

**As Introduced**

**133rd General Assembly**

**Regular Session**

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**H. B. No. 740**

**Representatives Skindell, Denson**

**Cosponsors: Representatives Lepore-Hagan, Romanchuk, Kent, Smith, K., Miller,  
J., Crawley, Crossman, O'Brien, Ingram, Miranda**

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**A BILL**

To amend section 4928.143 of the Revised Code 1  
regarding the significantly excessive earnings 2  
determination for an electric distribution 3  
utility's electric security plan. 4

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

**Section 1.** That section 4928.143 of the Revised Code be 5  
amended to read as follows: 6

**Sec. 4928.143.** (A) For the purpose of complying with 7  
section 4928.141 of the Revised Code, an electric distribution 8  
utility may file an application for public utilities commission 9  
approval of an electric security plan as prescribed under 10  
division (B) of this section. The utility may file that 11  
application prior to the effective date of any rules the 12  
commission may adopt for the purpose of this section, and, as 13  
the commission determines necessary, the utility immediately 14  
shall conform its filing to those rules upon their taking 15  
effect. 16

(B) Notwithstanding any other provision of Title XLIX of 17

the Revised Code to the contrary except division (D) of this 18  
section, divisions (I), (J), and (K) of section 4928.20, 19  
division (E) of section 4928.64, and section 4928.69 of the 20  
Revised Code: 21

(1) An electric security plan shall include provisions 22  
relating to the supply and pricing of electric generation 23  
service. In addition, if the proposed electric security plan has 24  
a term longer than three years, it may include provisions in the 25  
plan to permit the commission to test the plan pursuant to 26  
division (E) of this section and any transitional conditions 27  
that should be adopted by the commission if the commission 28  
terminates the plan as authorized under that division. 29

(2) The plan may provide for or include, without 30  
limitation, any of the following: 31

(a) Automatic recovery of any of the following costs of 32  
the electric distribution utility, provided the cost is 33  
prudently incurred: the cost of fuel used to generate the 34  
electricity supplied under the offer; the cost of purchased 35  
power supplied under the offer, including the cost of energy and 36  
capacity, and including purchased power acquired from an 37  
affiliate; the cost of emission allowances; and the cost of 38  
federally mandated carbon or energy taxes; 39

(b) A reasonable allowance for construction work in 40  
progress for any of the electric distribution utility's cost of 41  
constructing an electric generating facility or for an 42  
environmental expenditure for any electric generating facility 43  
of the electric distribution utility, provided the cost is 44  
incurred or the expenditure occurs on or after January 1, 2009. 45  
Any such allowance shall be subject to the construction work in 46  
progress allowance limitations of division (A) of section 47

4909.15 of the Revised Code, except that the commission may 48  
authorize such an allowance upon the incurrence of the cost or 49  
occurrence of the expenditure. No such allowance for generating 50  
facility construction shall be authorized, however, unless the 51  
commission first determines in the proceeding that there is need 52  
for the facility based on resource planning projections 53  
submitted by the electric distribution utility. Further, no such 54  
allowance shall be authorized unless the facility's construction 55  
was sourced through a competitive bid process, regarding which 56  
process the commission may adopt rules. An allowance approved 57  
under division (B) (2) (b) of this section shall be established as 58  
a nonbypassable surcharge for the life of the facility. 59

(c) The establishment of a nonbypassable surcharge for the 60  
life of an electric generating facility that is owned or 61  
operated by the electric distribution utility, was sourced 62  
through a competitive bid process subject to any such rules as 63  
the commission adopts under division (B) (2) (b) of this section, 64  
and is newly used and useful on or after January 1, 2009, which 65  
surcharge shall cover all costs of the utility specified in the 66  
application, excluding costs recovered through a surcharge under 67  
division (B) (2) (b) of this section. However, no surcharge shall 68  
be authorized unless the commission first determines in the 69  
proceeding that there is need for the facility based on resource 70  
planning projections submitted by the electric distribution 71  
utility. Additionally, if a surcharge is authorized for a 72  
facility pursuant to plan approval under division (C) of this 73  
section and as a condition of the continuation of the surcharge, 74  
the electric distribution utility shall dedicate to Ohio 75  
consumers the capacity and energy and the rate associated with 76  
the cost of that facility. Before the commission authorizes any 77  
surcharge pursuant to this division, it may consider, as 78

applicable, the effects of any decommissioning, deratings, and 79  
retirements. 80

(d) Terms, conditions, or charges relating to limitations 81  
on customer shopping for retail electric generation service, 82  
bypassability, standby, back-up, or supplemental power service, 83  
default service, carrying costs, amortization periods, and 84  
accounting or deferrals, including future recovery of such 85  
deferrals, as would have the effect of stabilizing or providing 86  
certainty regarding retail electric service; 87

