

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Determination of the	)	
Existence of Significantly Excessive Earnings	)	
for 2017 Under the Electric Security Plans of	)	Case No. 18-0857-EL-UNC
Ohio Edison Company, The Cleveland Electric	)	
Illuminating Company, and The Toledo Edison	)	
Company.	)	

In the Matter of the Determination of the	)	
Existence of Significantly Excessive Earnings	)	
for 2018 Under the Electric Security Plans of	)	Case No. 19-1338-EL-UNC
Ohio Edison Company, The Cleveland Electric	)	
Illuminating Company, and the Toledo Edison	)	
Company.	)	

In the Matter of the Determination of the	)	
Existence of Significantly Excessive Earnings	)	
for 2019 Under the Electric Security Plans of	)	Case No. 20-1034-EL-UNC
Ohio Edison Company, The Cleveland Electric	)	
Illuminating Company, and the Toledo Edison	)	
Company.	)	

In the Matter of the Quadrennial Review	)	
Required by R.C. 4928.143(E) for the Electric	)	
Security Plans of Ohio Edison Company, The	)	Case No. 20-1476-EL-UNC
Cleveland Electric Illuminating Company, and	)	
The Toledo Edison Company.	)	

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**MOTION FOR A CONTINUANCE OF THE PROCEDURAL SCHEDULE  
INVOLVING WHAT FIRSTENERGY CHARGES CONSUMERS FOR PROFITS  
BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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House Bill 166, with its provision for protecting FirstEnergy's profits at consumer expense, was enacted on the same timeline as tainted House Bill 6. It's like a cousin of the scandalous House Bill 6. About House Bill 6, U.S. Attorney David DeVillers said:

“[It] is likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio . . . .”<sup>1</sup>

Usually conservative Standard & Poor’s described FirstEnergy, in the aftermath of the H.B. 6 scandal, this way:

We believe these violations at the highest level of the company are demonstrative of insufficient internal controls and a cultural weakness. We view the severity of these violations as significantly outside of industry norms and, in our view, they represent a material deficiency in the company's governance . . . .<sup>2</sup>

Presently, Senate Bill 10 is pending to protect consumers by repealing parts of House Bills 6 and 166.<sup>3</sup> As background, House Bill 166 (state budget) allowed FirstEnergy to likely avoid making a refund to consumers for “significantly excessive” profits for one of its three utilities (Ohio Edison). This ploy was enabled by allowing FirstEnergy to average the profits of its three utilities for determining its profit level, thereby reducing through averaging the especially high profits of one of its utilities.<sup>4</sup> Senate Bill 10 would repeal that FirstEnergy legislative ornament.<sup>5</sup>

It is difficult to imagine that the terrible anti-consumer ratemaking in the 2008 energy law could be made worse. But FirstEnergy achieved that dubious distinction with its benefit in House Bill 166, that undermined the law’s (weak) protection against

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<sup>1</sup> Armus, Teo, ["GOP Ohio House speaker arrested in connection to \\$60 million bribery scheme"](#), *The Washington Post* (July 22, 2020).

<sup>2</sup> S&P Global Market Intelligence, “S&P Downgrades FirstEnergy following \$1.95B draw on revolving credit facility” (November 25, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/s-p-downgrades-firstenergy-following-1-95b-draw-on-revolving-credit-facility-61442506>.

<sup>3</sup> See S.B. 10, attached as Exhibit A.

<sup>4</sup> Historically, each of FirstEnergy’s operating companies’ profits were analyzed individually. See, e.g., PUCO Case No. 18-857-EL-UNC (OCC described how Ohio Edison had significantly excessive profits).

<sup>5</sup> See Exhibit A at 8, lines 214-218; 9, lines 245-250.

consumers paying significantly excessive profits.<sup>6</sup> As is known, the 2008 legislation allows electric utilities like FirstEnergy to charge Ohioans for excessive profits. Under the 2008 law, only “significantly” excessive profits are required to be refunded to consumers.

S.B. 10 could have a substantial impact for consumers on how the current consolidated cases are presented to the Public Utilities Commission of Ohio (“PUCO”) and decided. That’s because the PUCO is considering how to apply the significantly excessive profits test to FirstEnergy’s profits in 2017, 2018, and 2019. And it will consider how to evaluate future earnings from FirstEnergy’s electric security plan in the quadrennial review.

Accordingly, and for good cause per Ohio Admin. Code 4901-1-13(A), the Office of the Ohio Consumers’ Counsel (“OCC”) moves the PUCO on behalf of FirstEnergy’s 1.9 million consumers for a continuance of the schedule in these consolidated cases. The continuance should be an indefinite postponement of testimony deadlines and the evidentiary hearing, pending the Ohio General Assembly’s consideration of S.B. 10. The reasons the PUCO should grant OCC’s Motion are further set forth in the attached Memorandum in Support.

