



# Ohio Legislative Service Commission

## Final Analysis

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- Reps.** Roegner and Duffey, Blessing, Hill, Stebelton, Thompson, Stautberg, Martin, C. Hagan, R. Adams, Anielski, Antonio, Blair, Bubb, Buchy, Carney, DeGeeter, Dovilla, Fende, Garland, Gonzales, Goyal, Grossman, Hackett, Hall, Hollington, Johnson, Letson, Lundy, McClain, McGregor, Milkovich, Murray, Newbold, O'Brien, Slaby, Stinziano, Terhar, Williams, Young, Yuko, Batchelder
- Sens.** Bacon, Balderson, Beagle, Brown, Coley, Daniels, Eklund, Faber, Gentile, Hite, Hughes, Jones, LaRose, Lehner, Patton, Sawyer, Schaffer, Schiavoni, Seitz, Smith, Tavares, Turner, Wagoner, Widener

**Effective date:** March 22, 2012

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## ACT SUMMARY

- Permits an electric distribution utility (EDU) to apply to the Public Utilities Commission (PUCO) for a financing order authorizing the issuance of bonds to recover uncollected "phase-in costs" (which costs include carrying charges incurred before, on, or after the act's effective date) authorized by the PUCO for securitization or deferral before, on, or after the act's effective date.
- Excludes from the definition of "phase-in costs" (thereby prohibiting securitization of) both of the following:
  - For an electric generating facility owned wholly or partly by the EDU on and after the act's effective date, certain costs that are recoverable under an electric security plan (ESP);
  - For any electric generating facility, certain costs incurred after the act's effective date related to the ongoing operation of the facility, except for certain environmental clean-up or remediation costs for which the PUCO "approves recovery."
- Requires that ESP phase-in costs be securitized only in accordance with the act.

- Permits an EDU under a financing order to impose and collect phase-in-recovery charges on customers as long as they remain customers, or if they receive distribution from another EDU operating in the same service area, in accordance with a PUCO-approved adjustment mechanism, to recover the uncollected phase-in costs and financing costs on the bonds.
- Requires the EDU not to proceed with the securitization if, after a financing order is issued or becomes final, but before bonds are issued, market conditions are such that customers will not realize cost savings.
- Specifies that the phase-in-recovery charges are nonbypassable as long as bonds are outstanding and phase-in costs and financing costs have not been recovered in full.
- Requires a financing order to be consistent with Ohio's electric services policy.
- Requires the PUCO to find that, at the time of a financing order's issuance, the issuance of the bonds and phase-in-recovery charges results in, consistent with market conditions, measurably enhancing cost savings to customers and mitigating customer rate impacts as compared with traditional financing or recovery methods or a previously approved recovery method.
- Specifies that financing orders are irrevocable and remain in effect until the bonds and financing costs on the bonds have been paid in full.
- Specifies that for regulation and ratemaking purposes, the phase-in-recovery charges are not to be considered revenue of the EDU, the bonds are not to be considered debt of the EDU, and the phase-in costs or financing costs are not to be considered costs of the EDU.
- Specifies that phase-in-recovery bonds under a financing order do not involve a pledge of full faith and credit by the state or its subdivisions.
- Exempts imposition, charging, collection, and receipt of the phase-in-recovery revenues and the transfer and ownership of phase-in-recovery property from taxation and similar charges by the state, counties, municipal corporations, school districts, local authorities, and other subdivisions.
- Provides for the creation of "phase-in-recovery property," meaning the property, rights, and interests of an EDU or an assignee under a financing order, and contains provisions regarding transference, conveyance, pledging of property for payment of bonds, and perfection of security interests.

