



## *Final Analysis*

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Legislative Service Commission

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**Sens. Johnson, Finan, Blessing, Herington, Armbruster, Hottinger, Spada, Wachtmann, Mumper, Gardner, Kearns**

**Reps. Mead, Olman, Trakas, Schuler, Goodman, Hoops, Cates, Mottley, Terwilleger, Harris, Core, Brading, Womer Benjamin, Tiberi, Corbin, Thomas, Van Vyven, Winkler, O'Brien, Opfer, Evans, Perz, Hood, Amstutz, Britton, Barrett**

**Effective date: July 6, 1999; certain provisions effective other than that date**

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### **ACT SUMMARY**

#### **Market structure, consumer protection, environmental, and transitional provisions**

- Designates January 1, 2001, as the starting date of competitive retail electric service, but authorizes the Public Utilities Commission to delay that date for an electric utility by up to six months for extreme technical conditions and after application by the utility, notice, and an opportunity to be heard.
- Authorizes customer choice in the selection of suppliers of competitive retail electric services, in part, by removing, as of a specified date, the exclusive franchises of electric utility suppliers with respect to those services, and authorizing electric cooperatives to elect to eliminate their exclusive franchises.
- Declares electric generation service, aggregation service, power marketing, and power brokering as competitive retail electric services as of the starting date of competitive retail electric service.
- Authorizes ancillary service, metering service, and billing and collection service to be declared competitive services on or after the starting date, if specific conditions are met.

- Provides for the consolidation of low-income customer assistance programs and the creation of a weatherization program targeted to low-income housing, and an energy efficiency revolving loan program.
- Subjects competitive services to minimum service standards and generally requires suppliers of competitive services to be certified as to their financial, managerial, and technical capability.
- Continues regulation of electric transmission and distribution services by the Commission.
- Requires comparable and nondiscriminatory access to retail electric transmission and distribution services of electric utilities.
- Subjects noncompetitive services to minimum service standards focused on service quality, safety, and reliability.
- Requires corporate separation between competitive and noncompetitive retail electric service operations and between noncompetitive retail electric service and nonelectric products and services.
- Requires independent operation of transmission facilities.
- Provides for consumer education, universal service, and the consolidation of the state's low-income customer assistance programs.
- Authorizes an energy efficiency revolving loan program for residential, small commercial and small industrial business, local government, educational institution, nonprofit entity, and agricultural customers; and authorizes the disclosure of the generation resource mix and environmental characteristics of power supplies.
- Contemplates a market development period for an incumbent electric utility that ends on December 31, 2005.
- Initiates during the market development period certain transitional mechanisms pertaining to the transition of consumers, utility employees, and incumbent utilities to the restructured market, including the opportunity for utilities to receive transition revenues.

- Bases transition revenues on allowable transition costs of the electric utility as determined by the Commission pursuant to legislative standards that include recovery of those costs, including recovery of the revenue requirements associated with regulatory assets potentially through December 31, 2010, and that include netting of those costs.
- Authorizes collection of transition revenues through (1) rates frozen at current levels except for specified allowable adjustments and paid by a customer supplied generation service by its electric distribution utility, or through (2) a transition charge paid by a customer supplied generation service by another entity on each kilowatt hour of electricity delivered by an electric distribution utility and registered on the customer's meter or, if no meter is used, based on estimated kilowatt hours.
- Requires a rate reduction for residential customers of an incumbent electric utility receiving transition revenues, in the amount of 5% of the utility's unbundled generation rate.

**Tax and replacement payment provisions**

- Revises the true value determination of an electric or rural electric company's production equipment purchased, transferred, or placed into service after the act's effective date.
- Reduces to 25% the tax assessment rate for all tangible personal property of an electric company or a rural electric company, except transmission and distribution property, beginning in tax year 2001.
- Revises the apportionment formula for electric company production equipment.
- On and after May 1, 2001, levies a kilowatt-hour tax on electric distribution companies at a variable rate that decreases with the kilowatt-hours distributed to an end user.
- Permits certain commercial and industrial electricity purchasers to self-assess the tax at the rate of \$.00075 per kilowatt hour and 4% of the total price of electricity delivered, with adjustments to the 4% rate through 2007.

- Exempts the federal government, end users that enrich uranium, and "qualified end users" from paying the kilowatt-hour tax.
- Based on a target of \$552 million for kilowatt-hour tax collections each year, requires that 37% of the kilowatt-hour tax be deposited in the Local Government or School District Property Tax Replacement Funds, created by the act, to be distributed to school districts and other local governments to replace tax revenues lost due to the reduction in the assessment rate for tangible personal property, and 63% of the tax be split among the General Revenue Fund (GRF), Local Government Fund, and the Local Government Revenue Assistance Fund.
- Reduces the GRF share of the tax if the \$552 million annual target is not met.
- Requires that a portion of the Local Government and School District Property Tax Replacement Funds be distributed to county auditors and treasurers to reimburse them for administrative fee losses.
- Removes electric companies and rural electric companies from the public utility excise tax on gross receipts, and requires electric companies and combined companies to pay the corporation franchise tax, beginning in tax year 2002.
- For determination of net income under the corporation franchise tax, adjusts electric company and combined company income for certain "qualifying assets."
- Creates a new sales factor equation to use in determining when net income arising from sales of electric transmission and distribution services may be apportioned to Ohio and taxed under the corporation franchise tax.
- Permits electric companies to apply the Ohio coal tax credit against their corporation franchise or state income tax liability.
- Provides that a taxpayer may not claim a tax credit against corporation franchise or state income tax liability for certain new manufacturing machinery and equipment used to transmit or distribute electricity, but may claim the credit after a certain time period and under certain

circumstances if the machinery and equipment is used to generate electricity.

- Subjects electric companies and combined companies to municipal income taxes beginning January 1, 2002.
- Provides that sales of electricity will continue to be exempt from the sales and use tax, but changes the exemption to reflect a wider variety of sales of electricity-related personal property and services that qualify for the exemption.

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## CONTENT AND OPERATION

### OVERVIEW

#### *General operation of the act*

Prior to the act, most Ohioans received retail electric service from one of eight for-profit public utilities regulated by the Public Utilities Commission (PUCO), or from one of the 26 nonprofit electric cooperatives whose owners are also its customers. Each such supplier provided service within a "certified territory" for which it held an exclusive franchise in conjunction with a duty to provide adequate facilities to serve that territory. This franchise and "obligation to serve" were established pursuant to statutes effective in 1978.

Each such supplier provided or procured all of the components of retail electric service for its customers, such as generation, transmission, and distribution services. The eight for-profit utilities served roughly 91% of Ohio's electricity market with generation, transmission, and distribution facilities each owned. The 26 cooperatives served about 40% of Ohio's land area, but accounted for only about 4% of electric sales. Buckeye Power, a nonprofit entity owned by the 26 cooperatives, supplied all the electricity delivered to their customers.

The extent of competition for retail electric service in Ohio consisted of self- or co-generation efforts by individual consumers and of utility service provided by 84 municipal electric utilities pursuant to authority of municipal corporations under the Ohio Constitution (Sections 4 and 6, Article XVIII). The 84 municipal electric utilities had about 5% of the state's electric market and covered about 1% of the geographic area. Municipal utilities primarily were distribution utilities. While some operated local generating facilities or formed joint ventures for that purpose, most of the electricity they supplied came from the open market and through a nonprofit wholesale supplier they formed, called American Municipal Power-Ohio.

The act permits greater competition in retail electric service for customers of Ohio's electric utilities, and provides for the restructuring of that industry. It authorizes customer choice in the selection of suppliers of competitive retail electric services, in part by removing, as of the starting date of competitive retail electric service, the exclusive franchises of electric utilities with respect to those services and, thus, permitting any supplier to compete for customers desiring those services. The act anticipates service being provided by other suppliers (generally termed "electric services companies") and by authorized "governmental aggregators," in addition to the current for-profit, cooperative, and municipal suppliers.

Under the act, electric generation, aggregation, power marketing, and power brokering services are declared competitive retail electric services as of the starting date of competitive retail electric service. Metering service, billing and collection service, or certain services ancillary to transmission or generation service may be designated a competitive service on or after that date if specific conditions are met. The act subjects competitive services to minimum service standards and generally requires suppliers of competitive services to be certified as to their financial, managerial, and technical capability.

Electric transmission and distribution services are not authorized to be competitive services under the act, and their provision by electric utilities will continue under PUCO regulation. Transmission and distribution services of electric utilities are subject to the act's requirements of comparable and nondiscriminatory access to those services. Additionally, noncompetitive services are subject to minimum service standards focused on service quality, safety, and reliability.

Corporate separation is required between competitive and noncompetitive retail electric service operations and between noncompetitive retail electric service and nonelectric products and services. Independent operation of transmission facilities also is required.

The act also provides for consumer education, universal service, and the consolidation of the state's low-income customer assistance programs. It also authorizes an energy efficiency revolving loan program for certain private and public customers--specifically, residential, small commercial and small industrial business, local government, educational institution, nonprofit entity, and agricultural customers. Additionally, the act authorizes the disclosure of the generation resource mix and environmental characteristics of power supplies.

The act contemplates a market development period for an incumbent electric utility that ends on December 31, 2005, but may end earlier if certain

conditions are met. During the market development period, the act initiates certain transitional mechanisms pertaining to the transition of consumers, utility employees, and incumbent utilities to the restructured market. Those mechanisms include the opportunity for utilities to receive transition revenues during the period based on allowable transition costs of each electric utility as determined by the PUCO pursuant to legislative standards. The standards include, among other things, the recovery of those costs, including the recovery of revenue requirements associated with regulatory assets, potentially through December 31, 2010, and include netting of those costs.

The transition revenues will be collected through (1) rates frozen at their current levels except for specified allowable adjustments and paid by a customer supplied generation service by its electric distribution utility or through (2) a transition charge paid by a customer supplied generation service by another entity on each kilowatt hour of electricity delivered by an electric distribution utility as registered on the customer's meter or, if no meter is used, based on estimated kilowatt hours (excluding electricity produced and consumed by a self-generator). The act also provides for a 5% reduction in the unbundled generation rate payable by residential customers of an electric utility.

The act contains various tax changes that affect electric companies and rural electric companies. The act revises the method used to determine the true value of an electric or rural electric company's production equipment and changes how electric company production equipment is apportioned. The act also reduces the tax assessment rates for all electric company and rural electric company tangible personal property, except transmission and distribution property, to 25% of true value. The act levies a kilowatt-hour tax on electric distribution companies to replace the revenues lost from that assessment rate reduction. A substantial part of the revenues received from the kilowatt-hour tax will be distributed to school districts and other local governments.

The act changes the public utility excise tax law so that electric companies and rural electric companies are no longer subject to that tax. Instead, electric companies and combined companies must pay the state corporation franchise tax and municipal income taxes.

The act also contains a "severability clause," which generally provides that, if any provision of the act is held invalid, the invalidity does not affect other provisions of the act that can be given effect without the invalid provision (Section 20).

### **Organization of the act and final analysis**

The act contains provisions broadly categorized as provisions regarding market structure, consumer protection, the environment, transitional mechanisms, and taxation. Most of the tax law changes are found in the Title 57 sections of the act. Generally, the remaining sections, especially new Chapter 4928., cover the market structure, consumer protection, environmental, and transitional provisions.

This final analysis reflects those general topics. The first part of the analysis discusses market structure changes. The second part covers consumer protection provisions. The third part discusses environmental provisions. The fourth part explains the transitional provisions of the act. The fifth part discusses the tax and property tax replacement payment provisions.

### **MARKET STRUCTURE PROVISIONS**

The market structure provisions of the act include provisions regarding the timing of retail customer choice; the state policy regarding customer choice and industry restructuring; and the designation of services as noncompetitive or competitive and the elimination of certified territories for competitive services. They also include provisions regarding state regulation of the retail electric services of an electric utility and other suppliers; allowable pricing of services; requisite corporate separation and independent transmission; market monitoring, market power abuse, rule-making, and enforcement authority; power of appropriation; power siting; long-term forecasting; and governmental aggregation.

#### **Starting date of competitive retail electric service and other time periods**

(sec. 4928.01(A)(17) and (29) and (C); Sections 2, 5, and 9)

Generally, the act's provisions are keyed to the "starting date of competitive retail electric service." The act establishes January 1, 2001, as that starting date. However, it authorizes the PUCO to issue an order prior to that date delaying the starting date for an electric utility by a specified number of days not to exceed six months, but only for extreme technical conditions precluding the start of competitive retail electric service on January 1, 2001, and after application by the electric utility, notice, and an opportunity to be heard. (Sec. 4928.01(A)(29) and (C).)

Generally, the new market structure, consumer protection, environmental protection, and transitional provisions of the act take effect in accordance with the normal 90-day period for Ohio legislation, but, due to express references in many of those provisions to the "starting date of competitive retail electric service," the provisions are operative with respect to that variable starting date. Too, under the

act, the effective date of a number of amendments and repeals of existing laws relating to market structure recognizes the potential of a delayed starting date as authorized under the act (Sections 2, 5, and 9).

The act additionally refers to a "market development period." This period is defined as the period of time beginning on the starting date of competitive retail electric service and ending on the applicable date for that utility as specified in the "transition revenues" portion of the act, irrespective of whether the utility applies to receive transition revenues (sec. 4928.01(A)(17)).

**State policy regarding customer choice and industry restructuring**

(secs. 4928.01(A)(27), 4928.02, and 4928.06(A))

The act declares a state policy with respect to "retail electric service," which is defined under the act as any service involved in supplying or arranging for the supply of electricity to ultimate consumers in Ohio, from the point of generation to the point of consumption. It expressly includes one or more of the following "service components": generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service. (Sec. 4928.01(A)(27).)

The act provides that it is the policy of the State of Ohio to do the following throughout Ohio beginning on the starting date of competitive retail electric service:

- (1) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
- (2) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;
- (3) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;
- (4) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service;
- (5) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote effective customer choice of retail electric service;

(6) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(7) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa;

(8) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(9) Facilitate the state's effectiveness in the global economy. (Sec. 4928.02.)

The act requires that the PUCO ensure that this state policy is effectuated (sec. 4928.06(A)).

**Service providers recognized by the act**

(secs. 4928.01(A)(2), (5), (6), (7), (9), (11), (13), (20), (30), and (33) and 4905.03(A)(4); Sections 2 and 5)

The act recognizes several types of service providers in a restructured electric industry: an electric utility, electric cooperative, and electric services company, each of which are specifically acknowledged as types of electric light companies; a governmental aggregator; and a municipal electric utility. The act also recognizes a "customer-generator," defined as a user of a net metering system (sec. 4928.01(A)(30)), and a "self-generator," defined as an entity in Ohio that owns an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to retail electric service providers, whether the facility is installed or operated by the owner or by an agent under a contract (sec. 4928.01(A)(33)).

Under the act, an "electric utility" is an electric light company that is engaged on a for-profit basis in the business of supplying a noncompetitive retail electric service in Ohio or in the businesses of supplying both a noncompetitive and a competitive retail electric service. "Electric utility" excludes a municipal electric utility or a billing and collection agent. (Sec. 4928.01(A)(11).) An "electric distribution utility" is a specific type of electric utility--that is, an electric utility that supplies at least retail electric distribution service (sec. 4928.01(A)(6)).

An "electric cooperative" under the act is a not-for-profit electric light company that both is or has been financed in whole or in part under specified federal rural electrification law and owns or operates facilities in Ohio to

generate, transmit, or distribute electricity, or a not-for-profit successor of such company (sec. 4928.01(A)(5)).

An "electric services company" is defined as an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in Ohio. It expressly includes a power marketer, power broker, aggregator, or independent power producer but expressly excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent. (Sec. 4928.01(A)(9).)

Under new Chapter 4928. of the act, "electric light company" incorporates the definition of that term in Public Utility Law and expressly includes an electric services company, but excludes any self-generator to the extent it consumes electricity it so produces or to the extent it sells for resale electricity it so produces (sec. 4928.01(A)(7)). The act also changes the definition in former law so that "electric light company" not only means any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, that is engaged in the business of supplying electricity for light, heat, or power purposes to consumers within Ohio, but expressly includes the business of supplying electric transmission service for electricity delivered to consumers in Ohio and excludes a regional transmission organization approved by the Federal Energy Regulatory Commission (FERC) (sec. 4905.03(A)(4)).

Under the act, "municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity (sec. 4928.01(A)(20)).

Further, a "governmental aggregator" is defined as a legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners acting as an aggregator for the provision of a competitive retail electric service under authority otherwise conferred under the act (see "**Governmental aggregation**," below) (sec. 4928.01(A)(13)).

A "billing and collection agent" is defined under the act as a fully independent agent, not affiliated with or otherwise controlled by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under the act, to the extent that the agent is under contract with the utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on its behalf (sec. 4928.01(A)(2)).

### **Customer choice authority**

(secs. 4928.01(A)(1) and (B), 4928.03, 4928.04(A) and (B), 4928.05(B), and 4933.81(F); Sections 2 and 5)

Customer choice of competitive retail electric service suppliers is effected in two ways: by the act's designation of what are competitive and what are noncompetitive retail electric services, and by the act's amendment of the Certified Territories Law. Generally, under the act, on and after the starting date of competitive retail electric service, there is a lesser degree of state regulation of a competitive retail electric service than of a noncompetitive retail electric service. The act expressly states that nothing in it affects existing PUCO authority to regulate an electric light company in Ohio or an electric service supplied in Ohio prior to that starting date (sec. 4928.05(B)).

### **Designation of competitive and noncompetitive services**

The act provides that a retail electric service component is deemed a competitive retail electric service if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to a PUCO order as authorized under the act. Otherwise, the service component is deemed a noncompetitive retail electric service. (Sec. 4928.01(B).)

The act expressly declares the following as competitive retail electric services beginning on the starting date of competitive retail electric service: retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility. Such consumers may obtain those services, subject to the act, from any supplier or suppliers. In accordance with a filing under the Certified Territories Law, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of any electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain, subject to the act, from any supplier or suppliers. (Sec. 4928.03.)

Additionally, the act authorizes the PUCO to declare by order that retail ancillary, metering, or billing and collection service supplied to consumers within the certified territory of an electric utility on or after the starting date of competitive retail electric service is a competitive retail electric service that the consumers may obtain from any supplier or suppliers subject to the act (sec. 4928.04(A)). An "ancillary service" is any function necessary to the provision of electric transmission or distribution service to a retail customer. The term includes, but is not limited to, scheduling, system control, and dispatch services; reactive supply from generation resources and voltage control service; reactive supply from transmission resources service; regulation service; frequency response

service; energy imbalance service; operating reserve-spinning reserve service; operating reserve-supplemental reserve service; load following; back-up supply service; real-power loss replacement service; dynamic scheduling; system black start capability; and network stability service. (Sec. 4928.01(A)(1).)

The PUCO may issue an order declaring retail ancillary, metering, or billing and collection service competitive only if it first determines, after investigation and public hearing, either of the following:

- (1) There will be effective competition with respect to the service.
- (2) The customers of the service have reasonably available alternatives.

The PUCO must initiate a proceeding on or before March 31, 2003, on the question of the desirability, feasibility, and timing of any such competition. (Sec. 4928.04(A).)

In carrying out this authority, the PUCO may prescribe different classifications, procedures, terms, or conditions for different electric utilities and for the retail electric services they provide that the PUCO so declares competitive. However, these classifications, procedures, terms, or conditions must be reasonable and not confer any undue economic, competitive, or market advantage or preference upon any electric utility. (Sec. 4928.04(B).)

Further, the act provides that, beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, each Ohio consumer and the suppliers to a consumer have comparable and nondiscriminatory access to the noncompetitive retail electric services of an electric utility in Ohio within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the state policy specified in the act (see "*State policy regarding customer choice and industry restructuring*," above) (sec. 4928.03).

#### *Elimination of certified territories for competitive services*

Ohio's Certified Territories Law was enacted in 1978, and, in brief, it grants an exclusive service franchise to for-profit electric suppliers and not-for-profit electric suppliers (excluding municipal corporations) in conjunction with imposing an obligation on those suppliers to provide adequate facilities for service to their certified territories (secs. 4933.81 to 4933.90).

Under the act, customer choice of suppliers for competitive retail electric services is authorized in part by changes in the definition of "electric service" in the Certified Territories Law. The act defines the term differently for for-profit suppliers and not-for-profit suppliers, with the result that certified territories for

competitive retail electric services of for-profit suppliers are eliminated, and certified territories for competitive services of not-for-profit suppliers are eliminated only at the specific election of the supplier. (Sec. 4933.81(F).)

Under the act, "electric service" is redefined for purposes of the Certified Territories Law so that, as of the starting date of competitive retail electric service, the term excludes, in the case of a for-profit electric supplier, a competitive retail electric service as defined under the act (sec. 4933.81(F)).

In the case of a not-for-profit electric supplier and beginning on that starting date, "electric service" is defined as excluding any service component of a competitive retail electric service that is specified in an irrevocable filing the supplier makes with the PUCO, for informational purposes only, to eliminate permanently its certified territory as to that service component. Such a service component may include retail ancillary, metering, or billing and collection service irrespective of whether that service component has or has not been declared competitive under the act by the PUCO (see "*Designation of competitive and noncompetitive services*," above. (Sec. 4933.81(F).)

The filing by a not-for-profit supplier must specify the date on which its certified territory is eliminated as to the service component. Upon receipt of the filing by the PUCO, the not-for-profit electric supplier's certified territory is eliminated permanently as to the service component specified in the filing as of the date specified in the filing. (Sec. 4933.81(F).)

***State and municipal regulation of the retail electric services of an electric utility or electric services company***

(secs. 4905.402, 4905.46, 4928.05(A), 4928.06(B), (D), and (F), 4928.15, and 4935.03; specified additional sections in Chapters 1551., 4905., 4909., 4913., and 4933.; Sections 2, 5, 9, and 22)

Under the act, competitive retail electric services supplied by an electric utility or electric services company are removed from regulation by a municipal corporation under continuing law now limited to regulation of other services within municipal boundaries (Chapter 743.) (sec. 4928.05(A)(1)).