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<sup>6</sup> The benefit to FirstEnergy from averaging its operating companies’ profits occurs because Ohio Edison, one of FirstEnergy’s operating companies, tends to have much higher profits than the other FirstEnergy companies, with profits that can be considered significantly excessive. *See, e.g.*, PUCO Case No. 18-857-EL-UNC.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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On October 29, 2020, the PUCO issued an Entry establishing a procedural schedule for these consolidated cases involving the application of the significantly excessive profits test established as part of Ohio's 2008 electricity law (S.B. 221) to FirstEnergy's 2017, 2018, and 2019 profits as well as the Quadrennial Review of FirstEnergy's current electric security plan. The outcome of these consolidated cases will directly impact the rates that FirstEnergy's approximately 1.9 million customers will pay.

S.B. 221 favors utilities and disfavors consumers. One of the awful provisions of the law allows utilities to charge Ohio consumers for excessive profits, merely barring utilities from charging consumers for “significantly” excessive profits.<sup>7</sup> To make matters worse, the PUCO has unlawfully excluded certain revenues (distribution modernization revenues) from the calculation of Ohio utilities’ total profits, depriving consumers of potential refunds.<sup>8</sup> The Ohio Supreme Court recently reversed this PUCO practice as unlawful and unreasonable, ruling that *all* provisions under an electric security plan must be considered in calculating a utility’s total profits.<sup>9</sup>

H.B. 166 added further insult to the injury of the 2008 law. The 2008 energy law required each of the FirstEnergy utilities’ total profits to be reviewed individually under the significantly excessive profits test.<sup>10</sup> This can provide some consumer protection because historically some of FirstEnergy’s operating companies have significantly excessive profits while others do not.<sup>11</sup> H.B. 166 conveniently protected FirstEnergy, not consumers, by allowing FirstEnergy to aggregate its operating companies’ profits for purposes of the significantly excessive profits test. This change, accomplished through a late insertion into the budget bill, was for the sole benefit of the FirstEnergy utilities. And it set up a way for FirstEnergy to keep its significantly excessive earnings, avoiding what would otherwise be a refund to customers.

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<sup>7</sup> See R.C. 4928.143(F).

<sup>8</sup> See, e.g., PUCO Case No. 18-857-EL-UNC, Opinion and Order (March 20, 2019) (excluding so-called “distribution modernization rider” profits from the calculation of Ohio Edison’s total profits).

<sup>9</sup> *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under Elec. Sec. Plan of Ohio Edison Co.*, Slip Opinion No. 2020-Ohio-5450 at ¶¶ 14-21.

<sup>10</sup> See, e.g., R.C. 4928.143(F); cf. PUCO Case No. 18-857-EL-UNC (OCC showed that Ohio Edison had significantly excessive profits).

<sup>11</sup> See, e.g., *id.*

S.B. 10 proposes, among other consumer protections, to right that wrong. Under this proposed legislation, FirstEnergy would not be able to use the combined profits of its operating companies for purposes of defeating the intended consumer protections under the original profits test.<sup>12</sup> Instead, each utility's total profits would be analyzed individually as was required before the law was modified in 2019. This will restore some modicum of consumer protection to the 2008 energy law. It is therefore in the public interest for the PUCO to continue this procedural schedule, including testimony deadlines and the evidentiary hearing, pending the outcome of S.B. 10.

FirstEnergy has been getting the breaks, to consumers' detriment, regarding charges for profits. The 2008 law (S.B. 221) allowed the collection of excessive profits, the PUCO excluded distribution modernization charges from the test (then thrown out by the Court in our appeal), and FirstEnergy finagled a change in H.B. 166 to make the 2008 law even more unjust for consumers. It's time for the PUCO to give consumers some hope for justice, by awaiting an outcome for Senate Bill 10.

Accordingly, there is good cause under Ohio Admin. Code 4901-1-13(A) for continuing the procedural schedule in this case. The PUCO should protect consumers by continuing the schedule in these consolidated cases, pending the Ohio General Assembly's consideration of S.B. 10.<sup>13</sup> Doing so would advance administrative efficiency. And the indefinite continuance would enable the PUCO to receive, via Senate

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<sup>12</sup> See *id.* at 8, lines 214-218; 9, lines 245-250.

<sup>13</sup> It is well-settled that the PUCO has broad discretion to manage its own docket. See, e.g., *Weiss v. Pub. Util. Comm.*, 90 Ohio St. 3d 15 (2000); *Sanders Transfer, Inc. v. Pub. Util. Comm.*, 58 Ohio St. 2d 21 (1979).

Bill 10, much needed direction in these consolidated cases (where issues already been raised as to how to apply House Bill 166).<sup>14</sup>

Respectfully submitted,

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<sup>14</sup> For example, OCC filed a Motion to Compel in Case No. 20-1034-EL-UNC on October 5, 2020. OCC requested in discovery that FirstEnergy provide its operating companies' profits separately. It has refused to do so. OCC's Motion remains pending, four months later. FirstEnergy wins, consumers lose.



## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Motion was served on the persons stated below via electric transmission this 4th day of February 2021.