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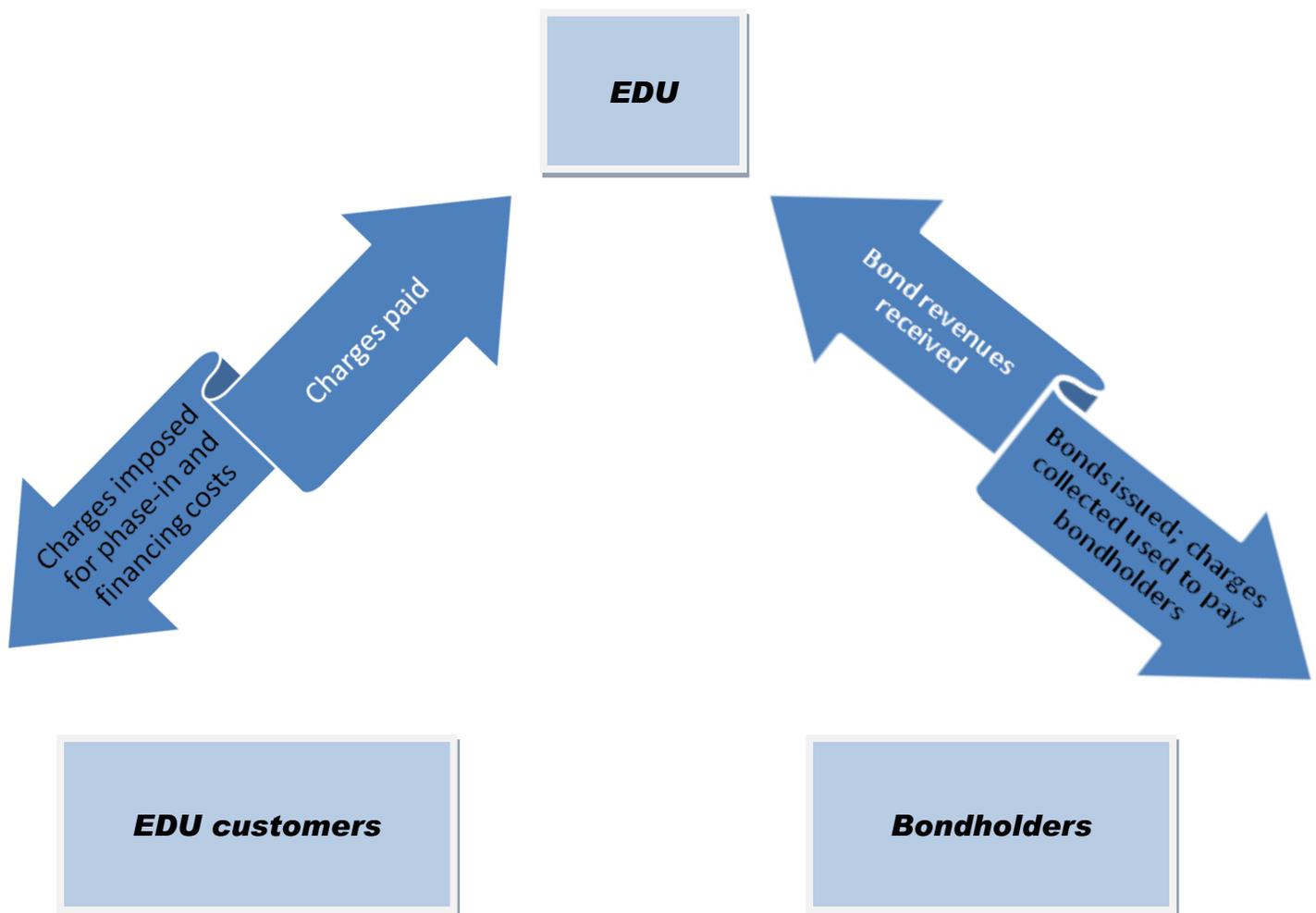
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## CONTENT AND OPERATION

### Financing orders

#### Overview

The act permits an electric distribution utility (EDU) to apply to the Public Utilities Commission (PUCO) for a financing order. The order, if approved, must authorize the EDU to issue bonds to recover uncollected "phase-in costs" that have been authorized for securitization or deferral by the PUCO under continuing and former law. The order must also permit the EDU to impose and collect charges (called "phase-in-recovery charges," discussed below) on customers, in accordance with an approved adjustment mechanism, to recover the uncollected phase-in costs and the approved financing costs on the phase-in-recovery bonds.<sup>1</sup>



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<sup>1</sup> R.C. 4928.23(J) and 4928.231.

An EDU is a for-profit electric utility that supplies at least retail electric distribution service. "EDU" excludes municipal electric utilities and billing and collection agents.<sup>2</sup>

### **Phase-in costs**

The act defines "phase-in costs" as costs, including carrying charges incurred before, on, or after the act's effective date, that have been authorized by the PUCO to be securitized or deferred as regulatory assets, before, on, or after the act's effective date, pursuant to a final order for which appeals have been exhausted, under one of the following proceedings:

- a standard rate-increase case;
- a proceeding to establish a standard service offer (SSO), which could be done through an electric security plan (ESP), a market-rate offer (MRO), or an application for approval of both an ESP and an MRO;
- under former law that required an EDU to file with the PUCO a market-based SSO, following the EDU's market development period.<sup>3</sup>

Some of the costs that may be authorized for securitization or deferral under the proceedings described above are costs for fuel, purchased power, compliance with federal emission standards and state renewable-energy benchmarks, economic development and energy efficiency programs, costs related to the competitive bidding process for procuring generation as part of an MRO, demand-side management costs, Percentage of Income Payment Plan arrears, future nuclear decommissioning costs, and other costs of rendering service.<sup>4</sup>

The act excludes certain costs from the definition of "phase-in costs," thereby prohibiting them from being securitized. Specifically, with respect to an electric generating facility owned by the EDU, wholly or partly, on and after the act's effective date, the following costs authorized under an ESP may *not* be securitized:

- a reasonable allowance for construction work in progress and costs for an environmental expenditure for the facility; and

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<sup>2</sup> R.C. 4928.01 (not in the act).

<sup>3</sup> R.C. 4928.23(J).

<sup>4</sup> R.C. 4928.143; R.C. 4909.15, 4909.18, 4928.01(A)(26), 4928.142, and 4928.144 (not in the act).

- a nonbypassable surcharge for the life of the facility to cover the EDU's costs if the facility meets certain criteria.

Also prohibited from being securitized (because they are excluded as "phase-in costs") are costs incurred after the act's effective date, with respect to *any* electric generating facility, related to the ongoing operation of the electric generating facility. But the act specifies that this exclusion does *not* extend to certain environmental clean-up or remediation costs. The act permits securitization for environmental clean-up or remediation costs, provided that:

- they are imposed or incurred under federal or state requirements;
- they are incurred because of the EDU's ownership or operation of an electric generating facility before the act's effective date; and
- the PUCO "approves recovery" for the costs in accordance with one of the proceedings described above.

These environmental costs must also have been authorized by the PUCO to be securitized or deferred pursuant to a final order in one of the proceedings described above. Otherwise, they would not qualify as "phase-in costs."