Competitive services supplied by an electric utility or electric services company generally also are removed from PUCO regulation on and after the starting date of competitive retail electric service. The act states that a competitive service supplied by an electric utility or electric services company is not subject to PUCO supervision and regulation under Public Utility Law (Chapters 4901. to 4909., 4933., 4935., or 4963.). Exceptions to this general policy consist of those exceptions otherwise authorized under the act (for example, a supplier certification

requirement (see "Supplier certification," below)) and of specified statutes in continuing Public Utility Law concerning certified territories, below cost or free service, and assessments for PUCO funding purposes and, only to the extent related to service reliability and public safety, statutes concerning safety inspections, energy emergencies, and line construction and maintenance. The act states that the PUCO's authority to enforce those excepted provisions with respect to a competitive retail electric service must be such authority as is provided for their enforcement under continuing Public Utility Law and the act. (Sec. 4928.05(A)(1).)

Further, in keeping with the designation of generation as a competitive service and the limitations on the PUCO's authority regarding a competitive service, the act makes a number of changes to Public Utility Law as of the starting date of competitive retail electric service, to remove certain duties of the PUCO and certain limitations relating to generation service, such as provisions relating to the electric fuel component in utility rates and to environmental compliance facilities, and such as a requirement of a semiannual report to the PUCO on short-term electricity demand and supply (secs. 1551.33, 1551.35, 4905.01, 4905.03, 4905.14, 4905.301, 4905.40, 4905.42, 4905.66 to 4905.70, 4909.01, 4909.05, 4909.15, 4909.157 to 4909.159, 4909.191 to 4909.193, 4913.01 to 4913.07, 4933.27, and 4933.34; Sections 2, 5, and 9).

Additionally, under the act, if the PUCO determines, on or after the starting date of competitive retail electric service, that there is a decline or loss of effective competition with respect to a competitive retail electric service of an electric utility, which service was declared competitive by PUCO order issued under the act (retail ancillary, metering, or billing and collection service), the PUCO must ensure that that service is provided at compensatory, fair, and nondiscriminatory prices, terms, and conditions (sec. 4928.06(B)). The procedures and criteria the PUCO must use in determining effective competition for that purpose are the same as the procedures and criteria specified in "Monitoring retail electric services," below (sec. 4928.06(D)). The act requires an electric light company to provide the PUCO with such information as the PUCO considers necessary to carry out this duty. The PUCO must take such measures as it considers necessary to protect the confidentiality of that information. (Sec. 4928.06(F).)

As to any noncompetitive retail electric service, the act provides that, on and after the starting date of competitive retail electric service, a noncompetitive retail electric service supplied by an electric utility is subject to supervision and regulation by the PUCO under Public Utility Law (Chapters 4901. to 4909., 4933., 4935., and 4963.) and the act, to the extent that authority is not preempted by federal law. The PUCO's authority to enforce those provisions with respect to a noncompetitive retail electric service is the authority provided under continuing

law and the act, to the extent the authority is not preempted by federal law. (Sec. 4928.05(A)(2).)

The act further requires the PUCO to exercise its jurisdiction with respect to the delivery of electricity by an electric utility in Ohio on or after the starting date of competitive retail electric service so as to ensure that no aspect of the delivery of electricity to consumers in Ohio that consists of a noncompetitive retail electric service is unregulated (sec. 4928.05(A)(2)).

Additionally, the act provides the PUCO with authority over electric utility mergers. Specifically, it requires PUCO approval of any acquisition of control of a domestic electric utility or a holding company controlling a domestic electric utility. The procedures and standards for approval are the same as those that apply to approval under continuing law in the case of a domestic telephone company or a holding company controlling a domestic telephone company. Under the act, this merger authority applies only to merger applications filed with the Federal Energy Regulatory Commission (FERC) after the starting date of competitive retail electric service. The act states that this limitation does not affect the PUCO's authority to consider and address merger applications with respect to a domestic electric utility or holding company controlling a domestic electric utility that are filed with FERC on or before that time. (Sec. 4905.402; Section 22.)

The act also removes restrictions and PUCO regulation regarding the investments and lending activities of public utilities that are a part of an electric utility holding company exempt from federal law governing public utility holding company activities; and removes restrictions on the investment and lending activities of such an exempt electric utility holding company that controls or holds the power to vote 10% or more of the outstanding securities of an electric light company or that is itself an electric light company (sec. 4905.46(B) to (D)).

Regarding the state's authority in a declared energy emergency, the act adds both of the following to the list of suppliers to whom the Governor may issue an order to sell energy to alleviate hardship or acquire emergency supplies to meet emergency needs: any supplier subject to certification under the act and any electric power producer or marketer (sec. 4935.03(A)(3)).

#### **Distribution service requirements of an electric utility**

The act prohibits an electric utility, except as otherwise provided in the act's transitional provisions, from supplying noncompetitive retail electric distribution service in Ohio on or after the starting date of competitive retail electric service except pursuant to a schedule for that service that is consistent with the state policy specified in the act and filed with the PUCO under continuing law pertaining to initiation of rate-making proceedings (sec. 4909.18). The schedule

must provide that electric distribution service under the schedule is available to all consumers within the utility's certified territory and to any supplier to those consumers on a nondiscriminatory and comparable basis. Distribution service rates and charges under the schedule must be established in accordance with Public Utility Law (Chapters 4905. and 4909.). The schedule must include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the PUCO. (Sec. 4928.15(A).)

**Transmission and ancillary service requirements of an electric utility**

The act prohibits an electric utility, except as otherwise provided in the act's transitional provisions and except as preempted by federal law, from supplying the transmission service or ancillary service component of noncompetitive retail electric service in Ohio on or after the starting date of competitive retail electric service except pursuant to a schedule for that service component that is consistent with the state policy specified in the act and filed with the PUCO under continuing law regarding initiation of rate-making proceedings (sec. 4909.18). The schedule must provide that transmission or ancillary service under the schedule is available to all consumers and to any supplier to those consumers on a nondiscriminatory and comparable basis. Service rates and charges under the schedule must be established in accordance with Public Utility Law (Chapters 4905. and 4909.). (Sec. 4928.15(B).)

**State regulation of the retail electric services of other suppliers**

(sec. 4928.05(A))

With the exception of subjecting municipal corporations and electric cooperatives to supplier certification and the minimum service requirements that must be met by a certified supplier of competitive retail electric services (see "**Supplier certification**" and "**Minimum service requirements for competitive services of certified suppliers**," below), the act generally makes no change in the current exemption of electric cooperatives and municipal electric utilities from PUCO regulation.

The act expressly states, however, that, on and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative is not subject to PUCO supervision and regulation under Public Utility Law (Chapters 4901. to 4909., 4933., 4935., or 4963.), except as otherwise expressly provided under the act (for example, the supplier certification requirement (in "**Supplier certification**," below) (sec. 4928.05(A)(1)).

Further, on and after that starting date, a noncompetitive retail electric service supplied by an electric cooperative is not subject to PUCO supervision and regulation under Public Utility Law (Chapters 4901. to 4909., 4933., 4935., and 4963.), except the Certified Territories Law and provisions regarding energy emergencies. The PUCO's authority to enforce those excepted sections with respect to a noncompetitive retail electric service of an electric cooperative is such authority as is provided for their enforcement under continuing law. (Sec. 4928.05(A)(2).)

### **Pricing of services**

(secs. 4928.07 and 4905.34; Sections 2 and 5)

The act requires each electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under the act, to the maximum extent practicable on or after the starting date of competitive retail electric service, to separately price competitive retail electric services, and to itemize the prices on the bill of a customer or otherwise disclose the separate prices to the customer. Although a competitive retail electric service must be supplied to any consumer on those bases, such an electric utility, electric services company, electric cooperative, or governmental aggregator may repackage a competitive retail electric service on or after the starting date and offer it on a bundled basis with other retail electric services to meet consumer preferences. Repackaging by an electric utility is subject to continuing law regarding nondiscriminatory pricing (secs. 4905.33 and 4905.35). Repackaging by such an electric services company, electric cooperative, or governmental aggregator is subject to a similar limitation that no such entity, as to a competitive retail electric service for which the company, cooperative, or aggregator is subject to certification, must furnish free service or service for less than actual cost for the purpose of destroying competition. (Sec. 4928.07; see also 4928.05(A)(1).)

The act additionally limits, as of the starting date of competitive retail electric service, the statutory authority of a public utility or railroad to grant its property for a public purpose or grant reduced rates or free service to the United States, the State of Ohio, or any Ohio political subdivision; for charitable purposes, fairs, or expositions; to a law enforcement officer residing in free housing as authorized under existing law; or to any officer or employee of the utility or railroad or the officer's or employee's family. As of that starting date, the act permits the exercise of that authority except as provided in the act and in two statutes, for this purpose not significantly changed by the act, concerning nondiscriminatory pricing, which the act references. (Sec. 4905.34; Sections 2 and 5.)

One of those statutes generally prohibits a public utility from giving any undue or unreasonable preference or advantage to any consumer or subjecting the consumer to any undue or unreasonable prejudice or disadvantage (sec. 4905.35, not in the act). The other statute prohibits a public utility from charging consumers a different amount for a like and contemporaneous service under substantially the same circumstances and conditions, or furnishing free service or service for less than actual cost for the purpose of destroying competition (sec. 4905.33). The act would appear, in part, to reverse the effect of an Ohio Supreme Court decision in which the Court held that a utility's right to enter into a reduced-rate utility service contract with a political subdivision under the statute amended by the act is not limited by the statutory provision prohibiting below-cost service contracts that attempt to destroy competition (*Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466).

### **Corporate separation**

(secs. 4928.17 and 4928.18(A))

Except as otherwise provided in the transition provisions of the act and beginning on the starting date of competitive retail electric service, the act prohibits an electric utility from engaging in Ohio, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, unless the utility implements and operates under a corporate separation plan that is approved by the PUCO, is consistent with the state policy specified in the act, and achieves all of the following:

(1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by PUCO rule, and such other measures as are necessary to effectuate the state policy specified in the act.

(2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.

(3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service, and to ensure that any such affiliate, division, or part will not receive undue preference or advantage from any affiliate, division, or part of the business engaged in business of supplying the noncompetitive retail

electric service. The act prohibits such utility, affiliate, division, or part from extending such undue preference. (Sec. 4928.17(A).)

With respect to the corporate separation requirement described in (3) above, the act in effect authorizes utility resources to be provided upon the fully loaded embedded costs being charged to the affiliate, including, but not limited to, trucks, tools, office equipment, office space, supplies, customer and marketing information, advertising, billing and mailing systems, personnel, and training. The act also specifies that the corporate separation requirement described in (3) above is effective January 1, 2000 (sec. 4928.17(A)).

Under the act, the PUCO may approve, modify and approve, or disapprove a corporate separation plan. As part of the requisite code of conduct, the PUCO must adopt rules under the rule-making provisions of the act regarding corporate separation and procedures for plan filing and approval. The rules must include limitations on affiliate practices solely for the purpose of maintaining a separation of the affiliate's business from the business of the utility to prevent unfair competitive advantage by virtue of that relationship. The rules also must include an opportunity for any person having a real and substantial interest in the corporate separation plan to file specific objections to the plan and propose specific responses to issues raised in the objections, which objections and responses the PUCO must address in its final order. Prior to PUCO approval of the plan, the PUCO must afford a hearing upon those aspects of the plan that the PUCO determines reasonably require a hearing. The PUCO may reject and require refiling of a substantially inadequate plan under the act. (Sec. 4928.17(B).)

The PUCO must issue an order approving or modifying and approving a corporate separation plan, to be effective on the date specified in the order, only upon findings that the plan reasonably complies with the requirements stated in (1) to (3) above and will provide for ongoing compliance with the state policy. However, for good cause shown, the PUCO may issue an order approving or modifying and approving a corporate separation plan that does not comply with the requirement described in (1) above but complies with such functional separation requirements as the PUCO authorizes to apply for an interim period prescribed in the order, upon a finding that such alternative plan will provide for ongoing compliance with the state policy. (Sec. 4928.17(C).)

Any party may seek an amendment to an approved corporate separation plan, and the PUCO, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances (sec. 4928.17(D)).

The act authorizes an electric utility to divest itself of any generating asset at any time without PUCO approval, notwithstanding continuing laws regarding facility abandonment, transactions between utilities, and mergers (secs. 4905.20, 4905.21, 4905.46, and 4905.48), and subject to the provisions of continuing Public Utility Law relating to the transfer of transmission, distribution, or ancillary service provided by such generating asset (sec. 4928.17(E)).

Additionally, the act states that, notwithstanding a provision of continuing rate-making law that refers to the actual embedded cost of debt of a utility (sec. 4909.15(D)(2)(a)), nothing in the act prevents the PUCO from exercising its authority under continuing Public Utility Law to protect customers of retail electric service supplied by an electric utility from any adverse effect of the utility's provision of a product or service other than retail electric service (sec. 4928.18(A)).

### **Independent transmission**

(sec. 4928.12)

Except as otherwise provided in the act's transitional provisions, the act prohibits any entity from owning or controlling transmission facilities as defined under federal law and located in Ohio on or after the starting date of competitive retail electric service unless that entity is a member of, and transfers control of those facilities to, one or more qualifying transmission entities that are operational (sec. 4928.12(A)).

The act states that such an entity complies with the act's independent transmission requirement if each transmission entity of which it is a member meets all of the following specifications:

- (1) The transmission entity is approved by FERC.
- (2) The transmission entity results in separate control of transmission facilities from control of generation facilities.
- (3) The transmission entity implements, to the extent reasonably possible, policies and procedures designed to minimize pancaked transmission rates within Ohio.
- (4) The transmission entity improves service reliability with Ohio.
- (5) The transmission entity achieves the objectives of an open and competitive electric generation marketplace, elimination of barriers to market

entry, and preclusion of control of bottleneck electric transmission facilities in the provision of retail electric service.

(6) The transmission entity is of sufficient scope or otherwise operates to substantially increase economical supply options for consumers.

(7) The governance structure or control of the transmission entity is independent of the users of the transmission facilities, and no member of its board of directors has an affiliation, with such a user or with an affiliate of a user during the member's tenure on the board, such as to unduly affect the transmission entity's performance. "User" is defined as any entity or affiliate of that entity that buys or sells electricity in the transmission entity's region or in a neighboring region.

(8) The transmission entity operates under policies that promote positive performance designed to satisfy the electricity requirements of customers.

(9) The transmission entity is capable of maintaining real-time reliability of the electric transmission system, ensuring comparable and nondiscriminatory transmission access and necessary services, minimizing system congestion, and further addressing real or potential transmission constraints. (Sec. 4928.12(B).)

To the extent that a transmission entity is authorized to build transmission facilities, the act affirms that the transmission entity has the powers provided in and is subject to existing provisions regarding the power to appropriate private property (secs. 1723.01 to 1723.08, not in the act; sec. 4928.12(C)).

The act requires the PUCO, for the purpose of forming or participating in a regional regulatory oversight body or mechanism developed for any transmission entity that is of regional scope and operates within Ohio, to make joint investigations, hold joint hearings, within or outside Ohio, and issue joint or concurrent orders in conjunction or concurrence with any official or agency of any state or of the United States. The act grants this authority whether the PUCO is functioning under agreements or compacts between states, under the concurrent power of states to regulate interstate commerce, as an agency of the United States, or otherwise. Further, the PUCO must negotiate and enter into agreements or compacts with agencies of other states for cooperative regulatory efforts and for the enforcement of the respective state laws regarding the transmission entity. (Sec. 4928.12(D).)

Additionally, the act provides that, if a qualifying transmission entity is not operational as contemplated under the act, including its transitional provisions (see "**Transition plan approval**," below), the PUCO by rule or order must take such measures or impose such requirements on all for-profit entities that own or control electric transmission facilities located in Ohio as the PUCO determines necessary

and proper to achieve independent, nondiscriminatory operation of, and separate ownership and control of, such electric transmission facilities on or after the starting date of competitive retail electric service (sec. 4928.12(E)).

**Monitoring retail electric services**

(secs. 4928.01(A)(18) and 4928.06(C), (D), and (F))

The act provides that, in addition to other authority under the act, the PUCO, on an ongoing basis, must monitor and evaluate the provision of retail electric service in Ohio for the purpose of discerning any noncompetitive retail electric service that should be available on a competitive basis on or after the starting date of competitive retail electric service pursuant to a declaration in the Revised Code, and for the purpose of discerning any competitive retail electric service that is no longer subject to effective competition on or after that date. Upon such evaluation, the PUCO periodically must report its findings and any recommendations for legislation to the standing committees of both houses of the General Assembly that have primary jurisdiction regarding public utility legislation. Until 2008, the PUCO and OCC also must provide biennial reports to those standing committees, regarding the effectiveness of competition in the supply of competitive retail electric services in Ohio. (Sec. 4928.06(C).)

In determining, for purposes of the above-described authority, whether there is effective competition in the provision of a retail electric service or reasonably available alternatives for that service, the PUCO must consider factors including, but not limited to, all of the following:

- (1) The number and size of alternative providers of that service;
- (2) The extent to which the service is available from alternative suppliers in the relevant market;
- (3) The ability of alternative suppliers to make functionally equivalent or substitute services readily available at competitive prices, terms, and conditions;
- (4) Other indicators of market power, which may include market share, growth in market share, ease of entry, and the affiliation of suppliers of services. (Sec. 4928.06(D).) "Market power" is defined for purposes of the act as the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market (sec. 4928.01(A)(18)).

The act provides that the burden of proof is on any entity requesting a determination by the PUCO of the existence of or a lack of effective competition or reasonably available alternatives (sec. 4928.06(D)).

The act requires an electric light company to provide the PUCO with such information as the PUCO considers necessary to carry out its monitoring duty. The PUCO must take such measures as it considers necessary to protect the confidentiality of that information. (Sec. 4928.06(F).)

Additionally, the act requires the standing committees of the General Assembly that have primary jurisdiction over public utility legislation to meet at least biennially, until the end of all market development periods as determined by the PUCO, to consider the effect on Ohio of electric restructuring and to receive reports from the PUCO, OCC, and the Director of Development (sec. 4928.06(C)).

### **Market power abuse**

(sec. 4928.06(E)(1) and (2))

The act provides that, beginning on the starting date of competitive retail electric service, the PUCO has authority under Public Utility Law (Chapters 4901. to 4909.), and must exercise that authority, to resolve abuses of market power by any electric utility that interfere with effective competition in the provision of retail electric service (sec. 4928.06(E)(1)).

In addition, the PUCO, beginning the first year after the market development period of a particular electric utility and after reasonable notice and opportunity for hearing, may take such measures within a transmission constrained area in the utility's certified territory as are necessary to ensure that retail electric generation service is provided at reasonable rates within that area. The PUCO may exercise this authority only upon findings that an electric utility is or has engaged in the abuse of market power and that that abuse is not adequately mitigated by rules and practices of any independent transmission entity controlling the transmission facilities. Any such measure must be taken only to the extent necessary to protect customers in the area from the particular abuse of market power and to the extent the PUCO's authority is not preempted by federal law. The measure must remain in effect until the PUCO, after reasonable notice and opportunity for hearing, determines that the particular abuse of market power has been mitigated. (Sec. 4928.06(E)(2).)

### **Rule-making and enforcement authority**

(secs. 4928.01(A)(19), 4928.06(A) and (F), 4928.16, and 4928.18(B) to (D); Section 10)

The act requires the PUCO, to the extent necessary, to adopt rules to carry out the act. Initial rules necessary for the commencement of the competitive retail electric service must be adopted within 180 days after the act's effective date.

Further, except as otherwise provided in the act, the proceedings and orders of the PUCO under the act must be subject to and governed by continuing Public Utility Law (Chapter 4903.). (Sec. 4928.06(A).)

The act requires an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under the act to provide the PUCO with such information, regarding a competitive retail electric service for which it is subject to certification, as the PUCO considers necessary to carry out the act. The PUCO must take such measures as it considers necessary to protect the confidentiality of that information. (Sec. 4928.06(F).)

### **General enforcement authority**

The act states that the PUCO has jurisdiction under continuing complaint law (sec. 4905.26), upon complaint of any person or upon complaint or initiative of the PUCO on or after the starting date of competitive retail electric service, regarding the provision by an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under the act of any service for which it is subject to certification (sec. 4928.16(A)(1)).

The act also provides that the PUCO has jurisdiction under such continuing complaint law, upon complaint of any person or upon complaint or initiative of the PUCO on or after the starting date of competitive retail electric service, to determine (1) whether an electric utility has violated or failed to comply with any provision of the act regarding the state policy, pricing of services, designation of competitive and noncompetitive services, state regulation of competitive or noncompetitive services, supplier certification, consent to service of process, minimum service requirements, universal service, information requirements, monitoring of retail service, independent transmission, or market power abuse (secs. 4928.01 to 4928.15) or with any related rule or order adopted or issued under the act, or (2) whether an electric services company, electric cooperative, or governmental aggregator subject to certification under the act, regarding a competitive retail electric service for which it is subject to certification, has violated or failed to comply with any provision of the act regarding the state policy, designation of competitive and noncompetitive services, state regulation of competitive or noncompetitive services, supplier certification, consent to service of process, minimum service requirements for competitive services, information requirements, monitoring of retail service (secs. 4928.01 to 4928.10) or any related rule or order. (Sec. 4928.16(A)(2).)

If the PUCO makes a finding regarding provision of retail electric service or a violation of failure to comply, the PUCO, in addition to its authority to rescind

or suspend certification and to any other remedies provided by law and after reasonable notice and opportunity for hearing, may do any of the following:

(1) Order rescission of a contract, or restitution to customers including damages due to electric power fluctuations;

(2) Order any remedy or forfeiture provided under continuing Public Utility Law (secs. 4905.54 to 4905.60 and 4905.64) upon a finding of a violation or failure to comply. (Sec. 4928.16(B)(1), (2), and (3).)

In addition, the PUCO may order any remedy provided under continuing Public Utility Law (secs. 4905.22, 4905.37, and 4905.38) if the violation or failure to comply by an electric utility related to the provision of a noncompetitive retail electric service (sec. 4928.16(B)(2)).

The act authorizes OCC, in addition to the authority conferred under continuing Consumers' Counsel Law (sec. 4911.15), to file a complaint under the act on behalf of Ohio residential consumers or appear before the PUCO as a representative of those consumers (sec. 4928.16(C)(1)).

Further, in addition to the authority conferred under continuing Consumers' Counsel Law (sec. 4911.19), OCC, upon reasonable grounds on and after the starting date of competitive retail electric service, may file with the PUCO under existing complaint authority (sec. 4905.26) a complaint for discovery if the recipient of an inquiry under the Consumers' Counsel Law (sec. 4911.19) fails to provide a response within the time specified in that law (sec. 4928.16(C)(2)).

Additionally, the act authorizes any party to seek treble damages under continuing Public Utility Law (sec. 4905.61) for any violation or failure to comply (sec. 4928.16(D)).