/s/ Willian J. Michael  
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The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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**As Introduced**

**134th General Assembly  
Regular Session  
2021-2022**

**S. B. No. 10**

**Senator Romanchuk**

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**A BILL**

To amend sections 4928.143, 4928.66, and 4928.6610 1  
and to repeal section 4928.471 of the Revised 2  
Code to terminate any approved decoupling 3  
mechanism, to modify the significantly excessive 4  
earnings determination for an electric security 5  
plan, and to provide refunds to retail electric 6  
customers in the state. 7

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

**Section 1.** That sections 4928.143, 4928.66, and 4928.6610 8  
of the Revised Code be amended to read as follows: 9

**Sec. 4928.143.** (A) For the purpose of complying with 10  
section 4928.141 of the Revised Code, an electric distribution 11  
utility may file an application for public utilities commission 12  
approval of an electric security plan as prescribed under 13  
division (B) of this section. The utility may file that 14  
application prior to the effective date of any rules the 15  
commission may adopt for the purpose of this section, and, as 16  
the commission determines necessary, the utility immediately 17  
shall conform its filing to those rules upon their taking 18  
effect. 19

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(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

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progress allowance limitations of division (A) of section 50  
4909.15 of the Revised Code, except that the commission may 51  
authorize such an allowance upon the incurrence of the cost or 52  
occurrence of the expenditure. No such allowance for generating 53  
facility construction shall be authorized, however, unless the 54  
commission first determines in the proceeding that there is need 55  
for the facility based on resource planning projections 56  
submitted by the electric distribution utility. Further, no such 57  
allowance shall be authorized unless the facility's construction 58  
was sourced through a competitive bid process, regarding which 59  
process the commission may adopt rules. An allowance approved 60  
under division (B) (2) (b) of this section shall be established as 61  
a nonbypassable surcharge for the life of the facility. 62

(c) The establishment of a nonbypassable surcharge for the 63  
life of an electric generating facility that is owned or 64  
operated by the electric distribution utility, was sourced 65  
through a competitive bid process subject to any such rules as 66  
the commission adopts under division (B) (2) (b) of this section, 67  
and is newly used and useful on or after January 1, 2009, which 68  
surcharge shall cover all costs of the utility specified in the 69  
application, excluding costs recovered through a surcharge under 70  
division (B) (2) (b) of this section. However, no surcharge shall 71  
be authorized unless the commission first determines in the 72  
proceeding that there is need for the facility based on resource 73  
planning projections submitted by the electric distribution 74  
utility. Additionally, if a surcharge is authorized for a 75  
facility pursuant to plan approval under division (C) of this 76  
section and as a condition of the continuation of the surcharge, 77  
the electric distribution utility shall dedicate to Ohio 78  
consumers the capacity and energy and the rate associated with 79  
the cost of that facility. Before the commission authorizes any 80

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surcharge pursuant to this division, it may consider, as 81  
applicable, the effects of any decommissioning, deratings, and 82  
retirements. 83

(d) Terms, conditions, or charges relating to limitations 84  
on customer shopping for retail electric generation service, 85  
bypassability, standby, back-up, or supplemental power service, 86  
default service, carrying costs, amortization periods, and 87  
accounting or deferrals, including future recovery of such 88  
deferrals, as would have the effect of stabilizing or providing 89  
certainty regarding retail electric service; 90

(e) Automatic increases or decreases in any component of 91  
the standard service offer price; 92

(f) Consistent with sections 4928.23 to 4928.2318 of the 93  
Revised Code, both of the following: 94

(i) Provisions for the electric distribution utility to 95  
securitize any phase-in, inclusive of carrying charges, of the 96  
utility's standard service offer price, which phase-in is 97  
authorized in accordance with section 4928.144 of the Revised 98  
Code; 99

(ii) Provisions for the recovery of the utility's cost of 100  
securitization. 101

(g) Provisions relating to transmission, ancillary, 102  
congestion, or any related service required for the standard 103  
service offer, including provisions for the recovery of any cost 104  
of such service that the electric distribution utility incurs on 105  
or after that date pursuant to the standard service offer; 106

(h) Provisions regarding the utility's distribution 107  
service, including, without limitation and notwithstanding any 108  
provision of Title XLIX of the Revised Code to the contrary, 109

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provisions regarding single issue ratemaking, ~~a revenue~~ 110  
~~decoupling mechanism or any other incentive ratemaking,~~ and 111  
provisions regarding distribution infrastructure and 112  
modernization incentives for the electric distribution utility. 113  
The latter may include a long-term energy delivery 114  
infrastructure modernization plan for that utility or any plan 115  
providing for the utility's recovery of costs, including lost 116  
revenue, shared savings, and avoided costs, and a just and 117  
reasonable rate of return on such infrastructure modernization. 118  
As part of its determination as to whether to allow in an 119  
electric distribution utility's electric security plan inclusion 120  
of any provision described in division (B) (2) (h) of this 121  
section, the commission shall examine the reliability of the 122  
electric distribution utility's distribution system and ensure 123  
that customers' and the electric distribution utility's 124  
expectations are aligned and that the electric distribution 125  
utility is placing sufficient emphasis on and dedicating 126  
sufficient resources to the reliability of its distribution 127  
system. 128

(i) Provisions under which the electric distribution 129  
utility may implement economic development, and job retention, 130  
~~and energy efficiency programs, which provisions may allocate~~ 131  
~~program costs across all classes of customers of the utility and~~ 132  
~~those of electric distribution utilities in the same holding~~ 133  
~~company system.~~ 134