Conversely, the act *prohibits* from being securitized environmental clean-up or remediation costs that are incurred by an EDU because of the EDU's ownership or operation of an electric generating facility on or *after* the act's effective date, if those costs are "related to the ongoing operation of an electric generating facility."<sup>5</sup>

### **Securitization of ESP costs permitted only in accordance with the act**

The act requires that ESP costs be securitized, and the cost of that securitization be recovered, only in accordance with the act.

### **Financing costs**

"Financing costs" are defined as:

- principal, interest, and redemption premiums;
- payments required under ancillary agreements;

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<sup>5</sup> R.C. 4928.23(J)(1) and (2).

- amounts for funding or replenishing a reserve account or another account established under a financing document relating to phase-in-recovery bonds;
- costs of retiring or refunding existing debt and equity securities in connection with either the issuance of, or the use of proceeds from, phase-in-recovery bonds;
- costs to modify any indenture, financing agreement, security agreement, or other agreement relating to phase-in-recovery bonds;
- costs to obtain any consent, release, waiver, or approval from a bondholder necessary for issuing phase-in-recovery bonds;
- taxes, franchise fees, or license fees imposed on phase-in-recovery revenues;
- costs related to issuing or servicing phase-in-recovery bonds or related to obtaining a financing order, including servicing fees and expenses, trustee fees and expenses, legal, accounting, or other professional fees and expenses, administrative fees, placement fees, underwriting fees, capitalized interest and equity, and rating-agency fees;
- any other similar costs that the PUCO finds appropriate.<sup>6</sup>

### **Applications**

An application for a financing order is to include all of the following:

- a description of the phase-in costs for which recovery is sought;
- the expected term for recovery of the phase-in costs for each series of bonds;
- an estimate of the date that each series of bonds are expected to be issued;
- an estimate of the financing costs for the issuance of each series of bonds;
- an estimate of the amount of phase-in-recovery charges necessary to recover the phase-in costs and financing costs set forth in the application, and the calculation for that estimate;

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<sup>6</sup> R.C. 4928.23(E).

- a description of a proposed adjustment mechanism for the imposition and collection of phase-in-recovery charges;
- for phase-in-recovery charges not subject to allocation under an existing order, a proposed methodology for allocation among customer classes of the charges;
- a description and valuation of how the issuance of the bonds, including financing costs, will both result in cost savings and mitigate rate impacts to customers when compared to the use of other financing mechanisms or cost-recovery methods; and
- any other information required by the PUCO.<sup>7</sup>

### **Standard for approval**

The act directs the PUCO to issue a financing order if, at the time the order is issued, it finds that the issuance of the phase-in-recovery bonds and the phase-in-recovery charges authorized by the order results in, consistent with market conditions, both measurably enhancing cost savings to customers and mitigating customer rate impacts as compared with traditional financing mechanisms or traditional cost-recovery methods available to the EDU or, if the PUCO previously approved a recovery method, as compared with that recovery method. The PUCO may not issue a financing order unless it determines that the financing order is consistent with Ohio's electric services policy.<sup>8</sup> This policy includes ensuring adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service, among many other policy objectives.<sup>9</sup>

### **Items established in financing orders**

In general, a financing order must set forth the PUCO's approval of the items required in the application. Specifically, all of the following are to be included in a financing order issued by the PUCO:

- the maximum amount and a description of the phase-in costs that may be recovered through the phase-in-recovery bonds issued under the order;

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<sup>7</sup> R.C. 4928.231.

<sup>8</sup> R.C. 4928.232(D).

<sup>9</sup> R.C. 4928.02 (not in the act).

- a description of the financing costs that may be recovered through phase-in-recovery charges, and the recovery period;
- the maximum term of the phase-in-recovery bonds;
- a description of the adjustment mechanism for the imposition and collection of the phase-in-recovery charges;
- for phase-in-recovery charges not subject to allocation under an existing order, a description of the methodology and calculation for charge allocation among customer classes;
- a description of the "phase-in-recovery property" created by the financing order, which is basically the property, rights, and interests of an EDU or an assignee under the financing order;
- any other provision that the PUCO considers appropriate to ensure the full and timely imposition, charging, collection, and adjustment of the phase-in-recovery charges.<sup>10</sup>

### **Irrevocability**

The act states that a final financing order is irrevocable. In addition, the PUCO may not reduce, impair, postpone, or terminate the phase-in-recovery charges authorized in the final financing order or "impair the property or the collection or recovery of phase-in costs."<sup>11</sup>

### **EDU discretion**

The act specifies that under a final financing order, the EDU retains sole discretion regarding whether to assign, sell, or otherwise transfer phase-in-recovery property, or to cause phase-in-recovery bonds to be issued, including the right to defer or postpone assignment, sale, transfer, or issuance. But the act requires an EDU not to proceed with securitization if, after a financing order is issued or becomes final, but before bonds have been issued, market conditions are such that customers will not realize cost savings.<sup>12</sup>

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<sup>10</sup> R.C. 4928.23(K) and 4928.232(E).

<sup>11</sup> R.C. 4928.235(B).

<sup>12</sup> R.C. 4928.235(C).