The act also requires the PUCO, OCC, and the Attorney General's Office to develop a memorandum of understanding not later than January 1, 2000, to establish a system to respond effectively and efficiently to residential consumer inquiries and complaints. The agencies must provide a joint report to the General Assembly on their efforts not later than June 30, 2002. (Section 10.)

An exception to the PUCO's general enforcement authority described above is when a contract between a mercantile commercial customer and an electric services company states that the forum for a commercial dispute involving that company is through a certified commercial arbitration process. In that instance, the process set forth in the contract and agreed to by the signatories is the exclusive forum unless all parties to the contract agree in writing to an amended process. The company must notify the PUCO for informational purposes of all

matters for which a contract remedy is invoked to resolve a dispute. (Sec. 4928.16(A)(3).) For this purpose, a "mercantile commercial customer" is a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than 750,000 kilowatt hours per year or is a part of a national account involving multiple facilities in one or more states (sec. 4928.01(A)(19)).

The act also requires the PUCO, to adopt by rule, alternative dispute resolution procedures for complaints by nonmercantile, nonresidential customers, including arbitration through a certified commercial arbitration process and at the PUCO. The PUCO also may adopt rules providing alternative dispute resolution procedures for complaints by residential customers. (Sec. 4928.16(A)(4).)

### **Enforcement authority regarding corporate separation**

The act grants the PUCO jurisdiction under its continuing complaint authority (sec. 4905.26), upon complaint of any person or upon complaint or initiative of the PUCO on or after the starting date of competitive retail electric service, to determine whether an electric utility or its affiliate has violated any provision of the act's corporate separation requirements or an order issued or rule adopted under any of those provisions. For this purpose, the PUCO may examine such books, accounts, or other records kept by an electric utility or its affiliate as may relate to the businesses for which corporate separation is required under the act, and may investigate such utility or affiliate operations as may relate to those businesses and investigate the interrelationship of those operations. Any such examination or investigation by the PUCO must be governed by continuing Public Utility Law (Chapter 4903.). (Sec. 4928.18(B).)

In addition to any remedies otherwise provided by law, the PUCO, regarding a determination of a violation, may do any of the following:

- (1) Issue an order directing the utility or affiliate to comply;
- (2) Modify an order as the PUCO finds reasonable and appropriate and order the utility or affiliate to comply with the modified order;
- (3) Suspend or abrogate an order, in whole or in part;
- (4) Issue an order that the utility or affiliate pay restitution to any person injured by the violation or failure to comply.

Commensurate with the severity of the violation, the source of the violation, any pattern of violations, or any monetary damages caused by the violation, the PUCO also may do either of the following:

(1) Impose a forfeiture on the utility or affiliate of up to \$25,000 per day per violation. The recovery and deposit of the forfeiture is subject to continuing law regarding the collection of forfeitures (secs. 4905.57 and 4905.59).

(2) Regarding a violation by a utility relating to a corporation separation plan involving competitive retail electric service, suspend or abrogate all or part of an order, to the extent it is still in effect, authorizing an opportunity for the utility to receive transition revenues under an approved transition plan. (Sec. 4928.18(D).)

The act also states that corporate separation under the PUCO enforcement statute does not prohibit the common use of employee benefit plans, facilities, equipment, or employees, subject to proper accounting and the code of conduct ordered by the PUCO under the act (sec. 4928.18(D)).

Additionally, the act authorizes an action for treble damages to be brought under continuing authority in Public Utility Law (sec. 4905.61), in the case of any violation of the act's corporation separation requirements or related rules (sec. 4928.18(E)).

### **Power of appropriation**

(secs. 4933.14 and 4933.15)

The act removes authority to exercise the power to appropriate private property for the purpose of erecting, operating, or maintaining an electric generating station (secs. 4933.14 and 4933.15).

### **Power siting**

(sec. 4906.10(A)(1); Sections 2 and 5)

Continuing law provides a siting approval process for major utility facilities. Under that process, the Power Siting Board grants certificates for the construction, operation, and maintenance of a major utility facility (Chapter 4906.). In granting such certification, the Board must make certain findings, including a finding regarding the basis of the need for the facility (sec. 4906.10). Under continuing law unchanged by the act, an application must contain a statement explaining the need for the facility (sec. 4906.03).

The act provides that, in the case of a major utility facility consisting of an electric generating plant of 50 megawatts or more to be constructed on or after the act's effective date, the Board must presume the need for the facility as that need is stated in an application for a certificate (sec. 4906.10(A)(1); Sections 2 and 5).

### **Long-term forecasting**

(sec. 4935.04; Sections 2 and 5)

Under the former Public Utility Forecasting Law, each person owning or operating a major utility facility within Ohio or furnishing gas, natural gas, or electricity to more than 15,000 Ohio customers must submit monthly and annual reports with information related to meeting forecasted needs. The reports and the record of hearings on the reports serve various purposes under Public Utility Law, including purposes related to power siting, ratemaking, energy planning, and securities approval. (Sec. 4935.04.)

The act redefines "major utility facility," as of the starting date of competitive retail electric service, to exclude an electric generating plant of 50 megawatts or more. By doing so and making other related changes in the Forecasting Law, the act eliminates the long-term forecasting requirement for any owner of such a generating plant. (Sec. 4935.04; Sections 2 and 5.)

### **Assessments for PUCO and OCC funding**

(secs. 4905.10(A) and (D), 4911.18(A) and (D), and 4928.06(F); Sections 2 and 5)

Under continuing law, railroads and public utilities in Ohio pay an annual assessment to the PUCO and OCC, the proceeds of which are used to fund the PUCO and OCC. The assessments are imposed pursuant to a statutory formula generally based on a railroad's or utility's gross earnings or gross receipts. (Secs. 4905.10 and 4911.18.)

The act provides that, for the purpose of such an assessment, "public utility" includes, in addition to an electric utility under the act, an electric services company, electric cooperative, or a governmental aggregator subject to certification under the act, to the extent of the company's, cooperative's, or aggregator's engagement in the business of supplying or arranging for the supply in Ohio of any retail electric service for which it must be so certified (secs. 4905.10(D) and 4911.18(D)).

Under the act, the PUCO must require each electric utility to file with the PUCO on and after the starting date of competitive retail electric service an annual report of its intrastate gross receipts and sales of kilowatt-hours of electricity. The PUCO also must require each electric services company, electric cooperative, and governmental aggregator subject to certification to file an annual report on and after that starting date of such receipts and sales from the provision of those retail electric services for which it is subject to certification. For the purpose of the reports, sales of kilowatt hours of electricity are deemed to occur at the meter of

the retail customer. (Sec. 4928.06(F).) The act states that, in the case of an assessment based on intrastate gross receipts against a public utility that is an electric utility under the act or an electric services company, electric cooperative or governmental aggregator subject to certification under the act, such receipts are those specified in the utility's, company's, cooperative's, or aggregator's most recent report of intrastate gross receipts and sales of kilowatt-hours of electricity (secs. 4905.10(A) and 4911.18(A)).

The act also authorizes the PUCO and OCC to include, in the first computation it makes in calculating a railroad's or public utility's assessment, any amount of the railroad's or public utility's gross earnings or receipts that were underreported in a prior year. Under the act, the agency, in addition to whatever penalties apply under the Revised Code to such underreporting, must assess the railroad or public utility interest at the rate of 8% annually as stated in existing Ohio law governing allowable interest (sec. 1343.01(A)). Any interest so collected must be deposited into the Public Utilities Fund or the Consumers' Counsel Operating Fund, as applicable. (Secs. 4905.10(A) and 4911.18(A).)

### **Governmental aggregation**

(secs. 4928.01(A)(8) and 4928.20)

The act authorizes certain political subdivisions to act as aggregators (in essence, purchasing agents) for groups of consumers within their jurisdictions. Specifically, it authorizes the legislative authority of a municipal corporation through the adoption of an ordinance, or the board of township trustees of a township or the board of county commissioners of a county through the adoption of a resolution, to aggregate, on or after the starting date of competitive retail electric service, the retail electric loads centers located respectively, within the municipal corporation, township, or unincorporated area of the county, except to the extent such aggregation is otherwise prohibited by the Certified Territories Law or other Ohio law.

For that purpose, the legislative authority or board may enter into service agreements to facilitate for those loads the sale and purchase of electricity. The legislative authority or board may exercise aggregation authority jointly with any other such legislative authority or board.

The act requires that an ordinance or resolution for such governmental aggregation specify whether the aggregation will occur only with the prior consent of each person owning, occupying, controlling, or using an electric load center proposed to be aggregated or will occur automatically for all such persons pursuant to the opt-out requirements of the act, as described below. (Sec. 4928.20(A).)

"Electric load center" has the same meaning as in the Certified Territories Law: all electric consuming facilities of any type of character owned, occupied, controlled or used by a person at a single location, which facilities have been, are, or will be connected to and served at a metered point of delivery and to which electric service has been, is, or will be rendered (secs. 4933.81(E) and 4928.01(A)(8)).

In the case of an ordinance or resolution authorizing governmental aggregation, the legislative authority or board must develop a plan of operation and governance for the aggregation program. Before adopting the plan, the legislative authority or board must hold at least two public hearings on the plan. Before the first hearing, it must publish notice of the hearings once a week for two consecutive weeks in a newspaper of general circulation in the jurisdiction. The notice shall summarize the plan and state the date, time, and location of each hearing. (Sec. 4928.20(C).)

In the case of an ordinance or resolution that specifies automatic aggregation, the ordinance or resolution must direct the board of elections to submit the question of the authority to aggregate to the electors of the respective municipal corporation, township, or unincorporated area of a county at a special election on the day of the next primary or general election. The legislative authority or board must certify a copy of the ordinance or resolution to the board of elections not less than 75 days before the special election. No ordinance or resolution will take effect unless approved by a majority of the electors. (Sec. 4928.20(B).)

Automatic governmental aggregation cannot occur under the act unless the legislative authority or board in advance clearly discloses to each person owning, occupying, controlling, or using an electric load center located within its jurisdiction that the person will be enrolled automatically in the aggregation program unless the person affirmatively elects by a stated procedure not to be so enrolled. The disclosure must state prominently the rates, charges, and other terms and conditions of enrollment. The stated procedure must allow any person enrolled in the aggregation program the opportunity to opt out of the program every two years, without paying a switching fee. (Sec. 4928.20(D).)

Under the act, any such person that opts out of the aggregation program pursuant to the stated procedure defaults to the applicable standard service offer provided under the act (see "Universal service," above and "Transition rate schedules," below) until the person chooses an alternative supplier. (Sec. 4928.20(D).)

The act further provides that any ordinance or resolution providing for governmental aggregation under the act is subject to initiative or referendum in accordance with procedures otherwise provided in existing law (sec. 4928.20(E)(1) and (2)).

The act states that such a "governmental aggregator" is not a public utility engaging in the wholesale purchase and resale of electricity, and provision of the aggregated service is not a wholesale utility transaction. A governmental aggregator must be subject to supervision and regulation by the PUCO only to the extent of any competitive retail electric service it provides and PUCO authority under the act. (Sec. 4928.20(F).)

The act further states that this governmental aggregation authority does not apply in the case of a municipal corporation that supplies such aggregated service to electric load centers to which its municipal electric utility also supplies a noncompetitive retail electric service through transmission or distribution facilities the utility singly or jointly owns or operates (sec. 4928.20(G)).

## **CONSUMER PROTECTION PROVISIONS**

The consumer protection provisions of the act include provisions requiring PUCO certification of suppliers and prescription of minimum service requirements for competitive and noncompetitive services, as well as universal service provisions.

### **Supplier certification**

(secs. 4928.01(A)(14) and 4928.08)

The act prohibits an electric utility, electric services company, electric cooperative, or governmental aggregator from providing a competitive retail electric service to a consumer in Ohio on and after the starting date of competitive retail electric service without first being certified by the PUCO regarding its managerial, technical, and financial capability to provide that service and providing a financial guarantee sufficient to protect customers and electric distribution utilities from default (sec. 4928.08(B)). However, this certification requirement applies to an electric cooperative, or to a governmental aggregator that is a municipal electric utility, only to the extent of a competitive retail electric service it provides to a customer to whom it does not provide a noncompetitive retail electric service through transmission or distribution facilities it singly or jointly owns or operates (sec. 4928.08(A)).

PUCO certification may be granted pursuant to procedures and standards the PUCO must prescribe in accordance with the act, except that certification or

certification renewal will be deemed approved 30 days after the filing of an application with the PUCO unless the PUCO suspends that approval for good cause shown. In the case of such a suspension, the PUCO must act to approve or deny certification or certification renewal to the applicant not later than 90 days after the date of the suspension. (Sec. 4928.08(B).)

Capability standards adopted in PUCO rules must be sufficient to ensure compliance with the minimum service requirements established under the act and with the act's consent-to-service-of-process requirement described below. The standards must allow flexibility for voluntary aggregation, to encourage market creativity in responding to consumer needs and demands. (Sec. 4928.08(C).) The standards also must provide flexibility for electric services companies that exclusively provide installation of small electric generation facilities, to provide ease of market access. Under the act, a "small electric generation facility" is an electric generation plant and associated facilities designed for, or capable of, operation at a capacity of less than two megawatts (sec. 4928.01(A)(28)). The rules additionally must include procedures for biennially renewing certification. (Sec. 4928.08(C).)

Under the act, the PUCO may suspend, rescind, or conditionally rescind the certification of any electric utility, electric services company, electric cooperative, or governmental aggregator if the PUCO determines, after reasonable notice and opportunity for hearing, that the utility, company, cooperative, or aggregator has failed to comply with any applicable certification standards or has engaged in anticompetitive or unfair, deceptive, or unconscionable acts or practices in Ohio (sec. 4928.08(D)).

Additionally, the act prohibits an electric distribution utility on and after the starting date of competitive retail electric service from knowingly distributing electricity, to a retail consumer in Ohio, for any supplier of electricity that has not been certified by the PUCO (sec. 4928.08(E)). Under the act, a person acts "knowingly," regardless of the person's purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. (Sec. 4928.01(A)(14).) This is the same standard as applies under the Ohio Criminal Code (sec. 2901.22(B), not in the act).

### **Consent to service of process**

(sec. 4928.09)

The act imposes a "consent-to-service-of-process" requirement to ensure that persons supplying competitive services in Ohio may be sued in Ohio courts

(sec. 4928.09). In recognition that most such suppliers will already have met the requirement due to similar requirements elsewhere in Ohio law, the act exempts the following from its consent-to-service-of-process requirement: a corporation incorporated under the Ohio law that has appointed a statutory agent pursuant to continuing General Corporation or Nonprofit Corporation Law; a foreign corporation licensed to transact business in Ohio that has appointed a designated agent pursuant to continuing Foreign Corporation Law; and any other person that is a resident of Ohio or that files consent to service of process and designates a statutory agent pursuant to other Ohio law (sec. 4928.09(C)).

Specifically, the act prohibits any person from operating in Ohio as an electric utility, an electric services company, or a billing and collection agent on and after the starting date of competitive retail electric service unless that person first does both of the following:

(1) Consents irrevocably to the jurisdiction of Ohio courts and service of process in Ohio, including, without limitation, service of summonses and subpoenas, for any civil or criminal proceeding arising out of or relating to such operation, by providing that irrevocable consent in accordance with the act;

(2) Designates an agent authorized to receive that service of process, by filing with the PUCO a document designating that agent. (Sec. 4928.09(A)(1).)

The act further prohibits a person from continuing to operate as such an electric utility, electric services company, or billing and collection agent unless that person continues to consent to such jurisdiction and service of process in Ohio and continues to designate an agent as provided under the act, by refileing the appropriate documents in accordance with the act or, as applicable, the appropriate amended documents. Such refileing must occur during the month of December of every fourth year after the initial filing of a document under the act. (Sec. 4928.09(A)(2).)

If the address of the person filing such a document changes, or if a person's agent or the address of the agent changes, from that listed on the most recently filed of such documents, the person must file an amended document containing the new information (sec. 4928.09(A)(3)).

The requisite consent and designation must be in writing, on forms prescribed by the PUCO. The original of each such document or amended document must be legible and must be filed with the PUCO, with a copy filed with the OCC and with the Attorney General's Office. (Sec. 4928.09(A)(4).)

The act states that a person who enters Ohio pursuant to a summons, subpoena, or other form of process authorized by the act is not subject to arrest or

service of process, whether civil or criminal, in connection with other matters that arose before the person's entrance into Ohio pursuant to such summons, subpoena, or other form of process (sec. 4928.09(B)).

**Minimum service requirements for competitive services of certified suppliers**

(sec. 4928.10)

The act requires the PUCO, for the protection of Ohio consumers, to adopt rules under the act's general rule-making authority (see "**Rule-making and enforcement authority**," above) specifying the necessary minimum service requirements, on or after the starting date of competitive retail electric service, of an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under the act regarding the provision directly or through its billing and collection agent of competitive retail electric services for which it is subject to certification. The rules must include a prohibition against unfair, deceptive, and unconscionable acts and practices in the marketing, solicitation, and sale of such a competitive retail electric service and in the administration of any contract for the service. The rules also must include additional consumer protections concerning all of the following:

(1) Contract disclosure. The rules must include requirements that an electric utility, electric services company, electric cooperative, or governmental aggregator subject to certification under the act does both of the following:

(a) Provides consumers with adequate, accurate, and understandable pricing and terms and conditions of service, including any switching fees, and with a document containing the terms and conditions of pricing and service before the consumer enters into the contract for service;

(b) Discloses the conditions under which a customer may rescind a contract without penalty. (Sec. 4928.10(A).)

(2) Service termination. The rules must include disclosure of the terms identifying how customers may switch or terminate service, including any required notice and any penalties. (Sec. 4928.10(B).)

(3) Minimum content of customer bills. The rules must include all of the following requirements, which must be standardized:

(a) Price disclosure and disclosures of total billing units for the billing period and historical annual usage;

(b) To the maximum extent practicable, separate listing of each service component to enable a customer to recalculate its bill for accuracy;

(c) Identification of the supplier of each service;

(d) Statement of where and how payment may be made and provision of a toll-free or local customer assistance and complaint number for the electric utility, electric services company, electric cooperative, or governmental aggregator, as well as a consumer assistance telephone number or numbers for state agencies, such as the PUCO, OCC, and the Attorney General's Office, with the available hours noted;

(e) Other than for the first billing after the starting date of competitive retail electric service, highlighting and clear explanation on each customer bill, for two consecutive billing periods, of any changes in the rates, terms, and conditions of service. (Sec. 4928.10(C).)

(4) Disconnection and service termination, including requirements with respect to master-metered buildings. The rules must include policies and procedures that are consistent with continuing law on the termination of residential electric service (secs. 4933.121 and 4933.122) and the PUCO's rules adopted under that law, and that provide for all of the following:

(a) Coordination between suppliers for the purpose of maintaining service;

(b) The allocation of partial payments between suppliers when service components are jointly billed;

(c) A prohibition against blocking, or authorizing the blocking of, customer access to a noncompetitive retail electric service when a customer is delinquent in payments to the electric utility or electric services company for a competitive retail electric service;

(d) A prohibition against switching, or authorizing the switching of, a customer's supplier of competitive retail electric service without the prior consent of the customer in accordance with appropriate confirmation practices, which may include independent, third-party verification procedures;

(e) A requirement of disclosure of the conditions under which a customer may rescind a decision to switch its supplier without penalty;

(f) Specification of any required notice and any penalty for early termination of contract. (Sec. 4928.10(D).)

(5) Minimum service quality, safety, and reliability. However, service quality, safety, and reliability requirements for electric generation service must be determined primarily through market expectations and contractual relationships. (Sec. 4928.10(E).)

(6) Generation resource mix and environmental characteristics of power supplies. The rules must include requirements for determination of the approximate generation resource mix and environmental characteristics of the power supplies and disclosure to the customer prior to the customer entering into a contract to purchase and four times per year under the contract. The rules also must require that the electric utility, electric services company, electric cooperative, or governmental aggregator provide, or cause its billing and collection agent to provide, a customer with standardized information comparing the projected, with the actual and verifiable, resource mix and environmental characteristics. This disclosure must occur not less than annually or not less than once during the contract period if the contract period is less than one year, and prior to any renewal of a contract. (Sec. 4928.10(F).)

(7) Customer information. The rules must include requirements that the electric utility, electric services company, electric cooperative, or governmental aggregator make generic customer load pattern information available to other electric light companies on a comparable and nondiscriminatory basis, and make customer-specific information available to other electric light companies on a comparable and nondiscriminatory basis unless, as to customer-specific information, the customer objects. The rules must ensure that each such utility, company, cooperative, or aggregator provide clear and frequent notice to its customers of the right to object and of applicable procedures. The rules also must establish the exact language that must be used in all such notices. (Sec. 4928.10(G).)

**Minimum service requirements for noncompetitive services of an electric utility**

(sec. 4928.11)

The act requires the PUCO, for the protection of Ohio consumers, to adopt rules under the act's rule-making provisions that specify minimum service quality, safety, and reliability requirements for noncompetitive retail electric services supplied by an electric utility in Ohio, to the extent such authority is not preempted by federal law. The rules must include prescriptive standards for inspection, maintenance, repair, and replacement of the transmission and distribution systems of electric utilities; must apply to each substantial type of transmission or distribution equipment or facility; must establish uniform interconnection standards to ensure transmission and distribution system safety

and reliability and otherwise provide for high quality, safe, and reliable electric service; and must include standards for operation, reliability, and safety during periods of emergency and disaster and voltage standards for efficient operation of single-phase motors.

The rules regarding interconnection must seek to prevent barriers to new technology and not make compliance unduly burdensome or expensive. When questions arise about specific equipment to meet interconnection standards, the PUCO must initiate public proceedings to solicit comments from all interested parties. Additionally, the rules must include nondiscriminatory metering standards. (Sec. 4928.11.)

The PUCO must require each electric utility to report annually to the PUCO on and after the starting date of competitive retail electric service, regarding its compliance with the rules. The PUCO must make the filed reports available to the public. The PUCO also must review a utility's report to determine the utility's compliance and may act pursuant to the act to enforce compliance. These duties are to be carried out periodically as determined by PUCO rule adopted under the act's rule-making provisions, in a proceeding initiated under the PUCO's complaint authority. (Sec. 4928.11.)

### **Universal service**

(sec. 4928.14)

After its market development period, an electric distribution utility in Ohio must provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. The offer must be filed with the PUCO under a continuing law pertaining to the initiation of rate-making proceedings (sec. 4909.18). (Sec. 4928.14(A).)