(C) (1) The burden of proof in the proceeding shall be on 135  
the electric distribution utility. The commission shall issue an 136  
order under this division for an initial application under this 137  
section not later than one hundred fifty days after the 138  
application's filing date and, for any subsequent application by 139  
the utility under this section, not later than two hundred 140

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seventy-five days after the application's filing date. Subject 141  
to division (D) of this section, the commission by order shall 142  
approve or modify and approve an application filed under 143  
division (A) of this section if it finds that the electric 144  
security plan so approved, including its pricing and all other 145  
terms and conditions, including any deferrals and any future 146  
recovery of deferrals, is more favorable in the aggregate as 147  
compared to the expected results that would otherwise apply 148  
under section 4928.142 of the Revised Code. Additionally, if the 149  
commission so approves an application that contains a surcharge 150  
under division (B) (2) (b) or (c) of this section, the commission 151  
shall ensure that the benefits derived for any purpose for which 152  
the surcharge is established are reserved and made available to 153  
those that bear the surcharge. Otherwise, the commission by 154  
order shall disapprove the application. 155

(2) (a) If the commission modifies and approves an 156  
application under division (C) (1) of this section, the electric 157  
distribution utility may withdraw the application, thereby 158  
terminating it, and may file a new standard service offer under 159  
this section or a standard service offer under section 4928.142 160  
of the Revised Code. 161

(b) If the utility terminates an application pursuant to 162  
division (C) (2) (a) of this section or if the commission 163  
disapproves an application under division (C) (1) of this 164  
section, the commission shall issue such order as is necessary 165  
to continue the provisions, terms, and conditions of the 166  
utility's most recent standard service offer, along with any 167  
expected increases or decreases in fuel costs from those 168  
contained in that offer, until a subsequent offer is authorized 169  
pursuant to this section or section 4928.142 of the Revised 170  
Code, respectively. 171

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(D) Regarding the rate plan requirement of division (A) of 172  
section 4928.141 of the Revised Code, if an electric 173  
distribution utility that has a rate plan that extends beyond 174  
December 31, 2008, files an application under this section for 175  
the purpose of its compliance with division (A) of section 176  
4928.141 of the Revised Code, that rate plan and its terms and 177  
conditions are hereby incorporated into its proposed electric 178  
security plan and shall continue in effect until the date 179  
scheduled under the rate plan for its expiration, and that 180  
portion of the electric security plan shall not be subject to 181  
commission approval or disapproval under division (C) of this 182  
section, and the earnings test provided for in division (F) of 183  
this section shall not apply until after the expiration of the 184  
rate plan. However, that utility may include in its electric 185  
security plan under this section, and the commission may 186  
approve, modify and approve, or disapprove subject to division 187  
(C) of this section, provisions for the incremental recovery or 188  
the deferral of any costs that are not being recovered under the 189  
rate plan and that the utility incurs during that continuation 190  
period to comply with section 4928.141, division (B) of section 191  
4928.64, or division (A) of section 4928.66 of the Revised Code. 192

(E) If an electric security plan approved under division 193  
(C) of this section, except one withdrawn by the utility as 194  
authorized under that division, has a term, exclusive of phase- 195  
ins or deferrals, that exceeds three years from the effective 196  
date of the plan, the commission shall test the plan in the 197  
fourth year, and if applicable, every fourth year thereafter, to 198  
determine whether the plan, including its then-existing pricing 199  
and all other terms and conditions, including any deferrals and 200  
any future recovery of deferrals, continues to be more favorable 201  
in the aggregate and during the remaining term of the plan as 202



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compared to the expected results that would otherwise apply 203  
under section 4928.142 of the Revised Code. The commission shall 204  
also determine the prospective effect of the electric security 205  
plan to determine if that effect is substantially likely to 206  
provide the electric distribution utility with a return on 207  
common equity that is significantly in excess of the return on 208  
common equity that is likely to be earned by publicly traded 209  
companies, including utilities, that face comparable business 210  
and financial risk, with such adjustments for capital structure 211  
as may be appropriate. The burden of proof for demonstrating 212  
that significantly excessive earnings will not occur shall be on 213  
the electric distribution utility. ~~For affiliated Ohio electric-~~ 214  
~~distribution utilities that operate under a joint electric-~~ 215  
~~security plan, their total earned return on common equity shall~~ 216  
~~be used for purposes of assessing significantly excessive~~ 217  
~~earnings.~~ If the test results are in the negative or the 218  
commission finds that continuation of the electric security plan 219  
will result in a return on equity that is significantly in 220  
excess of the return on common equity that is likely to be 221  
earned by publicly traded companies, including utilities, that 222  
will face comparable business and financial risk, with such 223  
adjustments for capital structure as may be appropriate, during 224  
the balance of the plan, the commission may terminate the 225  
electric security plan, but not until it shall have provided 226  
interested parties with notice and an opportunity to be heard. 227  
The commission may impose such conditions on the plan's 228  
termination as it considers reasonable and necessary to 229  
accommodate the transition from an approved plan to the more 230  
advantageous alternative. In the event of an electric security 231  
plan's termination pursuant to this division, the commission 232  
shall permit the continued deferral and phase-in of any amounts 233  
that occurred prior to that termination and the recovery of 234