## **When EDU elects not to issue bonds**

If an EDU elects not to finance phase-in costs through the issuance of phase-in-recovery bonds as authorized in a final financing order, those costs and charges must be recovered as authorized by the PUCO prior to the application for the financing order.<sup>13</sup>

## **Financing-order proceedings**

The PUCO must take action not later than 135 days after an application for a financing order is filed, by issuing a financing order, granting the application in whole or with modifications, or by suspending or rejecting the application. In the case of a suspension, the PUCO must notify the EDU, and may direct the EDU to provide additional information. The PUCO then has 90 days to take additional action, by issuing a financing order, granting the application in whole or with modifications, or by rejecting the application.<sup>14</sup>

The bill expressly permits the PUCO to hold such hearings, make such inquiries or investigations, and examine such witnesses, books, papers, documents, and contracts as it considers proper to carry out the act. The PUCO must publish a schedule of the financing-order proceeding within 30 days after the filing of an application.<sup>15</sup>

## **Rehearings**

Any party to a financing-order proceeding may file an application for rehearing of a PUCO order on a financing-order application within 30 days after the order's issuance. If the PUCO denies the application, a party to the proceeding may file a notice of appeal with the Supreme Court within 60 days after the PUCO issues the denial order. The same applies for a PUCO order after rehearing; parties may file notices of appeal with the Supreme Court for review within 60 days after issuance of the order after rehearing. Notices of appeal for Supreme Court review must be served, unless waived, upon the PUCO Chairperson, or, in the Chairperson's absence, upon any commissioner, or by leaving a copy at the PUCO's Columbus office.

The act states that because delay in the determination of an appeal will delay the issuance of phase-in-recovery bonds, thereby diminishing savings to customers, the Supreme Court must proceed to hear and determine the action as expeditiously as practicable and must give the action precedence over other matters not accorded similar precedence by law.

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<sup>13</sup> R.C. 4928.237(C).

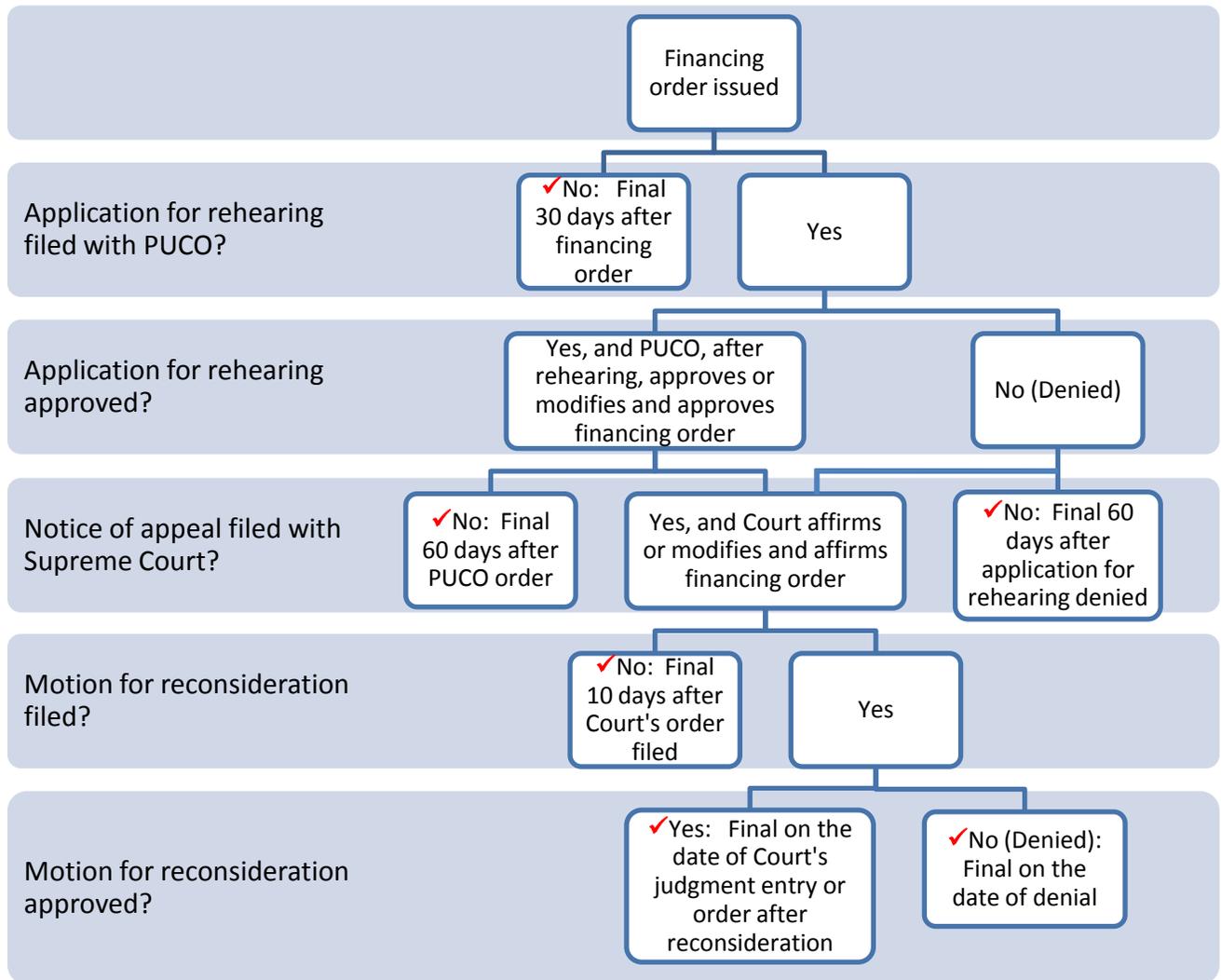
<sup>14</sup> R.C. 4928.232(C).

<sup>15</sup> R.C. 4928.232(B).