Further, after that market development period, each electric distribution utility also must offer customers within its certified territory an option to purchase competitive retail electric service, the price of which is determined through a competitive bidding process. Before January 1, 2004, the PUCO must adopt rules concerning the conduct of the competitive bidding process, including the information requirements necessary for customers to choose this option and the requirements to evaluate qualified bidders. The PUCO may require that the competitive bidding process be reviewed by an independent third party. The act provides that no generation supplier may be prohibited from participating in the bidding process, provided that any winning bidder must be considered a certified supplier for purposes of obligations to customers.

At the utility's election, and approval of the PUCO, this competitive bidding option may be used as the utility's market-based standard offer described above. Under the act, the PUCO may determine at any time that a competitive bidding process is not required if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed. (Sec. 4928.14(B).)

The act further provides that, after the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility will result in the supplier's customers defaulting to the utility's standard service offer until the customer chooses an alternative supplier. The act requires reasonable notice prior to any such default. A supplier is deemed to have failed to provide service if the PUCO finds, after reasonable notice and opportunity for hearing, that any of the following conditions is met:

(1) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.

(2) The supplier is no longer capable of providing the service.

(3) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by PUCO rule adopted under the act's rule-making provisions.

(4) The supplier's certification has been suspended, conditionally rescinded, or rescinded by the PUCO in accordance with the act. (Sec. 4928.14(C).)

#### **Low-income customer assistance**

(secs. 4928.01(A)(15) and (16), 4928.51 to 4928.57, 5117.01 to 5117.05, 5117.07 to 5117.10, and 5117.12; Sections 2 and 7)

The act defines the "low-income customer assistance programs" as consisting of the following four programs: the Percentage of Income Payment Plan Program (PIPP) as prescribed in PUCO rules (Rules 4901:1-18-02(B) to (G) and 4901:1-18-04(B) of the Ohio Administrative Code); the Home Energy Assistance Program as prescribed in law (sec. 5117.21) and in Executive Order 97-1023-V; the Home Weatherization Assistance Program as prescribed in law (secs. 122.011(A)(6) and 122.02); the Ohio Energy Credit Program as prescribed in law (secs. 5117.01 to 5117.05, 5117.07 to 5117.12, and 5117.99); and the Targeted Energy Efficiency and Weatherization Program established under the act as described below; or any such program as modified pursuant to authority granted

under the act. (Sec. 4928.01(A)(16).) The act also authorizes a consumer education program for low-income consumers, as described below (sec. 4928.56).

### **Targeted energy efficiency and weatherization program**

The act requires the Director of Development to establish an energy efficiency and weatherization program targeted, to the extent practicable, to high-cost, high-volume use structures occupied by customers eligible for PIPP assistance, with the goal of reducing the energy bills of the occupants. Acceptance of energy efficiency and weatherization services provided by the targeted program must be a condition for the eligibility of any such customer to participate in PIPP. Any difference between universal service fund revenues and any savings in PIPP costs as a result of competitive auctioning by the Director as described below in "**Low-income customer aggregation**" must be reinvested in the targeted energy efficiency and weatherization program. (Sec. 4928.55.)

### **Consumer education for low-income customers**

The act authorizes the Director of Development to adopt rules in accordance with the Ohio Administrative Procedure Act (Chapter 119.) establishing an education program for consumers eligible to participate in the low-income customer assistance programs. The education program must provide information to consumers regarding energy efficiency and energy conservation. (Sec. 4928.56.)

### **Program consolidation**

The act authorizes the Director of Development, beginning on July 1, 2000, to administer the low-income customer assistance programs. For that purpose, the PUCO must cooperate with and provide such assistance as the Director requires for administration of the low-income customer assistance programs. The Director must consolidate the administration of and redesign and coordinate the operations of those programs to provide, to the maximum extent possible, for efficient program administration and a one-stop application and eligibility determination process at the local level for consumers. (Sec. 4928.53(A).)

Additionally, not later than March 1, 2000, the Director, in accordance with the Ohio Administrative Procedure Act (Chapter 119.), must adopt rules to carry out the act's low-income assistance provisions and ensure the effective and efficient administration and operation of the low-income customer assistance programs. The rules must take effect on July 1, 2000. (Sec. 4928.53(B)(1).)

The Director's authority to adopt rules for the Ohio Energy Credit Program must be subject to such rule-making authority as is conferred on the Director by

the act's amendment of former law establishing the program (secs. 5117.01 to 5117.05, 5117.07 to 5117.12, and 5117.99), except that the rules must incorporate the substance of those laws as they exist on the act's effective date (sec. 4928.53(B)(2); Section 7). Formerly, this program was administered solely by the Tax Commissioner.

The Director's authority to adopt rules for PIPP includes authority to adopt rules prescribing criteria for customer eligibility and policies regarding payment and crediting arrangements and responsibilities, procedures for verifying customer eligibility, procedures for disbursing public funds to suppliers and otherwise administering funds under the Director's jurisdiction, and requirements as to timely remittances of program revenues. However, the Director's authority as to PIPP excludes authority to prescribe service disconnection and customer billing policies and procedures and to address complaints against suppliers; this excluded authority will be exercised by the PUCO, in coordination with the Director.

The act requires that rules adopted for PIPP specify a level of payment responsibility to be borne by an eligible customer based on a percentage of the customer's income. Rules initially adopted by the Director for PIPP must incorporate the eligibility criteria and payment arrangement and responsibility policies set forth in PUCO rules (Rule 4901:1-18-04(B) of the Ohio Administrative Code). (Sec. 4928.53(B)(3).)

However, the act also provides a one-time forgiveness of PIPP arrears for certain PIPP customers. Specifically, the act declares that a current or past PIPP customer is relieved of any payment obligation under the PIPP program for any unpaid arrears accrued by the customer under the program as of the act's effective date if the customer, as determined by the Director, meets both of the following criteria:

(1) The customer as of that date has complied with customer payment responsibilities under the program.

(2) The customer is permanently and totally disabled as defined in the Ohio Energy Credit Program Law or is 65 years of age or older as so defined. (Sec. 4928.51(C)(2).)

The act also requires the Director, on and after the starting date of competitive retail electric service, to provide a report every two years until 2008 to the standing committees of the General Assembly that deal with public utility matters, regarding the effectiveness of the low-income customer assistance programs and the consumer education program (sec. 4928.57).

### *Program funding*

The act establishes in the state treasury a universal service fund, into which must be deposited all universal service revenues remitted to the Director of Development, for the exclusive purposes of providing funding for the low-income customer assistance programs and for the consumer education program and paying the administrative costs of those programs. Interest on the fund must be credited to the fund. Disbursements from the fund must be made to any supplier that provides a competitive retail electric service or a noncompetitive retail electric service to a customer approved to receive assistance under a specified low-income customer assistance program and to any authorized provider of weatherization or energy efficiency service to an approved customer. (Sec. 4928.51(A).)

Universal service revenues include all of the following:

(1) Revenues remitted to the Director after collection by an electric distribution utility beginning on July 1, 2000, attributable to the collection from customers of the universal service rider described below;

(2) Revenues remitted to the Director that have been collected by an electric distribution utility beginning on July 1, 2000, as customer payments under PIPP, including revenues remitted as described below;

(3) Adequate revenues remitted to the Director after collection by a municipal electric utility or electric cooperative in Ohio, not earlier than July 1, 2000, upon the utility's or cooperative's decision to participate in the low-income customer assistance programs. (Sec. 4928.51(B).)

Further, the act requires an electric distribution utility, beginning on July 1, 2000, to transfer to the Director the right to collect all arrearage payments of a customer for PIPP debt owed to the utility on the day before that date, or retain the right to collect that debt but remit to the Director all program revenues received by the utility for that customer (sec. 4928.51(C)(1)). The PUCO must complete an audit of each utility by July 1, 2000, to establish a baseline for the PIPP component of the low-income programs (sec. 4928.51(D)).

The act requires that, beginning on July 1, 2000, the universal service rider replaces the current PIPP rider and any amount in utility rates for funding low-income customer energy efficiency programs. The universal service rider is a rider on retail electric distribution service rates as such rates are determined by the PUCO pursuant to the act. The universal service rider for the first five years after the starting date of competitive retail electric service must be the sum of all of the following:

- (1) The level of the current PIPP rider;
- (2) An amount equal to the level of funding for low-income customer energy efficiency programs provided through electric utility rates in effect on the act's effective date;
- (3) Any additional amount necessary and sufficient to fund through the universal service rider the administrative costs of the low-income customer assistance programs and the consumer education program. (Sec. 4928.52(A).)

For the purpose of (2) above, the act defines "level of funding for low-income customer energy efficiency programs provided through electric utility rates" as the level of funds specifically included in an electric utility's rates on the act's effective date pursuant to a PUCO order issued under Public Utility Law (Chapters 4905. and 4909.) and in effect on the date before the act's effective date, for the purpose of improving the energy efficiency of housing for the utility's low-income customers. The term excludes the level of any such funds committed to a specific nonprofit organization or organizations pursuant to a stipulation or contract. (Sec. 4928.01(A)(15).)

If, during or after the first five years of the low-income customer assistance programs, the Director, after consultation with the Public Benefits Advisory Board described below, determines that revenues in the universal service fund and revenues from federal or other sources of funding for those programs, including general revenue fund appropriations for the Ohio Energy Credit Program, will be insufficient to cover the funding and administrative costs of the programs, the Director must file a petition with the PUCO for an increase in the universal service rider. The PUCO, after reasonable notice and opportunity for hearing, may adjust the universal service rider by the minimum amount necessary to provide the additional revenues. The PUCO must not decrease the universal service rider without the approval of the Director, after consultation by the Director with the Advisory Board. (Sec. 4928.52(B).)

The act requires that the universal service rider must be set in such a manner so as not to shift among the customer classes of electric distribution utilities the costs of funding low-income customer assistance programs (sec. 4928.52(C)).

### **Low-income customer aggregation**

The act authorizes the Director, beginning on the starting date of competitive retail electric service, to aggregate PIPP customers for the purpose of competitively auctioning the supply of competitive retail electric generation service to bidders certified under the act and further qualified under eligibility

criteria the Director prescribes by rule after consultation with the PUCO and electric light companies. The objectives of the auction must be to provide reliable retail electric generation service at the lowest cost to the customers, based on selection criteria that the winning bid provide the lowest cost and best value to customers. The rules adopted by the Director must ensure a fair and unbiased auction process and the performance of any winning bidder. (Sec. 4928.54.)

### **Public Benefits Advisory Board**

(sec. 4928.58)

The act creates the Public Benefits Advisory Board, which has the purpose of ensuring that energy services be provided to low-income consumers in an affordable manner consistent with the state policy specified in the act (see "**State policy regarding customer choice and industry restructuring**," above). The Advisory Board must consist of 21 members as follows: the Director of Development, the Chairperson of the PUCO, the Consumers' Counsel, and the Director of the Air Quality Development Authority each serving ex officio and represented by a designee at the official's discretion; two members of the House of Representatives appointed by the Speaker of the House of Representatives, neither of the same political party, and two members of the Senate appointed by the President of the Senate, neither of the same political party; and 13 members appointed by the Governor with the advice and consent of the Senate, consisting of one representative of suppliers of competitive retail electric service; one representative of the residential class of electric utility customers; one representative of the industrial class of electric utility customers; one representative of the commercial class of electric utility customers; one representative of agricultural or rural electric customers of an electric utility; two customers receiving assistance under one or more of the low-income customer assistance programs, to represent customers eligible for any such assistance, including senior citizens; one representative of the general public; one representative of local in-take agencies; one representative of a community-based organization serving low-income customers; one representative of environmental protection interests; one representative of lending institutions; and one person considered an expert in energy efficiency or renewables technology. Initial appointments must be made not later than November 1, 1999. (Sec. 4928.58(A).)

Initial terms of six of the appointed members end on June 30, 2003, and initial terms of the remaining seven appointed members end on June 30, 2004. Thereafter, terms of appointed members are for three years, with each term ending on the same day of the same month as the term it succeeds. Each member holds office from the date of the member's appointment until the end of the term for which the member was appointed. Members may be reappointed.

Vacancies must be filled in the manner provided for original appointments. Any member appointed to fill a vacancy occurring prior to the expiration date of the term for which the member's predecessor was appointed holds office as a member for the remainder of that term. A member continues in office after the expiration date of the member's term until the member's successor takes office or until a period of 60 days has elapsed, whichever occurs first. (Sec. 4928.58(B).)

Board members are reimbursed for their actual and necessary expenses incurred in the performance of board duties. These reimbursements constitute administrative costs of the low-income customer assistance programs or Energy Efficiency Revolving Loan Program, as applicable (see "**Energy Efficiency Revolving Loan Program**," below). (Sec. 4928.58(C).)

The Advisory Board must select a chairperson from among its members. Only board members appointed by the Governor with the advice and consent of the Senate are voting members of the board; each has one vote in all deliberations of the board. A majority of the voting members constitute a quorum. (Sec. 4928.58(D).)

The duties of the Advisory Board are to advise the Director in the administration of the universal service fund and the low-income customer assistance programs and advise the Director on the Director's recommendation to the PUCO regarding the appropriate level of the universal service rider (sec. 4928.58(E)). Additionally, the Board must advise the Director on the administration of the Energy Efficiency Revolving Loan Program and the Program fund.

The act further provides that the Advisory Board is not an agency for purposes of Ohio law regarding the sunseting of agencies (sec. 101.84(A) and (B)) (sec. 4928.58(F)).

### **Consumer education by state agencies**

(sec. 4928.19)

In addition to education of low-income customers by the Department of Development (see "**Consumer education for low-income customers**," above), the PUCO and OCC, as part of their ongoing consumer education efforts, must engage in cooperative agency efforts to educate Ohio consumers regarding electric industry restructuring under the act (sec. 4928.19). The act also provides for consumer education by electric utilities during the market development period (see "**Consumer education plan of an electric utility**," below).

## ENVIRONMENTAL PROVISIONS

In addition to the minimum service requirements regarding the disclosure of the generation resource mix and environmental characteristics of power supplies (see "*Minimum service requirements for competitive services of certified suppliers*," above), the act imposes duties with respect to funds for nuclear decommissioning, establishes the Energy Efficiency Revolving Loan Program, provides for net metering, and provides for back-up supply for self-generators.

### *Nuclear decommissioning*

(sec. 4928.13)

The act requires each electric utility that owns nuclear generation facilities in Ohio to demonstrate compliance with decommissioning requirements of the Nuclear Regulatory Commission and the PUCO and demonstrate adequate financing mechanisms to fund facility decommissioning. This is to be done through a periodic filing with the PUCO in such form as the PUCO must prescribe by rule adopted under the act's rule-making provisions. (Sec. 4928.13.)

### *Energy Efficiency Revolving Loan Program*

(secs. 4928.01(A)(25) and 4928.61 to 4928.63)

#### *Program authority*

The act creates the Energy Efficiency Revolving Loan Program beginning on the starting date of competitive retail electric service, to be administered by the Director of Development. Under the Program, the Director may authorize the use of moneys in the Energy Efficiency Revolving Loan Fund, described below, for financial assistance for projects in Ohio (sec. 4928.62). "Project" is defined as any real or personal property connected with all or part of an industrial, distribution, commercial, or research facility, not-for-profit facility, or residence that is to be acquired, constructed, reconstructed, enlarged, improved, furnished, or equipped, or any combination of those activities, with aid furnished pursuant to the Energy Efficiency Revolving Loan Program for the purposes of not-for-profit, industrial, commercial, distribution, residential, and research development in this state. "Project" includes, but is not limited to, any small-scale renewables project. (Sec. 4928.01(A)(25).)

To the extent feasible given approved applications for assistance, program assistance must be distributed among the certified territories of electric distribution utilities and participating electric cooperatives, and among the service areas of participating municipal electric utilities, in amounts proportionate to the

remittances of each utility and cooperative to the Fund. The assistance must be made or provided through approved lending institutions in the form of loans at below market rates, loan guarantees for such loans, and linked deposits for such loans. The Director must not authorize financial assistance under the Program unless the Director first determines all of the following:

(1) The project will include an investment in products, technologies, or services, including energy efficiency for low-income housing, for residential, small commercial and small industrial business, local government, educational institution, nonprofit entity, or agricultural customers of an electric distribution utility or a participating municipal electric utility or electric cooperative in Ohio.

(2) The project will improve energy efficiency in a cost-efficient manner by using both the most appropriate national, federal, or other standards for products as determined by the Director, and the best practices for use of technology, products, or services in the context of the total facility or building.

(3) The project will benefit the economic and environmental welfare of Ohio's citizens.

(4) The receipt of financial assistance is a major factor in the applicant's decision to proceed with or invest in the project. (Sec. 4928.62(A).)

In carrying out the act, the Director may do all of the following for the purpose of the Energy Efficiency Revolving Loan Program:

(1) Acquire in the name of the Director any property of any kind or character, by purchase, purchase at foreclosure, or exchange, on such terms and in such manner as the Director considers proper;

(2) Make and enter into all contracts and agreements necessary or incidental to the performance of the Director's duties and the exercise of the Director's powers under the act;

(3) Employ or enter into contracts with financial consultants, marketing consultants, consulting engineers, architects, managers, construction experts, attorneys, technical monitors, energy evaluators, or other employees or agents as the Director considers necessary, and fix their compensation;

(4) Adopt rules prescribing the application procedures for financial assistance under the Program; the terms and conditions of any loans, loan guarantees, linked deposits, and contracts; criteria pertaining to the eligibility of participating lending institutions; and any other matters necessary for the implementation of the Program;

(5) Do all things necessary and appropriate for the operation of the Program (sec. 4928.62(B)).

The act provides that financial statements, financial data, and trade secrets submitted to or received by the Director from an applicant or recipient of financial assistance under the Program, or any information taken from those statements, data, or trade secrets for any purpose, are not public records for the purpose of Public Records Law (sec. 4928.62(C)).

Further, the act expressly states that the Director and the Public Benefits Advisory Board created by the act, as described below, have the powers and duties provided in the act regarding the Program, in order to promote the welfare of the people of Ohio, to stabilize the economy, to assist in the improvement and development within Ohio of not-for-profit entity, industrial, commercial, distribution, residential, and research buildings and activities required for the people of Ohio, to improve the economic welfare of the people of Ohio, and also to assist in the improvement of air, water, or thermal pollution control facilities and solid waste disposal facilities. Additionally, the act expressly provides that the accomplishment of those purposes is essential so that the people of Ohio may maintain their present high standards in comparison with the people of other states and so that opportunities for improving the economic welfare of the people of Ohio, for improving the housing of residents, and for favorable markets for the products of Ohio's natural resources, agriculture, and manufacturing are improved; and that it is necessary for Ohio to establish the Energy Efficiency Revolving Loan Program and Program Fund and the Public Benefits Advisory Board, and to vest the Director and the Board with the powers and duties provided under the act. (Sec. 4928.63.)

The act requires the Director, on and after the starting date of competitive retail electric service, to provide a report every two years until 2008 to the standing committees of the General Assembly that deal with public utility matters, regarding the effectiveness of the Energy Efficiency Revolving Loan Program (sec. 4928.57).

### **Program funding**

The act establishes in the state treasury the Energy Efficiency Revolving Loan Fund, into which must be deposited all energy efficiency revenues remitted to the Director of Development under the act, for the exclusive purposes of funding the Energy Efficiency Revolving Loan Program and paying the program's administrative costs. Interest on the Fund must be credited to the Fund. (Sec. 4928.61(A).)

Energy efficiency revenues include all of the following:

(1) Revenues remitted to the Director after collection by each electric distribution utility in Ohio of a temporary rider on retail electric distribution service rates as such rates are determined by the PUCO pursuant to the act. The rider must be a uniform amount statewide, determined by the Director, after consultation with the Public Benefits Advisory Board. The amount must be determined by dividing an aggregate revenue target for a given year, as determined by the Director after consultation with the Board, by the number of customers of electric distribution utilities in Ohio in the prior year. That aggregate revenue target cannot exceed more than \$15 million in any year through 2005, or more than \$5 million in any year after 2005. The rider must be imposed beginning on the starting date of competitive retail electric service and must terminate at the end of ten years following that starting date or until the Energy Efficiency Revolving Loan Fund, including interest, reaches \$100 million, whichever is first.

(2) Revenues from Energy Efficiency Revolving Loan Program loan repayments and payments from Program loan collections;

(3) Adequate revenues remitted to the Director after collection by a municipal electric utility or electric cooperative in Ohio not earlier than the starting date of competitive retail electric service upon the utility's or cooperative's decision to participate in the Energy Efficiency Revolving Loan Program. (Sec. 4928.61(B).)

The act requires each electric distribution utility in Ohio to remit to the Director on a quarterly basis the revenues described above. These remittances must begin with the first quarter following the starting date of competitive retail electric service. Each participating electric cooperative and participating municipal electric utility also must remit to the Director on a quarterly basis the revenues described above. These remittances must begin with the first quarter following the participating cooperative's or utility's decision to participate. All such electric utility, electric cooperative, or municipal utility remittances must continue only until the end of ten years following that starting date or until the Energy Efficiency Revolving Loan Fund, including interest, reaches \$100 million, whichever is first. (Sec. 4928.61(C).)

The act additionally provides that moneys collected in rates for non-low-income customer energy efficiency programs, as of the act's effective date and not contributed to the Energy Efficiency Revolving Loan Fund as described in (1) above, must be used to continue to fund cost-effective, residential energy efficiency programs, be contributed into the Universal Service Fund as supplementary funds (see "Low-income customer assistance"; "Program funding," above), or be returned to ratepayers in the form of a rate reduction at the option of the affected electric distribution utility (sec. 4928.61(D)).

### **Net metering**

(sec. 4928.67)

The act provides for net metering for customer-generators. Under the act, "net metering" means measuring the difference in an applicable billing period between the electricity supplied by an electric service provider and the electricity generated by a customer-generator which is fed back to the electric service provider (sec. 4928.01(A)(31)). A "net metering system" is a facility for the production of electric energy that does all of the following:

- (1) It uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell.
- (2) It is located on a customer-generator's premises.
- (3) It operates in parallel with the electric utility's transmission and distribution facilities.
- (4) It is intended primarily to offset part or all of the customer-generator's requirements for electricity. (Sec. 4928.01(A)(32).)

Specifically, the act requires that, as of the starting date of competitive retail electric service, a retail electric service provider in Ohio must develop a standard contract or tariff providing for net energy metering. The provider must make this contract or tariff available to customer-generators, upon request and on a first-come, first-served basis, any time that the total rated generating capacity used by customer-generators is less than 1% of the provider's aggregate customer peak demand in Ohio. The contract or tariff must be identical in rate structure, all retail rate components, and any monthly charges, to the contract or tariff to which the same customer would be assigned if that customer were not a customer-generator.