(e) Automatic increases or decreases in any component of 88  
the standard service offer price; 89

(f) Consistent with sections 4928.23 to 4928.2318 of the 90  
Revised Code, both of the following: 91

(i) Provisions for the electric distribution utility to 92  
securitize any phase-in, inclusive of carrying charges, of the 93  
utility's standard service offer price, which phase-in is 94  
authorized in accordance with section 4928.144 of the Revised 95  
Code; 96

(ii) Provisions for the recovery of the utility's cost of 97  
securitization. 98

(g) Provisions relating to transmission, ancillary, 99  
congestion, or any related service required for the standard 100  
service offer, including provisions for the recovery of any cost 101  
of such service that the electric distribution utility incurs on 102  
or after that date pursuant to the standard service offer; 103

(h) Provisions regarding the utility's distribution 104  
service, including, without limitation and notwithstanding any 105  
provision of Title XLIX of the Revised Code to the contrary, 106  
provisions regarding single issue ratemaking, a revenue 107

decoupling mechanism or any other incentive ratemaking, and 108  
provisions regarding distribution infrastructure and 109  
modernization incentives for the electric distribution utility. 110  
The latter may include a long-term energy delivery 111  
infrastructure modernization plan for that utility or any plan 112  
providing for the utility's recovery of costs, including lost 113  
revenue, shared savings, and avoided costs, and a just and 114  
reasonable rate of return on such infrastructure modernization. 115  
As part of its determination as to whether to allow in an 116  
electric distribution utility's electric security plan inclusion 117  
of any provision described in division (B) (2) (h) of this 118  
section, the commission shall examine the reliability of the 119  
electric distribution utility's distribution system and ensure 120  
that customers' and the electric distribution utility's 121  
expectations are aligned and that the electric distribution 122  
utility is placing sufficient emphasis on and dedicating 123  
sufficient resources to the reliability of its distribution 124  
system. 125

(i) Provisions under which the electric distribution 126  
utility may implement economic development, job retention, and 127  
energy efficiency programs, which provisions may allocate 128  
program costs across all classes of customers of the utility and 129  
those of electric distribution utilities in the same holding 130  
company system. 131

(C) (1) The burden of proof in the proceeding shall be on 132  
the electric distribution utility. The commission shall issue an 133  
order under this division for an initial application under this 134  
section not later than one hundred fifty days after the 135  
application's filing date and, for any subsequent application by 136  
the utility under this section, not later than two hundred 137  
seventy-five days after the application's filing date. Subject 138

to division (D) of this section, the commission by order shall 139  
approve or modify and approve an application filed under 140  
division (A) of this section if it finds that the electric 141  
security plan so approved, including its pricing and all other 142  
terms and conditions, including any deferrals and any future 143  
recovery of deferrals, is more favorable in the aggregate as 144  
compared to the expected results that would otherwise apply 145  
under section 4928.142 of the Revised Code. Additionally, if the 146  
commission so approves an application that contains a surcharge 147  
under division (B) (2) (b) or (c) of this section, the commission 148  
shall ensure that the benefits derived for any purpose for which 149  
the surcharge is established are reserved and made available to 150  
those that bear the surcharge. Otherwise, the commission by 151  
order shall disapprove the application. 152

(2) (a) If the commission modifies and approves an 153  
application under division (C) (1) of this section, the electric 154  
distribution utility may withdraw the application, thereby 155  
terminating it, and may file a new standard service offer under 156  
this section or a standard service offer under section 4928.142 157  
of the Revised Code. 158

(b) If the utility terminates an application pursuant to 159  
division (C) (2) (a) of this section or if the commission 160  
disapproves an application under division (C) (1) of this 161  
section, the commission shall issue such order as is necessary 162  
to continue the provisions, terms, and conditions of the 163  
utility's most recent standard service offer, along with any 164  
expected increases or decreases in fuel costs from those 165  
contained in that offer, until a subsequent offer is authorized 166  
pursuant to this section or section 4928.142 of the Revised 167  
Code, respectively. 168

(D) Regarding the rate plan requirement of division (A) of 169  
section 4928.141 of the Revised Code, if an electric 170  
distribution utility that has a rate plan that extends beyond 171  
December 31, 2008, files an application under this section for 172  
the purpose of its compliance with division (A) of section 173  
4928.141 of the Revised Code, that rate plan and its terms and 174  
conditions are hereby incorporated into its proposed electric 175  
security plan and shall continue in effect until the date 176  
scheduled under the rate plan for its expiration, and that 177  
portion of the electric security plan shall not be subject to 178  
commission approval or disapproval under division (C) of this 179  
section, and the earnings test provided for in division (F) of 180  
this section shall not apply until after the expiration of the 181  
rate plan. However, that utility may include in its electric 182  
security plan under this section, and the commission may 183  
approve, modify and approve, or disapprove subject to division 184  
(C) of this section, provisions for the incremental recovery or 185  
the deferral of any costs that are not being recovered under the 186  
rate plan and that the utility incurs during that continuation 187  
period to comply with section 4928.141, division (B) of section 188  
4928.64, or division (A) of section 4928.66 of the Revised Code. 189