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those amounts as contemplated under that electric security plan. 235

(F) With regard to the provisions that are included in an 236  
electric security plan under this section, the commission shall 237  
consider, following the end of each annual period of the plan, 238  
if any such adjustments resulted in excessive earnings as 239  
measured by whether the earned return on common equity of the 240  
electric distribution utility is significantly in excess of the 241  
return on common equity that was earned during the same period 242  
by publicly traded companies, including utilities, that face 243  
comparable business and financial risk, with such adjustments 244  
for capital structure as may be appropriate. ~~In making its~~ 245  
~~determination of significantly excessive earnings under this~~ 246  
~~division, the commission shall, for affiliated Ohio electric~~ 247  
~~distribution utilities that operate under a joint electric~~ 248  
~~security plan, use the total of the utilities' earned return on~~ 249  
~~common equity.~~ Consideration also shall be given to the capital 250  
requirements of future committed investments in this state. The 251  
burden of proof for demonstrating that significantly excessive 252  
earnings did not occur shall be on the electric distribution 253  
utility. If the commission finds that such adjustments, in the 254  
aggregate, did result in significantly excessive earnings, it 255  
shall require the electric distribution utility to return to 256  
consumers the amount of the excess by prospective adjustments; 257  
provided that, upon making such prospective adjustments, the 258  
electric distribution utility shall have the right to terminate 259  
the plan and immediately file an application pursuant to section 260  
4928.142 of the Revised Code. Upon termination of a plan under 261  
this division, rates shall be set on the same basis as specified 262  
in division (C) (2) (b) of this section, and the commission shall 263  
permit the continued deferral and phase-in of any amounts that 264  
occurred prior to that termination and the recovery of those 265

amounts as contemplated under that electric security plan. In 266  
making its determination of significantly excessive earnings 267  
under this division, the commission shall not consider, directly 268  
or indirectly, the revenue, expenses, or earnings of any 269  
affiliate ~~that is not an Ohio electric distribution utility or~~ 270  
parent company. 271

**Sec. 4928.66.** (A) (1) (a) Beginning in 2009, an electric 272  
distribution utility shall implement energy efficiency programs 273  
that achieve energy savings equivalent to at least three-tenths 274  
of one per cent of the total, annual average, and normalized 275  
kilowatt-hour sales of the electric distribution utility during 276  
the preceding three calendar years to customers in this state. 277  
An energy efficiency program may include a combined heat and 278  
power system placed into service or retrofitted on or after the 279  
effective date of the amendment of this section by S.B. 315 of 280  
the 129th general assembly, September 10, 2012, or a waste 281  
energy recovery system placed into service or retrofitted on or 282  
after September 10, 2012, except that a waste energy recovery 283  
system described in division (A) (38) (b) of section 4928.01 of 284  
the Revised Code may be included only if it was placed into 285  
service between January 1, 2002, and December 31, 2004. For a 286  
waste energy recovery or combined heat and power system, the 287  
savings shall be as estimated by the public utilities 288  
commission. The savings requirement, using such a three-year 289  
average, shall increase to an additional five-tenths of one per 290  
cent in 2010, seven-tenths of one per cent in 2011, eight-tenths 291  
of one per cent in 2012, nine-tenths of one per cent in 2013, 292  
and one per cent in 2014. In 2015 and 2016, an electric 293  
distribution utility shall achieve energy savings equal to the 294  
result of subtracting the cumulative energy savings achieved 295  
since 2009 from the product of multiplying the baseline for 296

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energy savings, described in division (A) (2) (a) of this section, 297  
by four and two-tenths of one per cent. If the result is zero or 298  
less for the year for which the calculation is being made, the 299  
utility shall not be required to achieve additional energy 300  
savings for that year, but may achieve additional energy savings 301  
for that year. The annual savings requirements shall be, for 302  
years 2017, 2018, 2019, and 2020, an additional one per cent of 303  
the baseline. For purposes of a waste energy recovery or 304  
combined heat and power system, an electric distribution utility 305  
shall not apply more than the total annual percentage of the 306  
electric distribution utility's industrial-customer load, 307  
relative to the electric distribution utility's total load, to 308  
the annual energy savings requirement. 309

(b) Beginning in 2009, an electric distribution utility 310  
shall implement peak demand reduction programs designed to 311  
achieve a one per cent reduction in peak demand in 2009 and an 312  
additional seventy-five hundredths of one per cent reduction 313  
each year through 2014. In 2015 and 2016, an electric 314  
distribution utility shall achieve a reduction in peak demand 315  
equal to the result of subtracting the cumulative peak demand 316  
reductions achieved since 2009 from the product of multiplying 317  
the baseline for peak demand reduction, described in division 318  
(A) (2) (a) of this section, by four and seventy-five hundredths 319  
of one per cent. If the result is zero or less for the year for 320  
which the calculation is being made, the utility shall not be 321  
required to achieve an additional reduction in peak demand for 322  
that year, but may achieve an additional reduction in peak 323  
demand for that year. In 2017 and each year thereafter through 324  
2020, the utility shall achieve an additional seventy-five 325  
hundredths of one per cent reduction in peak demand. 326