Net metering must be accomplished using a single meter capable of registering the flow of electricity in each direction. If its existing electrical meter does not have that capability, the customer-generator is responsible for all expenses involved in purchasing and installing a meter with two-way capability. The electric service provider, at its own expense and with the written consent of the customer-generator, may install one or more additional meters to monitor the flow of electricity in each direction. (Sec. 4928.67.)

### **Back-up supply for self-generators**

(sec. 4928.15(C))

The act provides that a self-generator must have access to backup electricity supply from its competitive electric generation service provider at a rate to be determined by contract (sec. 4928.15(C)).

## **TRANSITIONAL PROVISIONS**

The act contains several transitional mechanisms that pertain to the adjustment of customers, utility employees, and incumbent suppliers to a restructured market. These mechanisms consist of employee assistance, consumer education by utilities, and transition revenues granted under a transition planning process the act establishes, as follows.

### **Transition plan filing**

(sec. 4928.31)

The act requires every electric utility supplying retail electric service in Ohio, not later than 90 days after the act's effective date, to file on that date with the PUCO a plan for the utility's provision of retail electric service in Ohio during the market development period. This transition plan must be in such form as the PUCO must prescribe by rule adopted under the act's rule-making provisions, and must include all of the following:

(1) A rate unbundling plan that (a) specifies, consistent with the act's unbundling requirements and any rules adopted by the PUCO under the act's rule-making provisions, the unbundled components for electric generation, transmission, and distribution service and such other unbundled service components as the PUCO requires, to be charged by the utility beginning on the starting date of competitive retail electric service, and (b) includes information the PUCO requires to fix and determine those components;

(2) A corporate separation plan consistent with the act's corporation separation requirements (see "Corporate separation," above) and any rules adopted by the PUCO under the act's rule-making provisions;

(3) Such plan or plans as the PUCO requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service consistent with any rules adopted by the PUCO under the act's rule-making provisions;

(4) A plan for providing severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees whose employment is affected by electric industry restructuring under the act;

(5) A consumer education plan consistent with the act's transitional provisions (see "Consumer education plan of an electric utility," below) and any rules adopted by the PUCO. (Sec. 4928.31(A)(1) to (5).)

A transition plan may include tariff terms and conditions to address reasonable requirements for changing suppliers, length of commitment by a customer for service, and such other matters as are necessary to accommodate electric restructuring.

Additionally, a transition plan may include an application for the opportunity to receive transition revenues under the act, which application must be consistent with the act and any rules adopted by the PUCO.

The transition plan also may include a plan for the independent operation of the utility's transmission facilities consistent with the act's independent transmission requirements (see "Independent transmission," above and "Transition plan approval," below) and any rules adopted by the PUCO under the act's rule-making provisions.

The PUCO may reject and require refiling, in whole or in part, of any substantially inadequate transition plan. (Sec. 4928.31(A).)

The electric utility must provide public notice of its transition plan filing, in a form and manner that the PUCO must prescribe by rule. However, the adoption of rules regarding that public notice, regarding the form of the transition plan, and regarding procedures for expedited discovery under the act as described below, are not subject to Ohio law requiring review of "111" rules by the Joint Committee on Agency Rule Review (sec. 111.15). (Sec. 4928.31(B).)

### **Transition plan approval**

(sec. 4928.34)

The act prohibits the PUCO from approving or prescribing a transition plan under the act unless the PUCO first makes all of the following determinations:

(1) The unbundled components for the electric transmission component of retail electric service, as specified in the utility's rate unbundling plan, equal the tariff rates determined by the FERC that are in effect on the date of the approval of the transition plan, as each such rate is determined applicable to each particular customer class and rate schedule by the PUCO. The unbundled transmission component must include a sliding scale of charges as authorized under existing law (sec. 4905.31(B)) to ensure that refunds determined or approved by FERC are flowed through to retail electric customers.

(2) The unbundled components for retail electric distribution service in the rate unbundling plan equal the difference between the costs attributable to the utility's transmission and distribution rates and charges under its schedule of rates and charges in effect on the act's effective date, as based on the record of the utility's most recent rate proceeding establishing the schedule, less the tariff rates for electric transmission service determined by FERC.

(3) All other unbundled components required by the PUCO in the rate unbundling plan equal the costs attributable to the particular service as reflected in the utility's schedule of rates and charges in effect on the act's effective date.

(4) The unbundled components for retail electric generation service in the rate unbundling plan equal the residual amount remaining after the determination of the transmission, distribution, and other unbundled components and after any adjustments necessary to reflect the reductions in the assessment rates for electric utility tangible personal property (see "**Reduced assessment rates**," below).

(5) All unbundled components in the rate unbundling plan have been adjusted to reflect any base rate reductions under rate settlements on file with the PUCO and as scheduled to be in effect by December 31, 2005, under rate settlements in effect on the act's effective date. However, all earnings obligations, restrictions, or caps imposed on an electric utility in a PUCO order prior to the act's effective date are void.

(6) Subject to (5) above, the total of all unbundled components in the rate unbundling plan are capped and must equal during the market development period, except as specifically provided in the act (in Chapter 4928.), the total of all rates and charges in effect under the applicable bundled schedule of the electric utility in effect on the day before the act's effective date, including the transition charge determined under the act, adjusted for any changes in the taxation of electric utilities and retail electric service under the act, and the universal service rider and temporary rider authorized by the act (see "**Low-income customer assistance**" and "**Energy Efficiency Revolving Loan Program**," above). The rate cap applicable to a customer receiving electric service pursuant to an arrangement approved by the PUCO under existing law (sec. 4905.31), for the term of the arrangement, is the total of all rates and charges in effect under the arrangement.

Additionally under the act, for any rate schedule filed under continuing filing law (sec. 4905.30) or any arrangement subject to approval pursuant to continuing special arrangement law (sec. 4905.31), the initial tax-related adjustment to the rate cap must equal the rate of taxation specified in the Kilowatt-Hour Tax Law (sec. 5727.81) and applicable to the schedule or arrangement. To the extent the total annual amount of the tax-related adjustment is greater than or

less than the comparable amount of the total annual tax reduction experienced by the electric utility as a result of the act, the difference must be addressed by the PUCO through accounting procedures, refunds, or an annual surcharge or credit to customers, or through other appropriate means, to avoid placing the financial responsibility for the difference upon the utility or its shareholders. Any adjustments in that rate of taxation cannot occur without a corresponding adjustment to the rate cap for each such rate schedule or arrangement. The Department of Taxation must advise the PUCO and self-assessors under the Kilowatt-Hour Tax Law prior to the effective date of any change in the rate of taxation, and the PUCO must modify the rate cap to reflect that adjustment so that the rate cap adjustment is effective as of the effective date of the change in the rate of taxation. This requirement must be applied, to the extent possible, to eliminate any increase in the price of electricity for customers that otherwise may occur as a result of establishing the kilowatt-hour tax.

(7) The rate unbundling plan complies with any rules adopted by the PUCO under the act's rule-making provisions.

(8) The corporate separation plan complies with the act's provisions regarding corporate separation (see "Corporate separation," above) and any rules adopted by the PUCO.

(9) Any plan or plans the PUCO requires to address operational support systems and any other technical implementation issues pertaining to competitive retail electric service comply with any rules adopted by the PUCO.

(10) The utility's employee assistance plan sufficiently provides severance, retraining, early retirement, retention, outplacement, and other assistance for the utility's employees affected by industry restructuring under the act.

(11) The consumer education plan complies with the act's provision regarding such plan and any rules adopted by the PUCO.

(12) The utility's approved transition revenues are the allowable transition costs of the utility as such costs are determined by the PUCO under the act (see "Transition revenues for incumbent electric utilities," below), and transition charges for the customer classes and rate schedules of the utility are the charges determined pursuant to the act.

(13) Any independent transmission plan included in the transition plan reasonably complies with the act's independent transmission requirements (see "Independent transmission," above) and any rules adopted by the PUCO, unless the PUCO, for good cause shown, authorizes the utility to defer compliance until an independent transmission order is issued under the act (see "Changes to a

**transition plan**," below). The act requires that a transition plan approved by the PUCO but not containing an approved independent transmission plan must contain the express condition that the utility will comply with the independent transmission order.

(14) The utility is in compliance with the act's requirements regarding the state policy, pricing of services, supplier certification, minimum service requirements, and other requirements and any related rules or orders of the PUCO adopted or issued under the act.

(15) All unbundled components in the rate unbundling plan have been adjusted to reflect the elimination of the Ohio gross receipts tax. (Sec. 4928.34(A)(1) to (15).)

Further, the act provides that, subject to the act's divestiture authority (see "**Corporate separation**," above), if the PUCO finds that any part of the transition plan would constitute an abandonment under continuing facility abandonment law (secs. 4905.20 and 4905.21), the PUCO must not approve that part of the transition plan unless it makes the finding required for approval of an abandonment application under that law. The abandonment law otherwise will not apply to a transition plan. (Sec. 4928.34(B).)

### **Transition plan approval procedures**

(secs. 4928.32 and 4928.33)

Under the act, the PUCO must establish reasonable procedures for expedited discovery in any proceeding initiated to consider a transition plan filed with the PUCO (sec. 4928.32(A)).

Not later than 45 days after the date on which an electric utility files a transition plan, any person having a real and substantial interest in the transition plan may file with the PUCO preliminary objections to the transition plan, which objections must identify with specificity issues pertaining to any aspect of the transition plan. Any such person may propose specific responses to those issues. The PUCO must address those objections and responses in its final order.

In addition, not later than 90 days after the plan's filing, the PUCO staff must file with the PUCO a report of its recommendations with respect to the plan. Prior to PUCO approval of the plan, the PUCO must afford a hearing upon those aspects of the plan that the PUCO determines reasonably require a hearing. (Sec. 4928.32(B).)

The PUCO must maintain a complete record of all proceedings relative to a transition plan and must issue and file, with the record of the case, findings of fact and written opinions setting forth the reasons for any modification to or its approval of a transition plan (sec. 4928.32(C)).

Not later than 275 days after the date an electric utility files a transition plan, but, in any event, not later than October 31, 2000, the PUCO must issue a final order approving the transition plan as filed or an order modifying and approving that plan. The order is subject to existing law regarding the effective date of a PUCO order (sec. 4903.15) and is subject to review and appeal under existing Public Utility Law (Chapter 4903.). (Sec. 4928.33(A).)

If the PUCO fails to issue, by October 31, 2000, a final order approving a transition plan, or such a final order has been enjoined in whole or in part pending appeal to a court, the PUCO must issue an interim order prescribing a transition plan, to have effect on an interim basis only. The interim order must contain the requisite plan components and must provide for the opportunity for transition revenue receipt if such an application were included in the utility's original transition plan filing. The interim order is subject to existing law regarding the effective date of PUCO orders (sec. 4903.15), but is not subject to review and appeal under existing Public Utility Law (Chapter 4903.).

An interim plan prescribed under the interim order must be effective for the electric utility beginning on the starting date of competitive retail electric service and must continue in effect until such time as any other replacement transition plan takes effect pursuant to a final PUCO order or resolution of an appeal. Any interim plan so prescribed must comply with the applicable provisions for transition plan approval. A final PUCO order must provide for a reconciliation of those amounts determined in the final order as compared to the interim amounts as determined under an interim plan. (Sec. 4928.33(B).)

The act prohibits an electric utility required to file a transition plan under the act from failing to implement a transition plan approved or prescribed for the utility by PUCO order. The act also prohibits an electric utility from providing retail electric service in Ohio during the market development period except pursuant to such an approved or prescribed transition plan. (Sec. 4928.33(C).)

### **Transition rate schedules**

(secs. 4928.16(A)(2), (B), (C), and (D) and 4928.35)

The act requires an electric utility, upon approval of its transition plan, to file in accordance with continuing filing law (sec. 4905.30) schedules containing the unbundled rate components set in the approved plan in accordance with the

act. The schedules must be in effect for the duration of the utility's market development period, must be subject to the rate cap specified in the act, and must not be adjusted during that period by the PUCO except as otherwise authorized by the act or federal law or except to reflect any change in tax law or tax regulation that has a material effect on the electric utility. (Sec. 4928.35(A).)

The act also requires that efforts be made to reach agreements with electric utilities in matters of litigation regarding property valuation issues. Irrespective of those efforts, the unbundled components for an electric utility's retail electric generation service and distribution service are not subject to adjustment during the utility's market development period. However, the PUCO must order an equitable reduction in those components for all customer classes to reflect any refund a utility receives as a result of the resolution of utility personal property tax valuation litigation that is resolved on or after the act's effective date and not later than December 31, 2005. Immediately upon the issuance of that order, the electric utility must file revised rate schedules under continuing law regarding initiation of rate-making proceedings (sec. 4909.18) to effect the order. (Sec. 4928.35(B).)

The act further requires that the schedule containing the unbundled distribution components must provide that electric distribution service under the schedule will be available to all retail electric service customers in the electric utility's certified territory and their suppliers on a nondiscriminatory and comparable basis on and after the starting date of competitive retail electric service. The schedule also must include an obligation to build distribution facilities when necessary to provide adequate distribution service, provided that a customer requesting that service may be required to pay all or part of the reasonable incremental cost of the new facilities, in accordance with rules, policy, precedents, or orders of the PUCO. (Sec. 4928.35(C).)

Additionally, during the market development period, an electric distribution utility must provide consumers on a comparable and nondiscriminatory basis within its certified territory a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service priced in accordance with the schedule containing the utility's unbundled generation service component. Immediately upon approval of its transition plan, the utility must file the standard service offer with the PUCO pursuant to continuing law regarding initiation of rate-making proceedings (sec. 4909.18). During the market development period, the failure of a supplier to deliver retail electric generation service results in the supplier's customers, after reasonable notice, defaulting to that standard service offer until the customer chooses an alternative supplier. A supplier is deemed to have failed to deliver such service if any of the conditions specified in "Universal service," above is met. (Sec. 4928.35(D).)

The act also provides that the PUCO has jurisdiction under continuing complaint law (sec. 4905.26), upon complaint of any person or upon complaint or initiative of the PUCO on or after the starting date of competitive retail electric service, to determine whether an electric utility has violated or failed to comply with the provisions of the act regarding transitional rate schedules or the transitional standard service offer or with any related rule or order adopted or issued under the act. The PUCO's authority to enforce those provisions is the same authority described with respect to an electric utility in "General enforcement authority," above (sec. 4928.16(A)(2) and (B)). The OCC has the same authority to file complaints regarding such schedules or standard offers as it does to file complaints with respect to an electric utility, electric service company, municipal electric utility, or governmental aggregator, as described in "General enforcement authority," above (sec. 4928.16(C)(1) and (2)). In addition, the act authorizes any party to seek treble damages under continuing Public Utility Law (sec. 4905.61) for any violation of or failure to comply with a transition rate schedule or standard service offer (sec. 4928.16(D)).

### Changes to a transition plan

(secs. 4928.12(E) and 4928.35(E), (F), and (G))

Regarding changes to a transition plan, the act requires that an amendment of a corporate separation plan contained in a transition plan approved by the PUCO must be filed and approved as a corporate separation plan pursuant to the act's provisions regarding corporate separation (see "Corporate separation," above) (sec. 4928.35(E)).

Further, the act states that any change to an electric utility's opportunity to receive transition revenues under an approved transition plan must be authorized only as provided in the act's transition revenue provisions, as described below (sec. 4928.35(F)).

The act requires the PUCO, by order, to require each electric utility whose approved transition plan did not include an independent transmission plan to be a member of, and transfer control of transmission facilities it owns or controls in Ohio to, one or more qualifying transmission entities, as described in the act (see "Independent transmission," above), that are planned to be operational on and after December 31, 2003. However, the PUCO may extend that date if, for reasons beyond the utility's control, a qualifying transmission entity is not planned to be operational on that date. The order may specify an earlier date on which the transmission entity must be planned to be operational if the PUCO considers it necessary to carry out the state policy specified in the act (see "State policy").

regarding customer choice and industry restructuring," above) or to encourage effective competition in retail electric service in Ohio.

Upon the issuance of the order, each such utility must file with the PUCO a plan for such independent operation of its transmission facilities. The PUCO may reject and require refileing of any substantially inadequate plan.

After reasonable notice and opportunity for hearing, the PUCO must approve the plan upon a finding that it will result in the utility's compliance with the order, the act, and any related PUCO rules. The approved independent transmission plan is then deemed a part of the utility's transition plan for purposes of the act. (Sec. 4928.35(G).)

The act also vests the PUCO with such authority to effect the independent transmission requirement of a transition plan as is described in "Independent transmission," above, if a qualifying transmission entity is not operational as contemplated under the act (sec. 4928.12(E)).

#### Enforcement of a transition plan

(sec. 4928.36)

Under the act, the PUCO has jurisdiction under continuing complaint law (sec. 4905.26), upon complaint by any person or upon complaint or initiative of the PUCO on or after the starting date of competitive retail electric service, to determine whether an electric utility has failed to implement an approved transition plan in conformance with an approval order or in ongoing compliance with applicable provisions of the state policy specified in the act. If, after reasonable notice and opportunity for hearing as provided in the complaint law, the PUCO determines that the utility has failed to so comply, the PUCO, in addition to any other remedies provided by law, may use the first three and the last two remedies described in "Enforcement authority regarding corporate separation," above. (Sec. 4928.36.)

#### Transition revenues for incumbent electric utilities

(secs. 4928.01(A)(23) and (26) and 4928.37 to 4928.40)

#### General authority

The act expressly states that it provides an electric utility the opportunity to receive transition revenues that may assist it in making the transition to a fully competitive retail electric generation market. It further states that an electric utility for which transition revenues are approved pursuant to the act must receive those

revenues through both of the following mechanisms beginning on the starting date of competitive retail electric service and ending on the expiration date of its market development period as determined under the act:

(1) Payment of unbundled rates for retail electric services by each customer that is supplied retail electric generation service during the market development period by the customer's electric distribution utility, which rates must be specified in schedules filed with the PUCO as required by the act (see "*Transition rate schedules*," above);

(2) Payment of a nonbypassable and competitively neutral transition charge by each customer that is supplied retail electric generation service during the market development period by an entity other than the customer's electric distribution utility, as such transition charge is determined under the act. (Sec. 4928.37(A)(1)(a) and (b).)

Under the act, the transition charge is payable by each such retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved, and is billed on each kilowatt hour of electricity delivered by the electric distribution utility as registered on the customer's meter during the utility's market development period or, if no meter is used, as based on an estimate of kilowatt hours used or consumed by the customer (sec. 4928.37(A)(1)(b)). The act also states that, notwithstanding any provision of existing Public Utility Law (Title 49) to the contrary, any customer that receives a noncompetitive retail electric service from an electric distribution utility is a retail electric distribution service customer, irrespective of the voltage level at which service is taken (sec. 4928.40(E)). Further, the transition charge for each customer class must reflect the cost allocation to that class as provided under bundled rates and charges in effect on the day before the act's effective date (sec. 4928.37(A)(1)(b)).

Additionally, as reflected in the act's transition revenue provisions, the transition charges must be structured to provide shopping incentives to customers sufficient to encourage the development of effective competition in the supply of retail electric generation service. To the extent possible, the level and structure of the transition charge must be designed to avoid revenue responsibility shifts among the utility's customer classes and rate schedules. (Sec. 4928.37(A)(1)(b).)

However, the act provides that the transition charge is not payable on electricity supplied by a municipal electric utility to a retail electric distribution service customer in the certified territory of the electric utility for which the transition revenues are approved, if the municipal electric utility provides electric transmission or distribution service, or both services, through transmission or

distribution facilities singly or jointly owned or operated by the municipal electric utility and if the municipal electric utility was in existence, operating, and providing service as of January 1, 1999 (sec. 4928.37(A)(2)(a)).

Further, the transition charge is not payable on electricity supplied or consumed in Ohio except such electricity as is delivered to a retail customer by an electric distribution utility and is registered on the customer's meter during the utility's market development period or, if no meter is used, is based on an estimate of kilowatt hours used or consumed by the customer. However, no transition charge is payable on electricity that is both produced and consumed in Ohio by a self-generator. (Sec. 4928.37(A)(2)(b).)

The act prohibits discounting of the transition charge by any party (sec. 4928.37(A)(3)), and states that nothing prevents payment of all or part of the transition charge by another party on a customer's behalf if that payment does not contravene the act or continuing law regarding nondiscriminatory pricing of services (secs. 4905.33 to 4905.35) (sec. 4928.37(A)(4)).

The act also requires the electric utility to separately itemize and disclose, or cause its billing and collection agent to separately itemize and disclose, the transition charge on the customer's bill in accordance with reasonable specifications the PUCO must prescribe by rule (sec. 4928.37(B)).

Additionally, the act states that an electric utility in Ohio may receive transition revenues pursuant to an approved transition plan beginning on the starting date of competitive retail electric service. Additionally, except as provided in continuing law regarding nondiscriminatory pricing of services (secs. 4905.33 to 4905.35) and the act, an electric utility that receives such transition revenues is wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues terminates at the end of the market development period. With the termination of that approved revenue source, the utility is fully on its own in the competitive market. The PUCO must not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized under the act. (Sec. 4928.38.)

#### **Determination of transition revenues**

The act requires the PUCO, upon the filing of a transition revenue application with the transition plan of an electric utility, and by order, to determine the total allowable amount of the utility's transition costs to be received as transition revenues. That amount must be the just and reasonable transition costs of the utility, which costs the PUCO finds meet all of the following criteria:

- (1) The costs were prudently incurred.
- (2) The costs are legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in Ohio.
- (3) The costs are unrecoverable in a competitive market.
- (4) The utility would otherwise be entitled an opportunity to recover the costs.

The act expressly states that transition costs include the costs of employee assistance under a utility's approved employee assistance plan, which costs exceed those costs contemplated in labor contracts in effect on the act's effective date. (Sec. 4928.39.)

Further, the act requires the PUCO to separately identify regulatory assets of the utility that are a part of total allowable amount of transition costs and separately identify that portion of a transition charge (see "**Determination of transition charges and market development periods**," below) that is allocable to those assets. The act provides that the regulatory asset portion of the transition charge is subject to adjustment only prospectively and after December 31, 2004, unless the PUCO authorizes an adjustment prospectively with an earlier date for any customer class based upon an earlier termination of the utility's market development period pursuant to the act (see "**Determination of transition charges and market development periods**," below). (Sec. 4928.39.)