If any phase-in costs or financing order is or are subject to review by the PUCO or the Supreme Court, the act prohibits the EDU from issuing phase-in-recovery bonds based on those costs or that financing order until all PUCO and appellate reviews, including any appellate review following a PUCO decision on remand, have been exhausted.<sup>16</sup>

### Financing order effective times

The act specifies that a financing order takes effect when it is final. The following chart, with check marks indicating events resulting in a final order, illustrates the timing:<sup>17</sup>



<sup>16</sup> R.C. 4928.233(A), (B), and (D).

<sup>17</sup> R.C. 4928.233(E).

If the Supreme Court remands a financing order back to the PUCO, the same timing in the chart above applies to the remanded order, up to and including the 60-day effective times.<sup>18</sup>

The act specifies that a final financing order remains in effect until the phase-in-recovery bonds issued under the final financing order and all financing costs related to the bonds have been paid in full. It also specifies that a final financing order remains in effect and unabated notwithstanding the bankruptcy, reorganization, or insolvency of the EDU or any affiliate, or the commencement of any judicial or nonjudicial proceeding on the final financing order.<sup>19</sup>

### **Law governing proceedings**

The act specifies that Chapter 4903. of the Revised Code, which governs PUCO hearings, rehearings, and all other PUCO proceedings, governs proceedings before the PUCO on an application for a financing order, but only to the extent that the chapter is not inconsistent with the following:

- the requirement that the PUCO publish a schedule of proceedings;
- the act's provision expressly permitting the PUCO to hold hearings and make inquiries, investigations, and examinations;
- the 135-day requirement for PUCO action;
- the act's suspension provisions;
- the act's party-standing provision (discussed below);
- the standard for approval of financing orders; and
- the act's provisions governing PUCO rehearings and proceedings on financing orders remanded to the PUCO following Supreme Court review.<sup>20</sup>

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<sup>18</sup> R.C. 4928.233(E)(7).

<sup>19</sup> R.C. 4928.235(A).

<sup>20</sup> R.C. 4928.232(A).

The act also specifies that Chapter 4903. governs any review on appeal for a financing order. For these reviews on appeal, the act does not contain the "but only to the extent . . ." provision, regarding the extent to which the chapter applies.<sup>21</sup>

### **Party standing**

The act gives party standing to participate in any financing-order proceeding to any party that participated in the proceeding in which phase-in costs were originally authorized for securitization or deferral.<sup>22</sup>

### **Bond terms and conditions**

The act permits the PUCO, in a financing order, to afford an EDU flexibility in establishing the terms and conditions for phase-in-recovery bonds to accommodate changes in market conditions (that involve repayment schedules, interest rates, financing costs, collateral requirements, and required debt service and other reserves) and the ability of the EDU, at its option, to effect a series of issuances of such bonds and correlated assignments, sales, pledges, or other transfers of phase-in-recovery property (discussed below). The act requires any changes made to bond terms and conditions to be in conformance with the financing order.<sup>23</sup>

### **Phase-in-recovery charges**

As described above, an approved financing order must authorize the EDU to impose and collect phase-in-recovery charges on customers in accordance with an "adjustment mechanism," to recover uncollected phase-in costs and approved phase-in-recovery bond financing costs.<sup>24</sup> The PUCO also must require, in a financing order, that after establishment of the final terms of each issuance of bonds, but prior to the issuance, the EDU must determine the phase-in-recovery charges that result from the adjustment mechanism in the financing order. The act specifies that these initial charges are final and effective upon the issuance of the bonds, without further PUCO action.<sup>25</sup>

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<sup>21</sup> R.C. 4928.233(C).

<sup>22</sup> R.C. 4928.232(A) and 4928.233(A) and (B).

<sup>23</sup> R.C. 4928.232(F).

<sup>24</sup> R.C. 4928.231(A)(2).

<sup>25</sup> R.C. 4928.232(H).

## Adjustments

The act requires the EDU to file with the PUCO at least annually, or more frequently as provided in the final financing order, a schedule applying the adjustment mechanism to the phase-in-recovery charges authorized under the order. The schedule must be based on estimates of consumption for each customer class "and other mathematical factors." With the schedule, the EDU must request approval to make the charge adjustments. The act requires that the PUCO's review of this request be limited to a determination of mathematical error in the application of the adjustment mechanism to the charges. The request is to be deemed approved and the adjustments are to go into immediate effect if the PUCO does not approve the request within 60 days.

The act specifies that no adjustment approved or deemed approved in any way affects the irrevocability of the final financing order.<sup>26</sup>

## Applicability

The act requires that the phase-in-recovery charges apply to both of the following customers, subject to the methodology approved in the final financing order:

- all EDU customers for as long as they remain customers, including customers who purchase electric generation service from competitive retail electric service providers (CRES providers);
- an EDU customer who subsequently receives retail electric distribution service from another EDU operating in the same service area, including by succession, assignment, transfer, or merger.

The act specifies that if a customer purchases generation service from a CRES provider, the EDU must collect the charges directly from that customer. The act specifies generally that phase-in-recovery charges are to be collected by the EDU or the EDU's successors or assignees, or a collection agent, in full through a charge that is separate and apart from the EDU's base rates.<sup>27</sup> (See **COMMENT**.)

## Nonbypassability

The act specifies that as long as phase-in-recovery bonds issued under a final financing order are outstanding and the related phase-in costs and financing costs have not been recovered in full, the charges authorized under the final financing order are

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<sup>26</sup> R.C. 4928.238.