(E) If an electric security plan approved under division 190  
(C) of this section, except one withdrawn by the utility as 191  
authorized under that division, has a term, exclusive of phase- 192  
ins or deferrals, that exceeds three years from the effective 193  
date of the plan, the commission shall test the plan in the 194  
fourth year, and if applicable, every fourth year thereafter, to 195  
determine whether the plan, including its then-existing pricing 196  
and all other terms and conditions, including any deferrals and 197  
any future recovery of deferrals, continues to be more favorable 198  
in the aggregate and during the remaining term of the plan as 199

compared to the expected results that would otherwise apply 200  
under section 4928.142 of the Revised Code. The commission shall 201  
also determine the prospective effect of the electric security 202  
plan to determine if that effect is substantially likely to 203  
provide the electric distribution utility with a return on 204  
common equity that is significantly in excess of the return on 205  
common equity that is likely to be earned by publicly traded 206  
companies, including utilities, that face comparable business 207  
and financial risk, with such adjustments for capital structure 208  
as may be appropriate. The burden of proof for demonstrating 209  
that significantly excessive earnings will not occur shall be on 210  
the electric distribution utility. ~~For affiliated Ohio electric-~~ 211  
~~distribution utilities that operate under a joint electric-~~ 212  
~~security plan, their total earned return on common equity shall~~ 213  
~~be used for purposes of assessing significantly excessive~~ 214  
~~earnings.~~ If the test results are in the negative or the 215  
commission finds that continuation of the electric security plan 216  
will result in a return on equity that is significantly in 217  
excess of the return on common equity that is likely to be 218  
earned by publicly traded companies, including utilities, that 219  
will face comparable business and financial risk, with such 220  
adjustments for capital structure as may be appropriate, during 221  
the balance of the plan, the commission may terminate the 222  
electric security plan, but not until it shall have provided 223  
interested parties with notice and an opportunity to be heard. 224  
The commission may impose such conditions on the plan's 225  
termination as it considers reasonable and necessary to 226  
accommodate the transition from an approved plan to the more 227  
advantageous alternative. In the event of an electric security 228  
plan's termination pursuant to this division, the commission 229  
shall permit the continued deferral and phase-in of any amounts 230  
that occurred prior to that termination and the recovery of 231



those amounts as contemplated under that electric security plan. 232

(F) With regard to the provisions that are included in an 233  
electric security plan under this section, the commission shall 234  
consider, following the end of each annual period of the plan, 235  
if any such adjustments resulted in excessive earnings as 236  
measured by whether the earned return on common equity of the 237  
electric distribution utility is significantly in excess of the 238  
return on common equity that was earned during the same period 239  
by publicly traded companies, including utilities, that face 240  
comparable business and financial risk, with such adjustments 241  
for capital structure as may be appropriate. ~~In making its~~ 242  
~~determination of significantly excessive earnings under this~~ 243  
~~division, the commission shall, for affiliated Ohio electric~~ 244  
~~distribution utilities that operate under a joint electric~~ 245  
~~security plan, use the total of the utilities' earned return on~~ 246  
~~common equity.~~ Consideration also shall be given to the capital 247  
requirements of future committed investments in this state. The 248  
burden of proof for demonstrating that significantly excessive 249  
earnings did not occur shall be on the electric distribution 250  
utility. If the commission finds that such adjustments, in the 251  
aggregate, did result in significantly excessive earnings, it 252  
shall require the electric distribution utility to return to 253  
consumers the amount of the excess by prospective adjustments; 254  
provided that, upon making such prospective adjustments, the 255  
electric distribution utility shall have the right to terminate 256  
the plan and immediately file an application pursuant to section 257  
4928.142 of the Revised Code. Upon termination of a plan under 258  
this division, rates shall be set on the same basis as specified 259  
in division (C) (2) (b) of this section, and the commission shall 260  
permit the continued deferral and phase-in of any amounts that 261  
occurred prior to that termination and the recovery of those 262

amounts as contemplated under that electric security plan. In 263  
making its determination of significantly excessive earnings 264  
under this division, the commission shall not consider, directly 265  
or indirectly, the revenue, expenses, or earnings of any 266  
~~affiliate that is not an Ohio electric distribution utility~~ or 267  
parent company. 268

**Section 2.** That existing section 4928.143 of the Revised 269  
Code is hereby repealed. 270