(2) For the purposes of divisions (A) (1) (a) and (b) of 327

this section: 328

(a) The baseline for energy savings under division (A) (1) 329

(a) of this section shall be the average of the total kilowatt 330

hours the electric distribution utility sold in the preceding 331

three calendar years. The baseline for a peak demand reduction 332

under division (A) (1) (b) of this section shall be the average 333

peak demand on the utility in the preceding three calendar 334

years, except that the commission may reduce either baseline to 335

adjust for new economic growth in the utility's certified 336

territory. Neither baseline shall include the load and usage of 337

any of the following customers: 338

(i) Beginning January 1, 2017, a customer for which a 339

reasonable arrangement has been approved under section 4905.31 340

of the Revised Code; 341

(ii) A customer that has opted out of the utility's 342

portfolio plan under section 4928.6611 of the Revised Code; 343

(iii) A customer that has opted out of the utility's 344

portfolio plan under Section 8 of S.B. 310 of the 130th general 345

assembly. 346

(b) The commission may amend the benchmarks set forth in 347

division (A) (1) (a) or (b) of this section if, after application 348

by the electric distribution utility, the commission determines 349

that the amendment is necessary because the utility cannot 350

reasonably achieve the benchmarks due to regulatory, economic, 351

or technological reasons beyond its reasonable control. 352

(c) Compliance with divisions (A) (1) (a) and (b) of this 353

section shall be measured by including the effects of all 354

demand-response programs for mercantile customers of the subject 355

electric distribution utility, all waste energy recovery systems 356

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and all combined heat and power systems, and all such mercantile 357  
customer-sited energy efficiency, including waste energy 358  
recovery and combined heat and power, and peak demand reduction 359  
programs, adjusted upward by the appropriate loss factors. Any 360  
mechanism designed to recover the cost of energy efficiency, 361  
including waste energy recovery and combined heat and power, and 362  
peak demand reduction programs under divisions (A) (1) (a) and (b) 363  
of this section may exempt mercantile customers that commit 364  
their demand-response or other customer-sited capabilities, 365  
whether existing or new, for integration into the electric 366  
distribution utility's demand-response, energy efficiency, 367  
including waste energy recovery and combined heat and power, or 368  
peak demand reduction programs, if the commission determines 369  
that that exemption reasonably encourages such customers to 370  
commit those capabilities to those programs. If a mercantile 371  
customer makes such existing or new demand-response, energy 372  
efficiency, including waste energy recovery and combined heat 373  
and power, or peak demand reduction capability available to an 374  
electric distribution utility pursuant to division (A) (2) (c) of 375  
this section, the electric utility's baseline under division (A) 376  
(2) (a) of this section shall be adjusted to exclude the effects 377  
of all such demand-response, energy efficiency, including waste 378  
energy recovery and combined heat and power, or peak demand 379  
reduction programs that may have existed during the period used 380  
to establish the baseline. The baseline also shall be normalized 381  
for changes in numbers of customers, sales, weather, peak 382  
demand, and other appropriate factors so that the compliance 383  
measurement is not unduly influenced by factors outside the 384  
control of the electric distribution utility. 385

(d) (i) Programs implemented by a utility may include the 386  
following: 387

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(I) Demand-response programs; 388

(II) Smart grid investment programs, provided that such 389  
programs are demonstrated to be cost-beneficial; 390

(III) Customer-sited programs, including waste energy 391  
recovery and combined heat and power systems; 392

(IV) Transmission and distribution infrastructure 393  
improvements that reduce line losses; 394

(V) Energy efficiency savings and peak demand reduction 395  
that are achieved, in whole or in part, as a result of funding 396  
provided from the universal service fund established by section 397  
4928.51 of the Revised Code to benefit low-income customers 398  
through programs that include, but are not limited to, energy 399  
audits, the installation of energy efficiency insulation, 400  
appliances, and windows, and other weatherization measures. 401

(ii) No energy efficiency or peak demand reduction 402  
achieved under divisions (A) (2) (d) (i) (IV) and (V) of this 403  
section shall qualify for shared savings. 404

(iii) Division (A) (2) (c) of this section shall be applied 405  
to include facilitating efforts by a mercantile customer or 406  
group of those customers to offer customer-sited demand- 407  
response, energy efficiency, including waste energy recovery and 408  
combined heat and power, or peak demand reduction capabilities 409  
to the electric distribution utility as part of a reasonable 410  
arrangement submitted to the commission pursuant to section 411  
4905.31 of the Revised Code. 412

(e) No programs or improvements described in division (A) 413  
(2) (d) of this section shall conflict with any statewide 414  
building code adopted by the board of building standards. 415