The act defines "regulatory assets" as the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to a PUCO order or practice or pursuant to generally accepted accounting principles as a result of a prior PUCO rate-making decision, and that would otherwise have been charged to expense as incurred or would not have been capitalized or otherwise deferred for future regulatory consideration absent PUCO action. "Regulatory assets" includes, but is not limited to, all deferred demand-side management costs; all deferred percentage of income payment plan arrears; post-in-service capitalized charges and assets recognized in connection with statement of Financial Accounting Standards No. 109 (Receivables From Customers For Income Taxes); future nuclear decommissioning costs and fuel disposal costs as those costs have been determined by the PUCO in the utility's most recent rate or accounting application proceeding addressing such costs; the undepreciated costs of safety and radiation control equipment on nuclear generating plants owned or leased by an electric utility; and fuel costs currently deferred pursuant to the terms of one or more settlement agreements approved by the PUCO. (Sec. 4928.01(A)(26).) "Percentage of income payment plan arrears"

is defined to mean funds eligible for collection through the PIPP rider, but uncollected as of July 1, 2000 (sec. 4928.01(A)(23)).

The act provides that the electric utility has the burden of demonstrating allowable transition costs. It authorizes the PUCO to impose reasonable commitments upon the utility's collection of transition revenues to ensure that those revenues are used to eliminate the utility's allowable transition costs during the market development period and are not available for use by the utility to achieve an undue competitive advantage, or to impose an undue disadvantage, in the provision by the utility of regulated and unregulated products or services. (Sec. 4928.39.)

### **Determination of transition charges and market development periods**

The act requires the PUCO, upon determining allowable transition costs and by order, to establish the transition charge for each customer class of the electric utility and, to the extent possible, each rate schedule within each such customer class, with all such transition charges being collected as provided under the act (see "**General authority**," above) during a market development period for the utility, ending on such date as the PUCO must reasonably prescribe.

The act states that the market development period ends on December 31, 2005, as established under the act, unless otherwise authorized as described below. However, the PUCO may set the utility's recovery of the revenue requirements associated with regulatory assets, as established under the act, unless otherwise authorized as described below to end not later than December 31, 2010. The PUCO may not permit the creation or amortization of additional regulatory assets without notice and an opportunity to be heard through an evidentiary hearing and may not increase the charge recovering those revenue requirements associated with regulatory assets.

Factors the PUCO must consider in prescribing the expiration date of the utility's market development period and the transition charge for each customer class and rate schedule of the utility include, but are not limited to (1) the utility's total allowable amount of transition costs, (2) the relevant market price for the delivered supply of electricity to customers in that class, and to the extent possible, in each rate schedule as determined by the PUCO, and (3) such shopping incentives by customer class as are considered necessary to induce, at the minimum, a 20% load switching rate by customer class halfway through the utility's market development period but not later than December 31, 2003. In no case may the PUCO establish a shopping incentive in an amount exceeding the unbundled generation component. Additionally, the PUCO may not establish a transition charge in an amount less than zero. (Sec. 4928.40(A).)

The act authorizes the PUCO to conduct a periodic review, no more often than annually and, as it determines necessary, adjust the transition charges of the electric utility. Any such adjustment must be in accordance with the transition charge provisions of the act described above and may reflect changes in the relevant market. (Sec. 4928.40(B)(1).)

Additionally, the act provides that the market development period cannot end earlier than December 31, 2005, unless, upon application by an electric utility, the PUCO issues an order authorizing such earlier date for one or more customer classes as is specified in the order, upon a demonstration by the utility and a finding by the PUCO that (1) there is a 20% switching rate of the utility's load by the customer class, or (2) effective competition exists in the utility's certified territory (sec. 4928.40(B)(2)).

### **Residential rate reduction**

(sec. 4928.40(C))

The act requires the PUCO to issue an order approving a transition plan under the act that contains a rate reduction for residential customers of the utility, provided the rate reduction does not increase the rates or transition cost responsibility of any other customer class of the utility. The rate reduction is to be in effect only for such portion of the utility's market development period as the PUCO must specify.

The rate reduction must be applied to the unbundled generation component established under the act subject to the price cap for residential customers required under the act (see "**Transition plan approval**," above). The amount of the reduction must be 5% of the amount of that unbundled generation component, but must not unduly discourage market entry by alternative suppliers seeking to serve the residential market in Ohio. After reasonable notice and opportunity for hearing, the PUCO may terminate the rate reduction by order upon a finding that the rate reduction is unduly discouraging market entry by such alternative suppliers. However, no such termination may occur before the midpoint of the utility's market development period. (Sec. 4928.40(C).)

### **Resale of generation service**

(sec. 4928.40(D))

Beginning on the starting date of competitive retail electric service, the act prohibits an electric utility in Ohio from prohibiting the resale of electric generation service or imposing unreasonable or discriminatory conditions or limitations on the resale of that service (sec. 4928.40(D).)

### *Nonfirm electric service*

(secs. 4928.01(A)(12) and (22) and 4928.44)

The act authorizes the PUCO, by order, after reasonable notice and hearing, to determine that customers that are nonfirm electric service customers of electric utilities on the act's effective date would be assisted by the implementation by each such utility of a service schedule that provides for direct, comparable and nondiscriminatory access to the transmission and distribution services, capacities, functions, and facilities of the electric utility by any customer that is a nonfirm electric service customer on the act's effective date or by a group of such customers, for the purpose of securing from a supplier or suppliers of the customer's or group's own choice all or a portion of the customer's or group's electric power and energy requirements not served by an electric utility during a time of nonemergency curtailment or interruption.

In the order, the PUCO must specify the period of time, ending not later than December 31, 2005, during which the service offering would be available to any nonfirm electric service customers or group of such customers. Upon the issuance of the order, any such nonfirm electric service customer or group of such customers are eligible customers in each utility's transmission tariff subject to FERC jurisdiction for the period specified in the order. To effectuate the service offering, each electric utility with nonfirm customers must file a service schedule pursuant to continuing law regarding the initiation of rate-making proceedings (sec. 4909.18). (Sec. 4928.44(A) and (B).)

The act defines "nonfirm electric service" as electric service provided pursuant to a schedule filed with the PUCO under continuing filing law (sec. 4905.30) or pursuant to an arrangement authorized under continuing law regarding special arrangements (sec. 4905.31), which schedule or arrangement includes conditions that may require the customer to curtail or interrupt electric usage during nonemergency circumstances upon notification by an electric utility (sec. 4928.01(A)(22)). "Firm electric service" means any electric service other than nonfirm electric service (sec. 4928.01(A)(12)).

The act provides that the failure of an electric utility to file the requisite nonfirm service schedule described above constitutes inadequate service under Public Utility Law (Title 49).

It also provides that the nonfirm service offering is in addition to any service options otherwise available to a nonfirm electric service customer or group of such customers. If a customer that is a nonfirm customer on the act's effective date or a group of such customers elects to meet all or a portion of the customer's or group's electric power and energy requirements not served by an electric utility

during a time of nonemergency curtailment or interruption, by purchasing electricity and related services from a supplier or suppliers other than that electric utility, any existing service arrangement under continuing special arrangement law (sec. 4905.31) or any existing schedule under filing law (sec. 4905.30) must be modified to permit this election to occur without economic penalty and to facilitate the customer's or group's access to the electric market for the purpose of managing supply and price volatility risks. (Sec. 4928.44(C).)

Additionally, the act states that its nonfirm service provisions do not affect any obligation of an electric utility to curtail or interrupt electric transmission or distribution service to the extent required to protect the interests of firm electric service customers from an injury that is otherwise unavoidable but for the curtailment or interruption.

Further, under the act, the nonfirm service provisions must not be construed or applied to increase the rates and charges of firm electric service customers including residential firm electric service customers. (Sec. 4928.44(D).)

#### **Transitional revenues for electric cooperatives**

(sec. 4928.41)

The act states that the transition revenue authority it provides for electric utilities does not affect the authority of an electric cooperative in Ohio to receive transition revenues (sec. 4928.41).

#### **Consumer education plan of an electric utility**

(sec. 4928.42)

The act requires the PUCO, prior to the starting date of competitive retail electric service and in consultation with OCC and other state agencies as considered necessary, to adopt by order a general plan by which each electric utility must provide during its market development period consumer education on electric restructuring under the act. The general plan must require the utilities to spend on such consumer education within their respective certified territories in the aggregate up to \$16 million in the first year of that period and an additional \$17 million in the aggregate in declining amounts over the remaining years of each utility's market development period, with the aggregate amounts divided among the utilities based on their respective number of customers as of December 31, 1997. The general plan must prohibit such consumer education from occurring in combination with marketing for the utility's or its affiliate's retail electric services. (Sec. 4928.42.)

### Employee assistance

(secs. 4928.43 and 4928.431; Section 18)

#### Electric Employee Assistance Advisory Board

The act creates an Electric Employee Assistance Advisory Board, with the duties to make recommendations to the PUCO regarding its approval of an employee assistance plan filed by an electric utility as part of its transition plan (see "Transition plan filing," above) and regarding general eligibility standards applicable to benefits under the plan for affected employees (sec. 4928.431(B)). The Board is sunsetted on December 31, 2005 (Section 18).

The Board consists of 12 members: two members of the House of Representatives appointed by the Speaker, neither of the same political party; two members of the Senate appointed by the Senate President, neither of the same political party; and four representatives of electric utilities in Ohio and four representatives of electric industry employees, all appointed by the Governor. Initial appointments must be made by December 31, 1999. (Sec. 4928.431(A)(1).)

Initial terms of members appointed by the Governor end on December 31, 2001. Thereafter, terms of appointed members shall be for two years with each term ending on the same day of the same month as the term it succeeds. Each member holds office from the day of the member's appointment until the end of the term for which the member was appointed. Members may be reappointed. (Sec. 4928.431(A)(2).)

Vacancies must be filled in the manner provided for original appointments. Any member appointed to fill a vacancy occurring prior to the expiration date of the term for which the member's predecessor was appointed holds office as a member for the remainder of that term. A member continues in office after the expiration date of the member's term until the member's successor takes office or until a period of 60 days has elapsed, whichever occurs first. Board members receive no compensation or reimbursement for expenses. (Sec. 4928.431(A)(2).)

The Board must select a chairperson from among its members. Only Board members appointed by the Governor are voting members, with one vote each. A majority of the voting members constitutes a quorum. (Sec. 4928.431(A)(3).)

#### Utility employee pension funds

To the extent not prohibited by federal law or any Ohio law and except as otherwise provided in a labor contract or agreement, the act prohibits unencumbered money in a pension fund for employees of electric utilities to be

used for any purpose other than to pay allowable pensions or early retirement buyouts for the employees (sec. 4928.43(B)).

**State agency assistance**

The act requires each state agency that provides employment assistance and job training programs, including the Bureau of Employment Services and the Department of Development, to provide concentrated attention through those programs to assisting employees whose employment is affected by electric industry restructuring under the act (sec. 4928.43(A)).

**TAX AND REPLACEMENT PAYMENT PROVISIONS**

**Assessment of taxable property, assessment rate reductions applicable to the true value of that property, and apportionment of it to taxing districts**

Electric companies and rural electric companies pay taxes on their tangible personal property.<sup>1</sup> To determine the personal property taxes an electric company or rural electric company must pay, the Tax Commissioner first must ascertain what property is taxable and its true value. That taxable property is assessed each year by the Commissioner at a percentage of true value established in statute. The assessed value is the portion of true value to which the local tax rate is applied to determine the taxes due. The act changes aspects of the true value and assessment determinations.

**Taxable property and determination of its true value**

(secs. 5727.01(A), (E), (I), (J), and (K), 5727.06, and 5727.11)

**Taxable property.** For electric companies and rural electric companies, "taxable property" is all tangible personal property, other than certain property that is part of a pollution control facility, that on December 31 of the preceding year was both located in Ohio and owned by the company or leased by the company under a sale and leaseback transaction (secs. 5727.01(E) and 5727.06). Former law defined "sale and leaseback transaction" as a transaction in which a public utility or interexchange telecommunications company sells any tangible personal property to a person other than a public utility or interexchange

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<sup>1</sup> Law applicable to the assessment of property provides that any person is an "electric company" when engaged in the business of generating, transmitting, or distributing electricity within this state for use by others, but excludes a rural electric company. A "rural electric company" is any nonprofit corporation, organization, association, or cooperative engaged in the business of supplying electricity to its members or persons owning an interest therein in an area, the major portion of which is rural.

telecommunications company, and within the same calendar year, leases that property back from the buyer. The act removes the "within the same calendar year" standard from the "sale and leaseback transaction" definition, but does not otherwise change what constitutes the taxable property of an electric or rural electric company (sec. 5727.01(I)).

**True value.** After determining that an electric or rural electric company's tangible personal property is taxable, the true value of that property must be ascertained. Under continuing law, the true value of an electric company's taxable property, except its production equipment, is determined by a method of valuation using cost as capitalized on the company's books and records, less composite annual allowances prescribed by the Tax Commissioner. The true value of an electric company's production equipment, and of all taxable property of a rural electric company, is the equipment's or property's cost as capitalized on the company's books and records less 50% of that cost as an allowance for depreciation and obsolescence. Former law defined "production equipment" as all taxable steam, nuclear, hydraulic, and other production plant equipment, and all taxable steam equipment that was located at a production plant. (Sec. 5727.11.)

The act revises the true value determination of the production equipment of an electric company or rural electric company purchased, transferred, or placed into service after the act's effective date. The true value of that equipment is its purchase price as capitalized on the company's books and records less composite annual allowances prescribed by the Tax Commissioner (sec. 5717.11(D)). The definition of "production equipment" is amended to mean all taxable steam, nuclear, hydraulic, and other production plant equipment used to generate electricity. For tax years prior to 2001, it includes taxable station equipment that is located at a production plant (sec. 5727.01(J)).<sup>2</sup>

The act specifies that cost as capitalized on the books and records of any public utility includes amounts capitalized that represent regulatory assets, if the amounts previously were included on the company's books and records as capitalized costs of taxable personal property. Continuing law defines a "public utility" as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company, water transportation company, heating company, rural electric company, or railroad company. (Secs. 5727.01(A) and 5727.11(H).)

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<sup>2</sup> *The act defines "tax year" as the year for which property or gross receipts are subject to assessment under the public utility property and excise tax law (sec. 5727.01(K)). The definition does not limit the Tax Commissioner's ability to assess and value property or gross receipts outside the tax year.*

AFUDC. Under prior law, the true value of an electric or rural electric company's taxable property excluded an allowance for funds used during construction or interest during construction (AFUDC) that had been capitalized on the company's books and records as part of the total cost of the taxable property.

The act provides that the AFUDC exclusion does not apply to the taxable property of an electric company or a rural electric company, excluding transmission and distribution property, first placed into service after December 31, 2000, or to the taxable property a person purchases, which includes transfers, if that property was used in business by the seller prior to the purchase. (Sec. 5727.11(E).)

**Reduced assessment rates**

(sec. 5727.111; Section 3)

After determining taxable property's true value, the assessed value of the property can be calculated. This assessed value is the portion of true value to which the local tax rate is applied to determine the tangible personal property taxes due. Beginning in tax year 2001, the act reduces the percentages used to determine the assessed value of electric company and rural electric company personal property.

Under prior law, an electric company's taxable production equipment was assessed at 100% of true value, while all of its other taxable property was assessed at 88% of true value. Under the act, the assessment rate for the taxable transmission and distribution property of an electric company remains at 88% of true value, but all other taxable property of the electric company is assessed at 25% of true value.

Former law assessed all taxable property of a rural electric company at 50% of true value. Under the act, the assessment rate for taxable transmission and distribution property of a rural electric company remains at 50% of true value, but all other taxable property of a rural electric company is assessed at 25% of true value.

The act provides that the assessment rate for personal property listed and assessed under the general taxpayer personal property tax law is not reduced until January 1, 2002. The property treated in this manner is (1) personal property leased to an electric or rural electric company and used directly in the rendition of a public utility service and (2) boilers, machinery, equipment, and personal property used to generate or distribute electricity where some of the electricity is not distributed to others. General taxpayers pay their property taxes in the year assessed, but electric companies and rural electric companies pay those taxes the

year after they are assessed, so the delayed rate reduction date for this type of personal property has the same effect as dropping the rates on electric and rural electric company personal property beginning in tax year 2001.

**Apportionment of electric or rural electric company personal property**

(sec. 5727.15; Section 3)

When the taxable property of an electric or rural electric company is located in more than one taxing district, the Tax Commissioner apportions its taxable value among the taxing districts in which it is located. For an electric company, under prior law, 70% of the taxable value of its production equipment and all station equipment that was not production equipment was apportioned to the taxing district in which the property was physically located. The remaining 30% of that type of equipment and all other taxable personal property of the electric company was apportioned to each taxing district in the percentage that the cost of all transmission and distribution property physically located in the taxing district was of the total cost of all transmission and distribution property physically located in Ohio. There was an exception to this apportionment formula in instances where an electric company's taxable value included the value of production equipment at a plant at which the equipment's initial cost exceeded \$1 billion. In that case, the Tax Commissioner had to complete a calculation that apportioned the value in excess of a specified level of value in the same manner as the transmission and distribution base.

Beginning in tax year 2001, the act changes the apportionment formula so that the taxable value of all production equipment of an electric company is apportioned to the taxing district in which the property is physically located and the value of all other taxable personal property is apportioned to each taxing district in the proportion that the cost of the taxable property physically located in each taxing district is of the total cost of all taxable personal property physically located in Ohio. The act also eliminates the exception to the apportionment formula for \$1-billion-plus production plant equipment. The act does not change how rural electric company personal property is apportioned.

**Effect of reduction in assessment rates on certain state aid calculations**

(sec. 3317.028)

Each year before May 15, the Tax Commissioner must determine for each school district whether the taxable value of all tangible personal property, including utility tangible personal property, subject to taxation by the district in the preceding tax year was less or greater than the taxable value of the property during the second preceding tax year. If there is a decrease that exceeds 5% of the

district's tangible personal property taxable value included in the total taxable value used in the district's state aid computation, or an increase that exceeds 5% of the district's total taxable value used in that computation, the Commissioner certifies to the Department of Education the taxable value of the increase or decrease, and the decrease or increase in taxes charged and payable due to the change in taxable value. The Department, by the respective amount certified, reduces or increases the taxable value and the taxes charged and payable that were used to compute the district's state aid for the fiscal year that ends in the current calendar year, recomputes the state aid for the fiscal year, and during the last six months of the fiscal year, pays the district a sum equal to ½ of the recomputed payments.

The act provides that notwithstanding this computation, when determining in calendar year 2002 whether the taxable value of tangible personal property subject to taxation by each school district in the preceding tax year was less or greater than the taxable value of the property during the second preceding tax year, the Tax Commissioner must exclude from the taxable value for both years the "tax value loss" as defined and determined under the act in computing property tax replacement payments (see "*Tax value loss*," below).

### *The kilowatt-hour tax*

#### *Application of the new tax*

(secs. 5727.80, 5727.81, and 5727.88; Section 14)

The act levies a new excise tax on electric distribution companies, for all electricity distributed by such company that has May 1, 2001, as part of its measurement period, for the purpose of raising revenue for public education and state and local government operations. The tax is levied at a rate that decreases as more kilowatt hours (1,000 watt-hours) of electricity are distributed through the "meter of an end user in this state."<sup>3</sup> The rate for the first 2,000 kilowatt hours distributed in a 30-day period is \$.00465 per kilowatt hour; for the next 2,001 through 15,000 kilowatt hours, the rate is \$.00419; and for 15,001 and above, the rate is \$.00363. (Sec. 5727.81.)

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<sup>3</sup> *The "meter of an end user in this state" means the last meter used to measure the kilowatt hours distributed by an electric distribution company to a location in Ohio, the last meter located outside of Ohio that is used to measure the kilowatt hours consumed at a location in Ohio, or, if no meter is used, the estimated kilowatt hours distributed to an unmetered location in Ohio (sec. 5727.80(C)).*

The act defines an "electric distribution company" as either (1) a person, including a political subdivision of the state, that distributes electricity through a meter of an end user in this state (this includes a municipal electric utility), or (2) the end user of electricity in Ohio, if the end user obtains electricity that is not distributed or transmitted to the end user by an electric distribution company that is required to remit the kilowatt-hour tax.<sup>4</sup> An "electric distribution company" does not include the end user of electricity in Ohio who self-generates electricity that is used directly by that end user on the same site that the electricity is generated. (Sec. 5727.80(A).)

The tax for distribution for less than a 30-day period is calculated by dividing the days in the measurement period into the total kilowatt hours measured during the measurement period to obtain a daily average usage. The tax must be determined by obtaining the sum of (1), (2), and (3) and multiplying that amount by the number of days in the measurement period:

(1) Multiplying \$0.00465 per kilowatt hour for the first 67 kilowatt hours distributed using a daily average;

(2) Multiplying \$0.00419 for the next 68 to 500 kilowatt hours distributed using a daily average;

(3) Multiplying \$0.00363 for the remaining kilowatt hours distributed using a daily average.

Only the distribution of electricity through a meter of an end user in this state may be used by the electric distribution company to compute the amount or estimated amount of tax due. In the event a meter is not actually read for a measurement period, the estimated kilowatt hours distributed by an electric distribution company to collect its distribution charges may be used. (Sec. 5727.81(A).)

Except where a self-assessing purchaser is involved (see "*Self-assessing purchasers*," below), an electric distribution company must pay the kilowatt-hour tax in all of the following circumstances:

(1) The electricity is distributed by the company through a meter of an end user in Ohio;

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<sup>4</sup> Under the act, a "municipal electric utility" means a municipal corporation that owns or operates a system for the distribution of electricity (sec. 5727.80(E)).

(2) The company is distributing electricity through a meter located in another state, but the electricity is consumed in Ohio in the manner prescribed by the Tax Commissioner;

(3) The company is distributing electricity in Ohio without the use of a meter, but the electricity is consumed in this state as estimated and in the manner prescribed by the Tax Commissioner. (Sec. 5727.81(B).)

The act authorizes the Tax Commissioner to administer the tax and adopt such rules as are necessary for its administration. Upon request of the Commissioner, the Public Utilities Commission (PUCO) must provide assistance by furnishing information regarding any electric distribution company that is subject to regulation by the PUCO. (Sec. 5727.88.)