<sup>27</sup> R.C. 4928.239(B) and (C).

nonbypassable. "Nonbypassable" means that the charges cannot be avoided by any customer or other person obligated to pay them.<sup>28</sup>

## **Retirement and refunding of bonds**

The act permits the PUCO, at the request of the EDU, to commence a proceeding and issue a subsequent financing order that retires and refunds phase-in-recovery bonds issued under a final financing order. The act requires that the subsequent financing order satisfy the act's requirements applicable to an original financing order.

Upon retirement of the refunded bonds and the issuance of new phase-in-recovery bonds, the act requires the PUCO to adjust the phase-in-recovery charges accordingly.<sup>29</sup>

## **Phase-in-recovery property**

As mentioned above, an approved financing order authorizes the creation of "phase-in-recovery property,"<sup>30</sup> which the act defines as the property, rights, and interests of an EDU or assignee under a final financing order, including the right to impose, charge, and collect the phase-in-recovery charges, and including the right to obtain adjustments to those charges, and any revenues, receipts, collections, rights to payment, payments, moneys, claims, or other proceeds arising from the rights and interests created under the final financing order.<sup>31</sup> The act permits a financing order to specify that the creation of phase-in-recovery property be simultaneous with the (1) sale of that property to an assignee as provided in the application and (2) pledge of the property to secure phase-in-recovery bonds.<sup>32</sup>

### **May be transferred, sold, conveyed, or assigned**

The act permits phase-in-recovery property to be transferred, sold, conveyed, or assigned to any person or entity not affiliated with the EDU or to any affiliate of the EDU created for the limited purpose of acquiring, owning, or administering that

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<sup>28</sup> R.C. 4928.239(A) and (B).

<sup>29</sup> R.C. 4928.236.

<sup>30</sup> R.C. 4928.231(A)(3).

<sup>31</sup> R.C. 4928.23(K).

<sup>32</sup> R.C. 4928.232(G).

property, issuing phase-in-recovery bonds under the final financing order, or a combination of these purposes.<sup>33</sup>

### **Transfer of an interest**

The act requires that a transfer of an interest in phase-in-recovery property may be created only when all of the following have occurred:

- The financing order has become final and taken effect.
- The documents evidencing the transfer of the property have been executed and delivered to the assignee.
- Value has been received for the property.

The act also states that any sale, assignment, or transfer of the property under a final financing order is an absolute transfer and true sale of, and not a pledge of or secured transaction relating to, the seller's right, title, and interest in, to, and under the property. But the act requires that the documents governing the transaction expressly state that the transaction is a sale or other absolute transfer.<sup>34</sup>

### **May be pledged to secure payment**

The act permits all or any portion of the phase-in-recovery property to be pledged to secure the payment of phase-in-recovery bonds, amounts payable to financing parties and bondholders, amounts payable under any ancillary agreement, and other financing costs.<sup>35</sup>

A "financing party" is defined as any trustee, collateral agent, or other person acting for the benefit of any bondholder, or any party to an ancillary agreement, the rights and obligations of which relate to or depend upon (1) the existence of phase-in-recovery property, (2) the enforcement and priority of a security interest in phase-in-recovery property, (3) the timely collection and payment of phase-in-recovery revenues, or (4) a combination of these factors.<sup>36</sup> The act defines "ancillary agreement" as any bond insurance policy, letter of credit, reserve account, surety bond, swap arrangement, hedging arrangement, liquidity or credit support arrangement, or other similar agreement or arrangement entered into in connection with the issuance of phase-in-

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<sup>33</sup> R.C. 4928.234(A).

<sup>34</sup> R.C. 4928.2313(A).

<sup>35</sup> R.C. 4928.234(B).

<sup>36</sup> R.C. 4928.23(H).

recovery bonds that is designed to promote the credit quality and marketability of the bonds or to mitigate interest-rate increases.<sup>37</sup>

### **Existing property right**

The act specifies that the phase-in-recovery property constitutes an existing, present property right, notwithstanding any requirement that the imposition, charging, and collection of phase-in-recovery charges depend on the EDU continuing to deliver retail electric distribution service or continuing to perform its servicing functions relating to the collection of the charges or on the level of future energy consumption. The act also specifies that the property exists regardless of whether the charges have accrued or have been billed or collected. Under the act, the property exists notwithstanding any requirement that the value or amount of the property is dependent on the future provision of service to customers by the EDU. Finally, the act specifies that phase-in-recovery property continues to exist until the bonds issued under the final financing order and all financing costs relating to the bonds are paid in full.<sup>38</sup>

### **Perfection of security interests**

The act specifies that a security interest in phase-in-recovery property is created, valid, and binding when the security agreement is executed and delivered, or when value is received for the phase-in-recovery bonds, whichever happens later. The security interest is to attach without any physical delivery of collateral or other act. Upon the filing of a financing statement with the Office of the Secretary of State, the lien of the security interest is to be valid, binding, and perfected against all parties having claims against the person granting the security interest, regardless of whether the parties have notice of the lien.<sup>39</sup> A "financing statement" is defined as a record composed of an initial financing statement and any filed record or records relating to the initial financing statement.<sup>40</sup> Also upon the filing of the financing statement, a transfer of an interest in the phase-in-recovery property is to be perfected against all parties having claims of any kind, other than creditors holding a prior security interest, ownership interest, or assignment in the property previously perfected. The act requires the Secretary of State to maintain these financing statements in the same manner as financing statements filed by a transmitting utility perfecting a security

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<sup>37</sup> R.C. 4928.23(A).

<sup>38</sup> R.C. 4928.234(C) and (D).

<sup>39</sup> R.C. 4928.2312(C).