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(B) In accordance with rules it shall adopt, the public 416  
utilities commission shall produce and docket at the commission 417  
an annual report containing the results of its verification of 418  
the annual levels of energy efficiency and of peak demand 419  
reductions achieved by each electric distribution utility 420  
pursuant to division (A) of this section. A copy of the report 421  
shall be provided to the consumers' counsel. 422

(C) If the commission determines, after notice and 423  
opportunity for hearing and based upon its report under division 424  
(B) of this section, that an electric distribution utility has 425  
failed to comply with an energy efficiency or peak demand 426  
reduction requirement of division (A) of this section, the 427  
commission shall assess a forfeiture on the utility as provided 428  
under sections 4905.55 to 4905.60 and 4905.64 of the Revised 429  
Code, either in the amount, per day per undercompliance or 430  
noncompliance, relative to the period of the report, equal to 431  
that prescribed for noncompliances under section 4905.54 of the 432  
Revised Code, or in an amount equal to the then existing market 433  
value of one renewable energy credit per megawatt hour of 434  
undercompliance or noncompliance. Revenue from any forfeiture 435  
assessed under this division shall be deposited to the credit of 436  
the advanced energy fund created under section 4928.61 of the 437  
Revised Code. 438

~~(D) The commission may establish rules regarding the 439~~  
~~content of an application by an electric distribution utility 440~~  
~~for commission approval of a revenue decoupling mechanism under 441~~  
~~this division. Such an application shall not be considered an 442~~  
~~application to increase rates and may be included as part of a 443~~  
~~proposal to establish, continue, or expand energy efficiency or 444~~  
~~conservation programs. The commission by order may approve an 445~~  
~~application under this division if it determines both that the 446~~



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~~revenue decoupling mechanism provides for the recovery of~~ 447  
~~revenue that otherwise may be forgone by the utility as a result~~ 448  
~~of or in connection with the implementation by the electric~~ 449  
~~distribution utility of any energy efficiency or energy~~ 450  
~~conservation programs and reasonably aligns the interests of the~~ 451  
~~utility and of its customers in favor of those programs.~~ 452

~~(E)~~ The commission additionally shall adopt rules that 453  
require an electric distribution utility to provide a customer 454  
upon request with two years' consumption data in an accessible 455  
form. 456

~~(F) (1)~~ (E) (1) As used in divisions ~~(F) (2)~~ (E) (2), (3), and 457  
(4) of this section, "portfolio plan" has the same meaning as in 458  
division (C) (1) of section 4928.6610 of the Revised Code. 459

(2) If an electric distribution utility has a portfolio 460  
plan in effect as of October 22, 2019, the effective date of the 461  
amendments to this section by H.B. 6 of the 133rd general 462  
assembly and that plan expires before December 31, 2020, the 463  
commission shall extend the plan through that date. All 464  
portfolio plans shall terminate on that date. 465

(3) If a portfolio plan is extended beyond its commission 466  
approved term by division ~~(F) (2)~~ (E) (2) of this section, the 467  
existing plan's budget shall be increased for the extended term 468  
to include an amount equal to the annual average of the approved 469  
budget for all years of the portfolio plan in effect as of 470  
October 22, 2019, the effective date of the amendments to this 471  
section by H.B. 6 of the 133rd general assembly. 472

(4) All other terms and conditions of a portfolio plan 473  
extended beyond its commission-approved term by division ~~(F) (2)~~ 474  
(E) (2) of this section shall remain the same unless changes are 475

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authorized by the commission. 476

~~(G) (1)~~ (F) (1) Not later than February 1, 2021, the 477  
commission shall determine the cumulative energy savings 478  
collectively achieved, since 2009, by all electric distribution 479  
utilities in this state as of December 31, 2020. In determining 480  
that cumulative total, the commission shall do both of the 481  
following: 482

(a) Include energy savings that were estimated by the 483  
commission to be achieved as of December 31, 2020, and banked 484  
under division (G) of section 4928.662 of the Revised Code; 485

(b) Use an energy savings baseline that is the average of 486  
the total kilowatt hours sold by all electric distribution 487  
utilities in this state in the calendar years 2018, 2019, and 488  
2020. The baseline shall exclude the load and usage described in 489  
division (A) (2) (a) (i), (ii), and (iii) of this section. That 490  
baseline may also be reduced for new economic growth in the 491  
utility's certified territory as provided in division (A) (2) (a) 492  
of this section and adjusted and normalized as provided in 493  
division (A) (2) (c) of this section. 494

(2) (a) If the cumulative energy savings collectively 495  
achieved as determined by the commission under division ~~(G) (1)~~ 496  
(F) (1) of this section is at least seventeen and one-half per 497  
cent of the baseline described in division ~~(G) (1) (b)~~ (F) (1) (b) 498  
of this section, then full compliance with division (A) (1) (a) of 499  
this section shall be deemed to have been achieved 500  
notwithstanding any provision of this section to the contrary. 501

(b) If the cumulative energy savings collectively achieved 502  
as determined by the commission under division ~~(G) (1)~~ (F) (1) of 503  
this section is less than seventeen and one-half per cent of the 504

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baseline described in division ~~(G) (1) (b)~~ (F) (1) (b) of this 505  
section, then both of the following shall apply: 506

