding. The Commission's phase-in authority under that Section may only be invoked in a proceeding to establish SSO rates, may only be invoked to phase-in a rate established under Sections 4928.141 to 4928.143 Revised Code, may only be invoked in a prospective manner, and the "incurred costs" that are being deferred for future collection must be identified before that phase-in authority may be invoked. Because these conditions have not, and cannot, be satisfied, the Commission must grant rehearing and terminate the collection of AEP-Ohio's under-recovery balance on a non-bypassable basis.

III. CONCLUSION

For the foregoing reasons, the TCRR Order is unlawful and unreasonable and the Commission should grant rehearing, and terminate any authority that allows AEP-Ohio to collect its under-recovery balance on a non-bypassable basis.

Respectfully submitted,

/s/ Matthew R. Pritchard
Samuel C. Randazzo (Counsel of Record)
Frank P. Darr
Joseph E. Olikier
Matthew R. Pritchard
MCNEES WALLACE & NURICK LLC
21 East State Street, 17TH Floor
Columbus, OH 43215
sam@mwnmch.com
fdarr@mwncmh.com
joliker@mwncmh.com
mpritchard@mwncmh.com

Attorneys for Industrial Energy Users-Ohio

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Application for Rehearing and Memorandum in Support* was served upon the following parties of record this 21st day of November 2012, *via* hand-delivery, electronic transmission, or first class mail, U.S. postage prepaid.

/s/ Matthew R. Pritchard

MATTHEW R. PRITCHARD

Steven T. Nourse
Yazen Alami
American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215-2373
stnourse@aep.com
yalami@aep.com

COUNSEL FOR OHIO POWER COMPANY

Terry L. Etter, Counsel of Record
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
etter@occ.state.oh.us

COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

William Wright
Chief, Public Utilities Section
Thomas McNamee
Assistant Attorney General
180 E. Broad Street, 6th Floor
Columbus, OH 43215-3793
william.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us

COUNSEL FOR THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Sarah Parrot
Jon Tauber
Attorney Examiner
Public Utilities Commission of Ohio
180 East Broad Street, 12th Floor
Columbus, OH 43215
sarah.parrot@puc.state.oh.us
jonathan.tauber@puc.state.oh.us

ATTORNEY EXAMINERS

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

11/21/2012 2:25:41 PM

in

Case No(s). 12-1046-EL-RDR

Summary: App for Rehearing of Industrial Energy Users-Ohio electronically filed by Mr. Matthew R. Pritchard on behalf of Industrial Energy Users-Ohio