<sup>40</sup> R.C. 4928.23(I); R.C. 1309.102 (not in the act).

interest in collateral under the law governing secured transactions; the filing of the statements is to be governed by the same applicable law.

The act states that a security interest in phase-in-recovery property is a continuously perfected security interest and has priority over any other lien, created by operation of law or otherwise, that may subsequently attach to that property "or those rights or interests" unless the holder of the lien has agreed in writing otherwise.

The act specifies that the priority of a security interest in phase-in-recovery property is not affected by commingling of phase-in-recovery revenues with other amounts.<sup>41</sup> "Phase-in-recovery revenues" is defined as all revenues, receipts, collections, payments, moneys, claims, or other proceeds arising from phase-in-recovery property.<sup>42</sup> Any pledgee or secured party is to have a perfected security interest in the amount of all phase-in-recovery revenues that are deposited in any cash or deposit account of the EDU in which the revenues have been commingled with other funds. The act requires that any other security interest that may apply to those funds be terminated when the funds are transferred to a segregated account for an assignee or a financing party.

The act also specifies that no application of the adjustment mechanism for phase-in-recovery charges affects the validity, perfection, or priority of a security interest in, or the transfer of, phase-in-recovery property under the final financing order.<sup>43</sup>

### **Characterization of phase-in-recovery property rights**

The act declares that the characterization of the sale, assignment, or transfer of phase-in-recovery property is an absolute transfer and true sale, and the corresponding characterization of the property interest of the purchaser is effective and perfected against all third parties, and may not be affected or impaired by, among other things, the occurrence of any of the following:

- commingling of phase-in-recovery revenues with other amounts;
- the retention by the seller of a partial or residual interest in the phase-in-recovery property or retention of the right to recover costs associated with taxes, franchise fees, or license fees imposed on the collection of phase-in-recovery revenues;
- any recourse that the purchaser or an assignee may have against the seller;

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<sup>41</sup> R.C. 4928.2312(C)(2) and (D)(1) and (2); R.C. 1309.501 (not in the act).

<sup>42</sup> R.C. 4928.23(L).

<sup>43</sup> R.C. 4928.2312(D)(2) and (3).

- any indemnification rights, obligations, or repurchase rights made or provided by the seller;
- the obligation of the seller to collect phase-in-recovery revenues on behalf of an assignee;
- the treatment of the sale, assignment, or transfer for tax, financial reporting, or other purposes;
- any application of the adjustment mechanism under the final financing order.<sup>44</sup>

### **Governing law**

The act states that the law governing the validity, enforceability, attachment, perfection, priority, and exercise of remedies with respect to the transfer of phase-in-recovery property, or creation of a security interest in the property, phase-in-recovery charges, or final financing order is to be the law set forth in the act, specifically R.C. 4928.23 to 4928.2318.<sup>45</sup> In a separate provision, the act states that, except for the law governing the Secretary of State's maintenance of financing statements for secured transactions, the creation, perfection, and enforcement of any security interest in phase-in-recovery property is to be governed by the act and not Ohio's commercial-transactions laws.<sup>46</sup> The act also states that its provisions setting forth the governing law control in the event of a conflict with any other law regarding the attachment, assignment, or perfection, the effect of perfection, or priority of any security interest in or transfer of phase-in-recovery property under a final financing order.<sup>47</sup>

### **Reference to applicable law in description**

The act requires a description of phase-in-recovery property in a transfer or security agreement and a financing statement to refer to the applicable section of the act (specifically R.C. 4928.2312) and the final financing order creating the property. This requirement applies to all purported transfers of, and all purported grants of, liens on or security interests in that property, regardless of whether the related transfer or

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<sup>44</sup> R.C. 4928.2313(B).

<sup>45</sup> R.C. 4928.2316(A).

<sup>46</sup> R.C. 4928.2312(A).

<sup>47</sup> R.C. 4928.2316(B).

security agreement was entered into, or the related financing statement was filed, before or after the act's effective date.<sup>48</sup>

### **Limitations on PUCO authority**

The act limits the PUCO's authority in exercising its powers and carrying out its duties regarding regulation and ratemaking by prohibiting the PUCO from doing any of the following:

- considering phase-in-recovery bonds issued under a final financing order to be the debt of the EDU;
- considering the phase-in-recovery charges under the final financing order to be revenue of the EDU;
- considering the phase-in costs or financing costs authorized under the final financing order to be the costs of the EDU;
- ordering or otherwise requiring, directly or indirectly, an EDU to use phase-in-recovery bonds to finance the recovery of phase-in costs;
- refusing to allow the recovery of phase-in costs solely because the EDU has elected or may elect to finance those costs through a financing mechanism other than the issuance of phase-in-recovery bonds.<sup>49</sup>

### **Phase-in-recovery bonds not general obligations**

The act states that phase-in-recovery bonds issued under a final financing order do not constitute a debt or a pledge of the faith and credit or taxing power of the state or of any county, municipal corporation, or any other political subdivision of Ohio. It further states that bondholders have no right to have taxes levied by the state or the taxing authority of any county, municipal corporation, or any other political subdivision for the payment of the principal of or interest on the bonds. The act also declares that the issuance of phase-in-recovery bonds does not, directly, indirectly, or contingently, obligate the state or any county, municipal corporation, or political subdivision to levy any tax or make any appropriation for payment of the principal of or interest on the bonds.<sup>50</sup>

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<sup>48</sup> R.C. 4928.2312(B).

<sup>49</sup> R.C. 4928.237.