(i) The commission shall determine the manner in which 507  
further implementation of energy efficiency programs shall occur 508  
as may be reasonably necessary for collective achievement of 509  
cumulative energy savings equal to seventeen and one-half 510  
~~percent~~ per cent, and not more, of the baseline described in 511  
division ~~(G) (1) (b)~~ (F) (1) (b) of this section. 512

(ii) Full compliance with division (A) (1) (a) of this 513  
section shall be deemed to be achieved as of a date certain 514  
established by the commission notwithstanding any provision of 515  
this section to the contrary. 516

(3) Upon the date that full compliance with division (A) 517  
(1) (a) of this section is deemed achieved under division ~~(G) (2)~~ 518  
~~(a)~~ (F) (2) (a) or (b) of this section, any electric distribution 519  
utility cost recovery mechanisms authorized by the commission 520  
for compliance with this section shall terminate except as may 521  
be necessary to reconcile the difference between revenue 522  
collected and the allowable cost of compliance associated with 523  
compliance efforts occurring prior to the date upon which full 524  
compliance with division (A) (1) (a) of this section is deemed 525  
achieved. No such cost recovery mechanism shall be authorized by 526  
the commission beyond the period of time required to complete 527  
this final reconciliation. 528

**Sec. 4928.6610.** As used in sections 4928.6611 to 4928.6615 529  
of the Revised Code: 530

(A) "Customer" means either of the following: 531

(1) Effective January 1, 2020, a mercantile customer as 532  
defined in section 4928.01 of the Revised Code; 533

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(2) Any customer of an electric distribution utility to 534  
which either of the following applies: 535

(a) The customer receives service above the primary 536  
voltage level as determined by the utility's tariff 537  
classification. 538

(b) The customer is a commercial or industrial customer to 539  
which both of the following apply: 540

(i) The customer receives electricity through a meter of 541  
an end user or through more than one meter at a single location 542  
in a quantity that exceeds forty-five million kilowatt hours of 543  
electricity for the preceding calendar year. 544

(ii) The customer has made a written request for 545  
registration as a self-assessing purchaser pursuant to section 546  
5727.81 of the Revised Code. 547

(B) "Energy intensity" means the amount of energy, from 548  
electricity, used or consumed per unit of production. 549

(C) "Portfolio plan" means either of the following: 550

(1) The comprehensive energy efficiency and peak-demand 551  
reduction program portfolio plan required under rules adopted by 552  
the public utilities commission and codified in Chapter 4901:1- 553  
39 of the Administrative Code or hereafter recodified or 554  
amended; 555

(2) Any plan implemented pursuant to division ~~(G)~~ (F) of 556  
section 4928.66 of the Revised Code. 557

**Section 2.** That existing sections 4928.143, 4928.66, and 558  
4928.6610 of the Revised Code are hereby repealed. 559

**Section 3.** That section 4928.471 of the Revised Code is 560

hereby repealed. 561

**Section 4.** On and after the effective date of this 562  
section, and notwithstanding any provision in Title XLIX of the 563  
Revised Code to the contrary, no decoupling mechanism 564  
established under section 4928.143 or 4928.66 of the Revised 565  
Code or section 4928.471 of the Revised Code, as that section 566  
existed prior to the effective date of this section, shall 567  
remain in effect, and no amount, charge, mechanism, or rider 568  
related to decoupling may be assessed or collected from 569  
customers. 570

**Section 5.** Upon the effective date of this section, and 571  
notwithstanding section 4905.32 of the Revised Code and any 572  
other provision in Title XLIX of the Revised Code to the 573  
contrary, the full amount of revenues collected from customers 574  
through an amount, charge, mechanism, or rider established under 575  
section 4928.471 of the Revised Code, as that section existed 576  
prior to the effective date of this section, shall be promptly 577  
refunded to customers from whom the revenues were collected. 578  
Refunds paid to customers shall be allocated to customer classes 579  
in the same proportion as originally collected. 580

**Section 6.** Upon the effective date of this section, and 581  
notwithstanding section 4905.32 of the Revised Code and any 582  
other provision in Title XLIX of the Revised Code to the 583  
contrary, both of the following apply: 584

(A) The amounts of money collected from customers 585  
resulting from, or attributable to, the amendments to divisions 586  
(E) and (F) of section 4928.143 of the Revised Code by H.B. 166 587  
of the 133rd General Assembly, shall be treated as follows: 588

(1) The amounts shall be promptly refunded to customers 589

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from whom they were collected. 590

(2) The amounts refunded shall be allocated to customer 591  
classes in the same proportion as originally collected. 592

(B) The public utilities commission shall reconsider any 593  
order or determination it made in compliance with the amendments 594  
to divisions (E) and (F) of section 4928.143 of the Revised Code 595  
made by H.B. 166 of the 133rd General Assembly prior to the 596  
effective date of this section and shall issue a new order or 597  
determination in compliance with the provisions of divisions (E) 598  
and (F) of section 4928.143 as amended by this act. 599

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Summary: Motion Motion for a Continuance of the Procedural Schedule Involving What FirstEnergy Charges Consumers for Profits by Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Michael, William J. Mr.