**Self-assessing purchasers**

(secs. 5727.80(G) and (I) and 5727.81(C))

**Tax rate for self-assessing purchasers.** The act allows certain electricity purchasers, defined as self-assessing purchasers, to elect to self-assess the kilowatt-hour tax and pay it directly to the Treasurer of State, rather than having their electric distribution company pay the tax. A "self-assessing purchaser" is a commercial or industrial purchaser that receives electricity through a meter of an end user in Ohio and consumes, over the course of the previous calendar year, more than 120 million kilowatt hours of electricity. A self-assessing purchaser pays the excise tax at the rate of \$.00075 per kilowatt hour and 4% of the total price of electricity delivered through a meter of an end user in Ohio.<sup>5</sup> (Sec. 5727.81(C)(1).)

If the electric distribution company serving the self-assessing purchaser is a municipal electric utility, and the purchaser is within the municipal corporation's corporate limits, the self-assessing purchaser pays the kilowatt-hour tax to the municipality's general fund. Upon paying the tax to the Treasurer of State or municipality, the self-assessing purchaser is not required to pay the excise tax to the electric distribution company from which its electricity is delivered.

**Adjustment to the 4% of total price tax rate.** The act requires that the 4% of total price portion of the kilowatt-hour tax paid by self-assessing purchasers be adjusted in December 2001 and June 2002, and then yearly in June through 2007.

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<sup>5</sup> *The act states in Section 15 that the intent of the self-assessing tax provision is to craft a revenue neutral solution for all customer classes, with any margin of error being resolved in favor of residential customers.*

On or before December 10, 2001, the Tax Commissioner is required to calculate the "six month revenue differential for self-assessing purchasers" to use as a benchmark for determining whether to increase or reduce the 4% tax rate. The six month revenue differential is \$31,650,000 minus the amount of tax paid by all self-assessing purchasers for the six-month period ending in the month prior to the date of the calculation. If the six month revenue differential is greater than \$500,000, the Commissioner must increase the percentage of total price tax rate to be charged for the six-month period beginning in the month following that in which the calculation is done. The new tax rate is the rate in effect during the current period multiplied by the sum of one plus the product of (1) a fraction, the numerator of which is the six month revenue differential multiplied by two and the denominator of which is the amount paid during the period by all self-assessing purchasers on the percentage of total price basis and (2) a fraction, the numerator of which is total kilowatt hours consumed during the period by self-assessing purchasers and the denominator of which is 11,025,000,000. (Secs. 5727.80(H) and 5727.81(C)(1)(b).)

If the six month revenue differential is less than negative \$500,000, the Tax Commissioner must decrease the percentage of total price tax rate to be charged for the six-month period beginning in the month following that in which the calculation is made. The new tax rate will be the rate in effect during the current period multiplied by the sum of one plus the product of (1) a fraction, the numerator of which is the six month revenue differential multiplied by two and the denominator of which is the amount paid during the period by all self-assessing purchasers on the percentage of total price basis and (2) a fraction, the numerator of which is 11,025,000,000 and the denominator of which is total kilowatt hours consumed during the period by self-assessing purchasers. (Sec. 5727.81(C)(1)(b).)

On or before June 10, 2002, the Tax Commissioner again calculates the six month revenue differential, but increases or decreases the percentage of total price tax rate to be charged for the 12-month period beginning in the month following that in which the calculation is made. The rate is calculated in the same manner, and using the same fractions, as for the rate determined on or before December 10, 2001, but the six month revenue differential is not multiplied by two because the new rate will cover a 12-month period. (Sec. 5727.81(C)(1)(c).)

On or before June 10, 2003, 2004, 2005, 2006, and 2007, the Tax Commissioner must calculate the "twelve month revenue differential for self-assessing purchasers" under the act. The twelve month revenue differential is \$63,300,000 minus the amount of tax paid by all self-assessing purchasers for the 12-month period ending in the month prior to the date of the calculation. (Secs. 5727.80(I) and 5727.81(C)(1)(d).)

If the twelve month revenue differential is greater than \$1,000,000, the Tax Commissioner must increase the percentage of total price tax rate to be charged for the 12-month period beginning in the month following that in which the calculation is made. If the revenue differential is less than negative \$1,000,000, the Commissioner must decrease the percentage of total price tax rate to be charged for the 12-month period beginning in the month following that in which the calculation is made. The rate calculated in 2007 becomes the permanent tax rate. (Sec. 5727.81(C)(1)(d).)

Regardless of whether the twelve month revenue differential calls for an increase or a decrease in the percentage of total price tax rate, in each year, the new tax rate will be the rate in effect during the current period multiplied by the sum of one plus a fraction, the numerator of which is the twelve month revenue differential and the denominator of which is the amount paid during the period by all self-assessing purchasers on the percentage of total price basis. (Sec. 5727.81(C)(1)(d).)

**Registration.** Application for registration as a self-assessing purchaser must be made on a form prescribed by the Tax Commissioner. At the time of making the application and by May 1 of each year, excluding May 1, 2000, a self-assessing purchaser must pay a fee of \$500 to the Treasurer of State for deposit in the state treasury to the credit of the Kilowatt Hour Excise Tax Administration Fund, which is created by the act. Money in this Fund must be used to defray the Tax Commissioner's cost in administering the kilowatt-hour tax owed by self-assessing purchasers.

After the application for registration is approved by the Tax Commissioner, the registration remains in effect until canceled by the registrant upon written notification to the Commissioner of the election to pay the tax to the electric distribution company, or by the Commissioner if the registrant fails to pay the self-assessed tax or \$500 fee, or to meet the qualifications to be a self-assessing purchaser. The Commissioner must give written notice to the electric distribution company from which electricity is delivered to a self-assessing purchaser of the purchaser's self-assessing status, and that electric distribution company is relieved of the obligation to pay the tax for electricity distributed to that self-assessing purchaser until it is notified by the Commissioner that the self-assessing purchaser's registration is canceled. Within 15 days of notification of the canceled registration, the electric distribution company is responsible for payment of the kilowatt-hour tax (at the non-self-assessment rates discussed in "**Application of the new tax,**" above) on electricity distributed to a canceled self-assessing purchaser. A self-assessing purchaser with a canceled registration must file a report and remit the kilowatt-hour tax at the non-self-assessment rates on all electricity it receives for any measurement period prior to the tax being reported

and paid by the electric distribution company. A self-assessing purchaser whose registration is canceled by the Commissioner is not eligible to register as a self-assessing purchaser for two years after the registration is canceled. (Sec. 5727.81(C)(2).)

**Exemptions from the tax**

(secs. 5727.80(F) and 5727.81(D))

The kilowatt-hour tax does not apply to the distribution of any electricity distributed to the federal government, to an end user located at a federal facility that uses electricity for the enrichment of uranium, or to an end user who for any day is a "qualified end user." A "qualified end user" means an end user of electricity that uses more than 3,000,000 kilowatt hours of electricity at one manufacturing location in this state for a calendar day for use in a manufacturing process that features an electrochemical reaction in which electrons from direct current electricity remain a part of the product being manufactured.

**Payment of the kilowatt-hour tax**

(secs. 113.061, 5727.82, and 5727.83)

**Filing a return.** Except where an end user is a qualified end user (see "**Reports by qualified end users**," below), an electric distribution company must pay the kilowatt-hour tax to the Treasurer of State by the 20th day of each month. A company must file with the Treasurer a return as prescribed by the Tax Commissioner and make payment of the full amount of tax due for the preceding month. The first payment of this tax must be made on or before June 20, 2001.

If the electric distribution company required to pay the kilowatt-hour tax is a municipal electric utility, it may retain in its general fund that portion of the tax on the kilowatt hours distributed to end users located within the boundaries of the municipal corporation. But the municipal electric utility must pay to the Treasurer of State the tax due on any kilowatt hours distributed to end users located outside the boundaries of the municipal corporation. (Sec. 5727.82(A).)

A self-assessing purchaser that pays the kilowatt-hour tax directly to the Treasurer of State also must file a return with the Treasurer by the 20th day of each month and make payment of the full amount of the tax due for the preceding month.

As prescribed by the Tax Commissioner, the return must be signed by the company or self-assessing purchaser required to file it, or the company's or purchaser's authorized employee, officer, or agent. The Treasurer must mark on

the return the date it was received and indicate payment or nonpayment of the tax shown to be due on the return, and immediately transmit it to the Tax Commissioner. A return is deemed filed when received by the Treasurer. (Sec. 5727.82(A).)

Any electric distribution company or self-assessing purchaser that is required to file a return and fails to file it and pay the tax within the period prescribed must pay an additional charge of \$50 or 10% of the tax required to be paid for the reporting period, whichever is greater. The Tax Commissioner may collect the additional charge by assessment (see "Assessments for failure to file a return or pay the tax, interest, or charges," below). The Commissioner may abate all or a portion of the additional charge and adopt rules governing such abatements. (Sec. 5727.82(B).)

If any tax due is not paid timely, the electric distribution company or self-assessing purchaser liable for the tax must pay interest, calculated at the federal short-term rate determined each year by the Tax Commissioner, from the date the tax payment was due to the date of payment or to the date an assessment is issued, whichever occurs first.<sup>6</sup> Interest must be paid in the same manner as the tax, and the Commissioner may collect the interest by assessment. (Sec. 5727.82(C).)

**Reports by qualified end users.** Since the kilowatt-hour tax does not apply to electricity distributed to end users for days the end user is a qualified end user, a modified tax payment schedule applies with respect to them. Not later than the tenth day of each month, a qualified end user must report in writing to the electric distribution company that distributes electricity to the end user the non-taxable kilowatt hours that were consumed (as a qualified end user) for the prior month and the number of days, if any, on which the end user was not a qualified end user. For each calendar day the end user was not a qualified end user, the end user is required to report in writing to the electric distribution company the number of kilowatt hours used on that day, and the electric distribution company must pay the kilowatt-hour tax on each kilowatt hour that was not distributed to a qualified end user. The company may rely in good faith on a qualified end user's report filed in accordance with this provision, and if it is determined that the end user was not a qualified end user for any calendar day or the quantity of electricity used by the qualified end user was overstated, the Tax Commissioner must assess and collect any kilowatt-hour tax directly from the qualified end user. As requested by the Commissioner, each end user reporting to an electric distribution company that

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<sup>6</sup> On October 15, 1998, the Tax Commissioner determined that the interest rate for 1999 is 8% per annum.

it is a qualified end user must provide documentation that establishes the daily volume of electricity it consumed. (Sec. 5727.82(D).)

**Filing by electronic funds transfer.** Under the act, an electric distribution company or self-assessing purchaser must remit each monthly tax payment by electronic funds transfer. The Tax Commissioner must notify each electric distribution company and self-assessing purchaser of this obligation, maintain an updated list of those companies and purchasers, and timely certify to the Treasurer of State the list and any additions thereto or deletions therefrom. Failure by the Commissioner to notify a company or self-assessing purchaser to remit taxes by electronic funds transfer does not relieve the company or purchaser of its obligation to remit taxes in that manner. (Sec. 5727.83(A).)

An electric distribution company or self-assessing purchaser required to remit payments in this manner must remit them to the Treasurer of State on or before the 20th day of each month in the manner prescribed by rules adopted by the Treasurer under existing law that governs the acceptable modes of electronic funds transfer. The payment of taxes by electronic funds transfer does not affect a company's or purchaser's obligation to file the monthly return. (Secs. 113.061 and 5727.83(B).)

An electric distribution company or self-assessing purchaser required to remit taxes by electronic funds transfer may apply to the Treasurer of State in the manner prescribed by the Treasurer to be excused from that requirement. The Treasurer may excuse the company or purchaser from remittance by that method for good cause shown for the period of time requested by the company or for a portion of that period. The Treasurer must notify the Tax Commissioner and the company or purchaser of the Treasurer's decision as soon as is practicable. (Sec. 5727.83(C).)

If an electric distribution company or self-assessing purchaser required to remit taxes by electronic funds transfer remits those taxes by some means other than by that method, and the Treasurer of State determines that the failure was not due to reasonable cause or was due to willful neglect, the Treasurer must notify the Tax Commissioner of the failure and provide the Commissioner with any information used in making that determination. The Commissioner may collect an additional charge, by assessment, that is equal to 5% of the amount of the taxes required to be paid by electronic funds transfer, not exceeding \$5,000. The charge assessed is in addition to any other penalty or charge imposed under the kilowatt-hour tax law, and must be considered as revenue arising from the tax. The Commissioner may abate all or a portion of the charge and may adopt rules governing such abatements.

No additional charge may be assessed under this provision against an electric distribution company or self-assessing purchaser that has been notified of its obligation to remit taxes by electronic funds transfer and that remits its first two tax payments after notification by some means other than electronic funds transfer. The additional charge may be assessed upon the remittance of any subsequent tax payment that the company or purchaser remits by some means other than electronic funds transfer. (Sec. 5727.83(D).)

**School District and Local Government Property Tax Replacement Funds**

(secs. 5727.84(A) and (B) and 5727.85(A))

The act requires that all money arising from the kilowatt-hour tax be credited to various funds, as follows:

(1) 59.976% of the tax, plus the amount of the "state education aid offset," must be credited to the General Revenue Fund (GRF);

(2) 2.646% must be credited to the Local Government Fund;

(3) .378% must be credited to the Local Government Revenue Assistance Fund;

(4) 11.1% of the tax must be credited to the Local Government Property Tax Replacement Fund, created in the state treasury by the act for the purpose of making property tax replacement payments to local governments (see "**Property tax replacement payments**," below);

(5) 25.9% of the tax, less an amount equal to the "state education aid offset," must be credited to the School District Property Tax Replacement Fund, created in the state treasury by the act for the purpose of making property tax replacement payments to school districts and joint vocational school districts. (Sec. 5727.84(B).)

The "state education aid offset" is deposited in the GRF. It represents the additional money paid by the state to school districts through the Foundation Formula attributable to the act's reduced tangible personal property assessment rates. The offset is determined by the Department of Education and is the amount by which state education aid computed for school districts for the current fiscal year **exceeds** the amount of state education aid that would be computed for the current fiscal year if the district's adjusted total taxable value included the tax

value loss certified by the Tax Commissioner (see "*Tax value loss*," below).<sup>7</sup> The Department certifies the state education aid offset to the Director of Budget and Management. (Sec. 5727.85(A).)

Beginning in the fiscal year in which property tax replacement payments are required to be made, if the revenue arising from the kilowatt-hour tax is less than \$552 million, the amount credited to the GRF under (1), above, must be reduced by the amount necessary to credit to the funds in (2) through (5) the amount each fund would have received if the kilowatt-hour tax did raise \$552 million for that fiscal year. The Tax Commissioner must certify to the Director the amounts that are so credited. (Sec. 5727.84(B)(6).)

**Assessments for failure to file a return or pay the tax, interest, or charges**

(secs. 5727.89 and 5727.90)

**Assessment procedure.** The act permits the Tax Commissioner to make an assessment, based on any information in the Commissioner's possession, against any electric distribution company, self-assessing purchaser, or qualified end user that fails to file a return or pay any tax, interest, or additional charge required by the kilowatt-hour tax. A 15% penalty must be added to all amounts assessed. The Commissioner may adopt rules providing for the remission of penalties.

When information in the possession of the Commissioner indicates that a person liable for the tax has not paid it in full, the Commissioner may audit a representative sample of the person's business and may issue an assessment based on the audit. The Commissioner must give the person a written assessment notice by personal service or certified mail.

The Commissioner may issue an assessment for which the kilowatt-hour tax was due and unpaid on the date the person was informed by an agent of the Commissioner of an investigation or audit of the person. Any payment of the tax for the period covered by the assessment, after the person is so informed, must be credited against the assessment. (Sec. 5727.89(A).)

Unless the party assessed files with the Tax Commissioner within 30 days after service of the notice of assessment, either personally or by certified mail, a

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<sup>7</sup> Under the act, "state education aid" means the sum of the state basic aid and state special education aid amounts computed for a school district under the school foundation program law (sec. 3317.022, not in the act). "Adjusted total taxable value" has the same meaning as in the school foundation program law (sec. 3317.02, not in the act).

written petition for reassessment signed by the party assessed or the party's authorized agent having knowledge of the facts, the assessment is final and the amount of the assessment is due and payable. The petition must indicate the objections of the party assessed, but additional objections may be raised in writing prior to the date shown on the final determination of the Commissioner. The Commissioner must grant the petitioner a hearing on the petition, unless waived by the petitioner. (Sec. 5727.89(B).)

The Commissioner may make any correction to the assessment that the Commissioner finds proper and must issue a final determination thereon. The Commissioner is required to serve a copy of the final determination on the petitioner either by personal service or certified mail, and the Commissioner's decision in the matter is final, subject to existing law regarding appeals from final determinations of the Commissioner. (Sec. 5727.89(C).)

After an assessment becomes final, if any portion of it, including accrued interest, remains unpaid, a certified copy of the Commissioner's entry making the assessment final may be filed in the office of the common pleas court clerk in the county in which the party assessed resides or in which the party's business is conducted. If the party assessed maintains no place of business in Ohio and is not a resident of Ohio, the certified copy of the entry may be filed in the office of the Clerk of the Court of Common Pleas of Franklin County.

The clerk, immediately upon the filing of the entry, must enter a judgment for the state against the person assessed in the amount shown on the entry. The judgment may be filed by the clerk in a loose-leaf book entitled "Special Judgments for the Kilowatt-Hour Tax," and has the same effect as other judgments. Execution issues upon the judgment at the request of the Tax Commissioner, and all laws applicable to sales on execution apply to sales made under the judgment (execution of judgments against property is regulated by R.C. Chapter 2329.).

The portion of the assessment not paid within 30 days after the day it was issued bears interest at the federal short-term rate from the day the Commissioner issues the assessment until the day the assessment is paid. Interest must be paid in the same manner as the tax and may be collected by the issuance of an assessment. (Sec. 5727.89(D).)

**Jeopardy assessments.** If the Tax Commissioner believes that collection of the kilowatt-hour tax will be jeopardized unless proceedings to collect or secure collection of the tax are instituted without delay, the Commissioner may issue a jeopardy assessment against the electric distribution company, self-assessing purchaser, or qualified end user liable for the tax. Upon issuance of the jeopardy

assessment, the Commissioner immediately must file a certified copy of the entry making the assessment final with the common pleas court clerk in the manner prescribed above for final assessments. Notice of the jeopardy assessment must be served on the party assessed or the party's legal representative within five days of the filing of the entry with the clerk. The total amount assessed is immediately due and payable, unless the party assessed files a petition for reassessment and provides security in a form satisfactory to the Commissioner and in an amount sufficient to satisfy the unpaid balance of the assessment. Full or partial payment of the assessment does not prejudice the Commissioner's consideration of the petition for reassessment. (Sec. 5727.89(E).)

All money collected by the Tax Commissioner by assessment must be paid to the Treasurer of State, and when paid must be considered as revenue arising from the kilowatt-hour tax. (Sec. 5727.89(F).)

**Limitation on assessments.** The Tax Commissioner is prohibited from making an assessment for the kilowatt-hour tax more than four years after the date on which the return for the period assessed was due or filed, whichever date is later. This prohibition does not bar an assessment when the party assessed failed to file a return or knowingly filed a false or fraudulent return, or the party assessed and the Commissioner waived the time limitation in writing. (Sec. 5727.90.)

### **Tax refunds**

(secs. 5703.052, 5703.053, and 5727.91)

Under the act, the Treasurer of State is required to refund any amount of the kilowatt-hour tax paid that was paid illegally or erroneously, or paid on an illegal or erroneous assessment. An electric distribution company or self-assessing purchaser must file an application for a refund with the Tax Commissioner on a form prescribed by the Commissioner, within four years of the illegal or erroneous tax payment.

Upon the filing of the application, the Commissioner must determine the amount of refund due and certify that amount to the Director of Budget and Management and the Treasurer of State for payment from the existing Tax Refund Fund. If the application for refund is for taxes paid on an illegal or erroneous assessment, the Commissioner must include in the certified amount interest calculated at the federal short-term rate, from the date of overpayment to the date of the Commissioner's certification. (Secs. 5703.052 and 5727.91(A).)

If an electric distribution company entitled to a refund of taxes is indebted to the state for any tax or fee administered by the Tax Commissioner that is paid to the state, or for any charge, penalty, or interest arising from that tax or fee, the

amount refundable may be applied in satisfaction of the debt. If the amount refundable is less than the amount of the debt, it may be applied in partial satisfaction of the debt. If the amount refundable is greater than the amount of the debt, the amount remaining after satisfaction of the debt must be refunded. If the company has more than one such debt, any debt arising from failure to file or pay the state sales tax or the state income tax must be satisfied first. The refund provision of the act applies only to debts that have become final. (Sec. 5727.91(B).)

An electric distribution company that can substantiate to the Commissioner that the kilowatt-hour tax was paid on electricity distributed via wires and consumed at a location outside Ohio may claim a refund by filing an application for it within the four-year refund period. (Sec. 5727.91(C).)

Before a refund is issued, an electric distribution company must certify, as prescribed by the Tax Commissioner, that it either did not include the kilowatt-hour tax in its distribution charge to an electric customer upon which a refund of the tax is claimed, or it has refunded or credited to the electric customer the excess distribution charge related to the tax that was erroneously included in the electric customer's distribution charge. (Sec. 5727.91(D).)

#### **Record-keeping requirements**

(sec. 5727.92)

Every person liable for the kilowatt-hour tax must keep complete and accurate records of all electric distributions and other records as required by the Tax Commissioner. The records must be preserved for four years after the return for the taxes to which the records pertain is due or filed, whichever is later. The records must be available for inspection by the Tax Commissioner or the Commissioner's authorized agent, upon request of the Commissioner or agent.

#### **Mandatory registration with the Tax Commissioner**

(sec. 5727.93; Section 14)

The act prohibits a person from distributing electricity to a meter of an end user in this state if the person is not registered with the Tax Commissioner as an electric distribution company before May 1, 2001. Each person required to register must do so prior to distributing electricity. The Commissioner must prescribe the form of the registration application, assign an identification number to each registration, and notify the registrant of that number. The registration remains in effect until canceled in writing by the registrant upon the cessation of

distributing electricity to a meter of an end user in this state, or until such registration is denied, revoked, or canceled by the Commissioner.

A registration may be revoked or canceled by the Commissioner in accordance with the Administrative Procedure Act, which requires notice and a hearing, for failure of an electric distribution company to pay the kilowatt-hour tax or comply with the law that created the tax. An electric distribution company whose registration is denied may petition for a hearing, in accordance with the procedures set forth for a petition for reassessment (see "Assessments for failure to file a return or pay the tax, interest, or charges," above), not later than 30 days after receiving the denial, and the final determination is subject to appeal in accordance with the law regarding appeals of the Commissioner's final determinations. (Sec. 5727.93(A) and (B); Section 14.)