<sup>50</sup> R.C. 4928.2314(B).

## **Exemption of bond revenues from local taxation**

The act specifies that the transfer and ownership of phase-in-recovery property and the imposition, charging, collection, and receipt of phase-in-recovery revenues are not subject to taxation or similar charges by the state or any county, municipal corporation, school district, local authority, or other subdivision.<sup>51</sup>

## **EDU default on payment of revenues**

If an EDU defaults on any required payment of phase-in-recovery revenues, a court, upon application by an interested party and without limiting any other remedies available to the applicant, must order the sequestration and payment of the revenues for the benefit of bondholders, any assignee, and any financing parties. The court's order is to remain in full force and effect notwithstanding any bankruptcy, reorganization, or other insolvency proceedings with respect to the EDU or any affiliate.

An EDU's customers are to be held harmless for an EDU's failure to remit any required payment of phase-in-recovery revenues.

The act states that an EDU's failure to remit any required payment of phase-in-recovery revenues in no way is to affect the phase-in-recovery property or the rights to impose, collect, and adjust phase-in-recovery charges. The act further states that phase-in-recovery property and the interests of an assignee, bondholder, or financing party in that property under a financing agreement are not subject to setoff, counterclaim, surcharge, or defense by the EDU or any other person, including as a result of the EDU's failure to provide past, present, or future services, or in connection with the bankruptcy, reorganization, or other insolvency proceeding of the EDU, any affiliate, or any other entity.<sup>52</sup>

## **EDU successor duties**

Any successor to an EDU subject to a final financing order is to be bound by the act's requirements. The successor must perform and satisfy all of the EDU's obligations under the final financing order, in the same manner and to the same extent as the EDU, including the obligation to collect and pay phase-in-recovery revenues. The act grants the successor the same rights of the EDU, in the same manner and to the same extent.<sup>53</sup>

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<sup>51</sup> R.C. 4928.2314(A).

<sup>52</sup> R.C. 4928.2310.

<sup>53</sup> R.C. 4928.2311.

## **Prohibition of state interference**

The act includes a declaration that the state pledges to and agrees with the bondholders, any assignee, and any financing parties under a final financing order that the state will not take or permit any action that impairs the value of phase-in-recovery property or revises the phase-in costs for which recovery is authorized. The declaration continues: that the state pledges and agrees that, except for the PUCO's review of adjustments to phase-in-recovery charges, the state will not reduce, alter, or impair phase-in-recovery charges that are for the benefit of the bondholders, assignees, or financing parties, until any principal, interest, and redemption premium (in respect of phase-in-recovery bonds), and all financing costs and amounts to be paid to an assignee or financing party under an ancillary agreement are paid or performed in full.

The act permits any person who issues phase-in-recovery bonds to include the above pledge in the bonds, ancillary agreements, and documentation related to the issuance and marketing of the bonds.<sup>54</sup>

## **Interaction with governmental aggregation**

The act requires that phase-in-recovery charges be allocated consistently with Ohio's governmental aggregation law, which requires the PUCO to make a proportionate benefit determination for aggregation groups subject to an ESP or MRO. Specifically, this law states that aggregation customers are responsible only for such portion of a surcharge under an ESP or MRO that is proportionate to the benefits, as determined by the PUCO, that the aggregation group receives.<sup>55</sup> The act also specifies that Ohio's aggregation law must not result in less than the full and timely imposition, charging, collection, and adjustment by an EDU, its assignee, or any collection agent, of the phase-in-recovery charges.<sup>56</sup>

## **Repealed laws have no effect on actions taken**

The act specifies that if any of its provisions (specifically R.C. 4928.23 to 4928.2318) is held to be invalid or is superseded, replaced, repealed, or expires for any reason, the occurrence shall not affect any action allowed under those provisions that is taken prior to that occurrence by the PUCO, an EDU, an assignee, a collection agent, a

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<sup>54</sup> R.C. 4928.2315.

<sup>55</sup> R.C. 4928.20(I), 4928.231(A)(2) and (B)(6), 4928.232(E)(4), and 4928.238(B).

<sup>56</sup> R.C. 4928.20(I).

financing party, a bondholder, or a party to an ancillary agreement. The act further states that any such action remains in full force and effect.<sup>57</sup>

### **Assignee/financing party not an EDU**

The act states that an assignee or financing party is not to be considered an EDU or person providing electric service by virtue of engaging in the transactions described in the act.<sup>58</sup>

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## **COMMENT**

The act is unclear as to who is required to collect phase-in-recovery charges when a customer of an EDU subject to a final financing order subsequently receives distribution service from another EDU operating in the same service area, including by succession, assignment, transfer, or merger. Though the act states that phase-in-recovery charges are to be collected by the EDU or the EDU's successors or assignees, or a collection agent, it is not clear (1) whether this provision applies when a customer subsequently receives distribution service from another EDU operating in the same service area; and, if the provision does apply, (2) which EDU the provision is referring to – the one subject to the final financing order or the one who subsequently provides distribution service to the customer.<sup>59</sup>

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## **HISTORY**

<b>ACTION</b>	<b>DATE</b>
Introduced	11-01-11
Reported, H. Public Utilities	12-14-11
Passed House (87-0)	12-14-11
Passed Senate (33-0)	12-14-11
House concurred in Senate amendments (84-0)	12-14-11

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<sup>57</sup> R.C. 4928.2317.

<sup>58</sup> R.C. 4928.2318.

<sup>59</sup> R.C. 4928.239(B) and (C).