The Commissioner must maintain a list containing the name and address of each electric distribution company registered by the Commissioner. The list and subsequent updates of it must be open to public inspection. (Sec. 5727.93(C).)

#### Notice of tax in customers' bills

(secs. 4933.33 and 5727.94)

Each electric distribution company required to pay the kilowatt-hour tax must distribute annually to its customers in Ohio a statement notifying them that the amount they are being billed for electricity includes an amount for payment of the kilowatt-hour tax. The statement must list the current dollar figure of the kilowatt-hour taxes levied.

#### Prohibitions

(secs. 5727.95 and 5727.99(D))

The act prohibits an electric distribution company from failing to file any return or report required to be filed pursuant to the kilowatt-hour tax law, or filing or causing to be filed any incomplete, false, or fraudulent return, report, or statement, or aiding or abetting another in the filing of any false or fraudulent return, report, or statement. The act also prohibits a person from distributing electricity to a meter of an end user in this state without holding a valid registration from the Tax Commissioner.

Whoever violates the kilowatt-hour tax law or any rule of the Tax Commissioner adopted under that law is guilty of a first degree misdemeanor on the first offense. On each subsequent offense, the person is guilty of a fourth degree felony.

**Payment of tax considered a normal expense**

(sec. 4909.161(B))

Notwithstanding continuing law regarding the PUCO's general power to regulate public utilities and fix their rates, the payment of the kilowatt-hour tax is to be considered a normal expense incurred by an electric distribution utility in the course of rendering service to the public, and may be recovered as such in accordance with an order of the PUCO (sec. 4909.161(B)). The act defines an "electric distribution utility" as an electric utility that supplies at least retail electric distribution service. An "electric utility" means an electric light company that is engaged, on a for-profit basis, in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state (sec 4928.01). "Electric utility" does not include a municipal electric utility or a billing or collection agent.

An electric distribution utility required to pay the tax may file with the PUCO revised rate schedules, consistent with existing Public Utility Law (Chapters 4905. and 4909.) and the act's rate cap provision (sec. 4928.34(A)(6)), that will permit full recovery on a permanent basis in its rates, of the amount of any resultant tax payments, after taking into account in the utility's rates any reductions of taxes resulting from the act. The PUCO must act promptly to approve those schedules.

**Joint Legislative Committee on the Kilowatt-Hour Tax**

(Section 19)

The act creates the Joint Legislative Committee on the Kilowatt-Hour Tax. The Committee consists of five members of the House of Representatives and five members of the Senate. Three members of the House and three members of the Senate must be members of the majority party appointed by the House Speaker and Senate President, respectively, and two members of the House and two members of the Senate must be members from the minority party appointed by the Minority Leader of the House of Representatives and Minority Leader of the Senate, respectively. A member of the Joint Legislative Committee on the Kilowatt-Hour Tax designated by the Speaker and the Senate President serves as the chairperson of the Committee. Any vacancies that occur on the Committee must be filled in the manner of the original appointment.

The Committee is required to study the effects, fairness, and structure of the kilowatt-hour tax on purchasers of electricity. The Committee may conduct public hearings on these matters and request assistance from the Tax Commissioner.

Not later than September 30, 2000, the Committee must issue a report of its findings, including recommendations regarding changes to the kilowatt-hour tax and any alternatives to the tax, to the Senate and House of Representatives in accordance with general notice provisions for the General Assembly (sec. 101.68, not in the act). Thereafter, the Committee ceases to exist.

**Property tax replacement payments**

The act requires that school districts, joint vocational school districts, and other local governments receive property tax replacement payments for revenues lost due to the reduction in the tangible personal property tax assessment rates for electric companies and rural electric companies. The payments are to be made from the Local Government Property Tax Replacement Fund and the School District Property Tax Replacement Fund, into which a portion of the revenues from the kilowatt-hour tax are deposited. The act also requires that county auditors and county treasurers receive replacement payments for losses incurred in their administrative fees.

**Determination of tax value loss, fixed-rate levy loss, and fixed-sum levy loss used in replacement payment computations**

(sec. 5727.84(A), (C), (D), and (E))

Under the act, not later than January 1, 2002, the Tax Commissioner is required to determine the tax value loss for each taxing district.<sup>8</sup> At the same time, the Commissioner must determine for each school district, joint vocational school district, and local taxing unit its fixed-rate levy loss and fixed-sum levy loss. All of these amounts are used to compute property tax replacement payments for those entities.

**Tax value loss.** The tax value loss is the **sum** of the amounts described in (1) and (2):

(1)(a) The value of electric company and rural electric company tangible personal property as assessed by the Tax Commissioner for tax year 1998 on a preliminary assessment, or an amended preliminary assessment if issued prior to March 1, 1999, and as apportioned to the taxing district for tax year 1998; **minus**

(b) The value of such property as assessed by the Tax Commissioner for tax year 1998 had the property been apportioned to the taxing district for tax year

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<sup>8</sup> Under continuing law (sec. 5727.01), a "taxing district" is a municipal corporation or township, or part thereof, in which the aggregate rate of taxation is uniform.

2001, and assessed at the rates in effect for tax year 2001 (25% for all such tangible personal property, except transmission and distribution property).

(2)(a) The three-year average for tax years 1996, 1997, and 1998 of the assessed value from nuclear fuel materials and assemblies (generally nuclear fuel rods) assessed against a person under the general taxpayer personal property tax law from the leasing of the materials and assemblies to an electric company for those respective tax years, as reflected in the preliminary assessments; **minus**

(b) The three-year average assessed value of that same property for tax years 1996, 1997, and 1998, as reflected in the preliminary assessments, using an assessment rate of 25%. (Sec. 5727.84(C).)

The Tax Commissioner may request that electric companies and rural electric companies file a report to help determine the tax value loss. The report must be filed within 30 days of the Commissioner's request. A company that fails to file the report or does not timely file the report is subject to the penalty in R.C. § 5727.60, discussed in "Miscellaneous," below.

**Fixed-rate levy loss.** The fixed-rate levy loss for a school district, joint vocational school district, and local taxing unit is its tax value loss **multiplied** by the tax rate in effect for fixed-rate levies in tax year 1998 or 1999, whichever is greater, but excluding any levy approved after June 30, 1999 (sec. 5727.84(D)). The act defines "fixed-rate levies" as any tax levied on property other than a fixed-sum levy (sec. 5727.84(A)(8)).

**Fixed-sum levy loss.** The act defines a "fixed-sum levy" as a tax levied on property at whatever rate is required to produce a specified amount of tax money or to pay debt charges, including school district emergency levies (sec. 5727.84(A)(10)). The fixed-sum levy loss for a school district, joint vocational school district, and local taxing unit is the amount obtained by **subtracting** the total taxable value in tax year 1998 in each school district, joint vocational school district, and local taxing unit multiplied by one-fourth of one mill **from** the tax value loss **multiplied** by the tax rate in effect for fixed-sum levies for all taxing districts within each school district, joint vocational school district, and local taxing unit in tax year 1998 or 1999, whichever is greater, but excluding any levy approved after June 30, 1999 (sec. 5727.84(E)).

For years 2002 through 2006, the computation of the fixed-sum levy loss includes school district emergency levies that existed in 1998, and all other fixed-sum levies that existed in 1998 and continue to be charged in the tax year preceding the distribution year. For years 2007 through 2016, this computation excludes all school district emergency levies and all other fixed-sum levies that

existed in 1998 but are no longer in effect in the tax year preceding the distribution year (sec. 5727.84(E)(1)).

If the computation for any school district, joint vocational school district, or local taxing unit is greater than zero, the one-fourth of one mill that would otherwise be subtracted instead must be apportioned among all contributing fixed-sum levies in the proportion of each levy to the sum of all fixed-sum levies within each school district, joint vocational school district, or local taxing unit. (Sec. 5727.84(E)(2).)

**Replacement revenues for school districts and joint vocational school districts**

(secs. 5727.84(A)(1) and (2) and 5727.85)

**Payments to school districts for fixed-rate levy losses.** Under the act, city, local, and exempted village school districts receive property tax replacement payments for tax revenue losses incurred in their fixed-sum and fixed-rate levies. By July 31 of each year, beginning in 2002 and ending in 2016, the Department of Education is required to determine for each school district eligible for property tax replacement payments its state education aid offset (discussed above in "**School District and Local Government Property Tax Replacement Funds**") and its **adjusted fixed-rate levy loss**, which is the difference obtained by **subtracting** the state education aid offset from the fixed-rate levy loss for all taxing districts in each school district. The Department must certify the amount of the adjusted fixed-rate levy loss to the Director of Budget and Management. (Sec. 5727.85(A).)

Not later than October 31 of years 2006 through 2016, the Department of Education also must determine all of the following for each school district to see if it continues to qualify for payments:

(1) The amount obtained by **subtracting** the district's state education aid computed for fiscal year 2002 from the district's state education aid computed for the current fiscal year;

(2) The inflation-adjusted property tax loss, which is the fixed-rate levy loss for all taxing districts in each school district **plus** the product obtained by **multiplying** that loss by the cumulative percentage increase in the consumer price index from January 1, 2002, to June 30 of the current year (using the consumer price index, all items, all urban consumers, prepared by the Bureau of Labor Statistics of the United States Department of Labor).

(3) The difference obtained by **subtracting** the amount computed under (1) from the amount of the inflation-adjusted property tax loss. If this difference is zero or a negative number, no further property tax replacement payments are to be made to a school district from the School District Property Tax Replacement Fund. If the difference is greater than zero, the district continues to qualify for replacement payments, and not later than December 31 of each year, beginning in 2006 and ending in 2016, the Department of Education must certify to the Director of Budget and Management the adjusted fixed-rate levy loss for each district. (Sec. 5727.85(B).)

For all taxing districts in each school district, the Director must pay from the School District Property Tax Replacement Fund to the county undivided income tax fund in the proper county treasury all of the following:

(1) In February of 2002, one-half of the fixed-rate levy loss on or before February 15;

(2) From August 2002 through August 2006 (and from February 2007 through August 2016 for those districts that continue to qualify for payments), one-half of the adjusted fixed-rate levy loss certified for that fiscal year on or before each of the days prescribed for the settlements between the county treasurer and the county auditor, which occur on or before February 15 and on or before August 10 each year.

The county treasurer distributes these amounts to the proper school district as if they had been levied and collected as taxes, and the school district must apportion the amounts so received among its funds in the same proportions as if those amounts had been levied and collected as taxes. (Sec. 5727.85(C).)

**Payments to joint vocational school districts for fixed-rate levy losses.**

Like school districts, joint vocational school districts, which include cooperative education school districts and county financing school districts, receive property tax replacement payments under the act for tax revenue losses incurred in their fixed-rate levies. From February 2002 to August 2016, the Director must pay from the School District Property Tax Replacement Fund to the county undivided income tax fund in the proper county treasury, one-half of the fixed-rate levy loss certified for each year on or before each of the days prescribed for settlements. The county treasurer must distribute such amounts to the proper joint vocational school district as if they had been levied and collected as taxes, and the joint vocational school district is required to apportion the amounts so received among its funds in the same proportions as if those amounts had been levied and collected as taxes. (Sec. 5727.85(D).)

**Payments to school districts and joint vocational school districts for fixed-sum levy losses.** Not later than January 1, 2002, for each school district and joint vocational school district, the Tax Commissioner must certify to the Director of Budget and Management the fixed-sum levy loss. The certification must cover a time period sufficient to include all fixed-sum levies in effect in 1998 to June 30, 1999, until they are no longer in effect. The Director must pay from the School District Property Tax Replacement Fund to the county undivided income tax fund in the proper county treasury one-half of the fixed-sum levy loss so certified for each year on or before each of the days prescribed for settlements. The county treasurer must distribute the amounts to the proper school district or joint vocational school district as if they had been levied and collected as taxes, and the district must apportion the amounts so received among its funds in the same proportions as if those amounts had been levied and collected as taxes. No further payments may be made once all fixed-sum levies in effect in 1998 to June 30, 1999, are no longer in effect. (Sec. 5727.85(E)(1).)

Beginning in 2003 and ending in 2016, by January 31 of each year, the Tax Commissioner must review the original certification of the fixed-sum levy loss. If the Commissioner determines that a fixed-sum levy that had been scheduled to be reimbursed in the current year has expired, a revised certification for that and all subsequent years must be made to the Director of Budget and Management. (Sec. 5727.85(E)(2).)

**Early payoffs.** By August 5, 2002, the Tax Commissioner is required to estimate the amount of money in the School District Property Tax Replacement Fund in excess of the amount necessary to make payments in that month. The Department of Education, in consultation with the Tax Commissioner and from those excess funds, may pay any school district four and one-half times the adjusted fixed-rate levy loss. Payments must be made in order from the smallest annual loss to the largest annual loss. An early payoff payment made in this manner is in lieu of the payment to be made in August of 2002. No payments may be made in this manner to any school district with annual losses from any fixed-rate levies in excess of \$20,000. A school district receiving an early payoff payment is no longer entitled to any further fixed-rate levy loss payments. (Sec. 5727.85(F).)

**Excess moneys.** If, on July 31 of 2003, 2004, 2005, and 2006, and on the thirty-first day of January and July of 2007 and each year thereafter, the amount credited to the School District Property Tax Replacement Fund exceeds the amount needed to make payments from the fund in the following month, the Director of Budget and Management must distribute the excess among school districts and joint vocational school districts. The amount distributed to each district must bear the same proportion to the excess remaining in the fund as the

ADM of the district bears to the ADM of all of the districts.<sup>9</sup> The excess amounts distributed in this manner must be used exclusively for capital improvements. If, in the opinion of the Director, the excess remaining in the School District Property Tax Replacement Fund in any year is not sufficient to warrant distribution, the excess remains to the credit of the Fund. (Sec. 5727.85(G).)

**Insufficient funds.** If the total amount in the School District Property Tax Replacement Fund is insufficient to make all payments, the fixed-sum levy loss payments must be made first in their entirety. After all of those payments are made, fixed-rate levy loss payments to school districts and joint vocational school districts must be made from the balance of money available in the proportion of each school district's or joint vocational school district's payment amount to the total amount of fixed-rate levy loss payments. (Sec. 5727.85(H).)

**Mergers.** If all or a part of the territory of a school district or joint vocational school district is merged with or transferred to another district, the Tax Commissioner must adjust the property tax replacement payments to each of the districts in proportion to the tax value loss apportioned to the merged or transferred territory. (Sec. 5727.85(I).)

**Electric Property Tax Study Committee.** The act creates the Electric Property Tax Study Committee, effective January 1, 2011. The Committee consists of the following seven members: the Tax Commissioner, three members of the Senate appointed by the Senate President, and three members of the House of Representatives appointed by the House Speaker. The appointments must be made not later than January 31, 2011. The Commissioner is the chairperson of the Committee.

The Committee is required to study the extent to which each school district or joint vocational school district has been compensated under this act and any subsequent acts, for the property tax loss caused by the reduction in the assessment rates for electric and rural electric company tangible personal property. Not later than June 30, 2011, the Committee must issue a report of its findings, including any recommendations for providing additional compensation for the property tax loss or regarding remedial legislation, to the Senate President and the House Speaker, at which time the Committee ceases to exist.

The Department of Taxation and Department of Education must provide such information and assistance as is required for the Committee to carry out its duties. (Sec. 5727.85(J).)

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<sup>9</sup> "ADM" means the formula ADM for school districts, and the average daily membership for joint vocational school districts.

**Replacement revenues for other local governments**

(sec. 5727.86)

Under the act, each local taxing unit receives property tax replacement payments for tax revenue losses incurred in its fixed-sum levies and fixed-rate levies due to the reduction in the assessment rates for electric company and rural electric company tangible personal property.<sup>10</sup> Not later than January 1, 2002, the Tax Commissioner must certify to the Director of Budget and Management, for all taxing districts in each local taxing unit, the fixed-rate levy loss and the fixed-sum levy loss determined as above in "**Determination of tax value loss, fixed-rate levy loss, and fixed-sum levy loss used in replacement payment computations.**" The certification of the fixed-sum levy loss must cover a period of time sufficient to include all fixed-sum levies in effect in 1998 to June 30, 1999, until they are no longer in effect. Based on the Commissioner's certification, the Director computes the payments to be made to each local taxing unit for each year according to (1) and (2), below. (Sec. 5727.86(A).)

(1) For **fixed-rate levy losses**, payments are to be made in each of the following years at the following percentage of the certified fixed-rate levy loss (sec. 5727.86(A)(1)):

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<sup>10</sup> *The act defines "local taxing unit" as any subdivision, as defined in continuing law, which is any county; municipal corporation; township; township police or fire district; joint fire, ambulance, emergency medical service, or recreation district; fire and ambulance district; township waste disposal or road district; community college district; technical college district; detention home district; a district organized for juvenile facilities; a combined district detention home or juvenile facility; a joint-county alcohol, drug addiction, and mental health service district; a drainage improvement district; or a union cemetery district. "Local taxing unit" also includes a park district or township park district created under continuing law, or a "taxing unit" as defined in continuing law, which means any subdivision or other governmental district having authority to levy taxes on the property in the district or issue bonds that constitute a charge against the property of the district, including conservancy, metropolitan park, sanitary, road, and other districts. "Local taxing unit" excludes school districts and joint vocational school districts.*

<u>Year</u>	<u>Percentage</u>
2002 through 2006	100%
2007 through 2011	80%
2012	66.7%
2013	53.4%
2014	40.1%
2015	26.8%
2016	13.5%
2017 and thereafter	0%

(2) For **fixed-sum levy losses**, 100% of the certified fixed-sum levy loss is paid to the local taxing unit in 2002 and thereafter. Beginning in 2003, by January 31 each year, the Tax Commissioner must review the original certification of the fixed-sum levy loss. If the Commissioner determines that a fixed-sum levy that had been scheduled to be reimbursed in the current year has expired, a revised certification for that and all subsequent years has to be made. (Sec. 5727.86(A)(2) and (B).)

The Director pays from the Local Government Property Tax Replacement Fund to the county undivided income tax fund in the proper county treasury one-half of the amount of the fixed-sum and fixed-rate levy losses, on or before each of the days prescribed for the settlements between the county treasurer and the county auditor, which occur on or before February 15 and on or before August 10 each year. The county treasurer distributes the amounts to the proper local taxing unit as if they had been levied and collected as taxes, and the local taxing unit must apportion the amounts so received among its funds in the same proportions as if those amounts had been levied and collected as taxes. (Sec. 5727.86(C).)

**Special payment provision.** The act provides for special payments to a local taxing unit in a county of less than 250 square miles that receives 80% or more of its combined general fund and bond retirement fund revenues from property taxes and rollbacks based on 1997 actual revenues as presented in its 1999 tax budget, and in which electric companies and rural electric companies comprise over 20% of its property valuation. That local taxing unit will receive 100% of its certified fixed-rate levy losses in years 2002 through 2016. (Sec. 5727.86(A)(3).)

**Early payoffs.** By February 5, 2002, the Tax Commissioner is required to estimate the amount of money in the Local Government Property Tax Replacement Fund in excess of the amount necessary to make payments to local taxing units in that month. The Commissioner may pay any local taxing unit, from those excess funds, nine and four-tenths times the amount computed for 2002 under (1), above. An early payoff payment made in this manner is in lieu of the payment to be made in February 2002 under (1). A local taxing unit receiving a payment in this manner will no longer be entitled to any further fixed-rate levy loss payments. (Sec. 5727.86(D).)

**Excess moneys.** On July 31, 2002, 2003, 2004, 2005, and 2006, and on the 31st day of January and July of 2007 and each year thereafter, if the amount credited to the Local Government Property Tax Replacement Fund exceeds the total amount of property tax replacement payments required to be paid to local taxing units, the Director of Budget and Management must distribute the excess to each county as follows:

(1) One-half is distributed to each county in proportion to each county's population;

(2) One-half is distributed to each county in the proportion that the amount of the total levy loss in 2002 for all taxing districts in the county is of the amounts so determined in 2002 for all taxing districts to which property tax replacement payments are required to be made.

These excess amounts must be distributed each year by the county budget commission to each local taxing unit in the county in the proportion that the unit's current taxes charged and payable are of all taxing units' current taxes charged and payable in the county. The amounts received must be credited to the general fund of the local taxing unit that receives them. "Current taxes charged and payable" means the taxes charged and payable as most recently determined for local taxing units in the county. (Sec. 5727.86(C) and (E).)

If, in the opinion of the Director, the excess remaining in the Local Government Property Tax Replacement Fund in any year is not sufficient to warrant distribution in this manner, the excess must remain to the credit of the Fund. (Sec. 5727.86(E).)

**Insufficient funds.** If the total amount in the Local Government Property Tax Replacement Fund is insufficient to make all payments, the fixed-sum levy loss payments must be made first in their entirety. After all of those payments are made, fixed-rate levy loss payments must be made from the balance of money available in the proportion of each local taxing unit's payment amount to the total amount of fixed-rate levy loss payments. (Sec. 5727.86(F).)

**Mergers.** If all or a part of the territories of two or more local taxing units are merged, or unincorporated territory of a township is annexed by a municipal corporation, the Tax Commissioner must adjust the payments made to each of the local taxing units in proportion to the tax value loss apportioned to the merged or annexed territory, or as otherwise provided by a written agreement between the legislative authorities of the local taxing units certified to the Commissioner not later than June 1 of the calendar year in which the payment is to be made. (Sec. 5727.86(G).)

**Effect of replacement payments on current year fixed-sum levy tax rates**

(sec. 5705.34)

Under continuing law, the county budget commission works on a tax budget for subdivisions and taxing units in the county and, together with an estimate by the county auditor of the rate of each tax necessary to be levied by the taxing authority within its subdivision or taxing unit, certifies its results to the taxing authority. The act provides that if a taxing authority levies a tax for a fixed sum of money or to pay debt charges for the tax year for which the tax budget is prepared, and the tax was levied in tax year 1998, the county auditor, when estimating the rate at which the tax has to be levied in the current year, must estimate the rate necessary to raise the required sum less the estimated amount of any property tax replacement payments made for the tax year to a taxing unit. The estimated rate must be the rate of the levy that the budget commission certifies to the taxing authority.

**Net indebtedness of political subdivisions**

(sec. 133.04)

Ongoing law limits the amount of net indebtedness a political subdivision ultimately may incur, and establishes a separate limit that the subdivision may incur with a vote of its electors. "Net indebtedness" generally means the principal amount of the outstanding securities of a subdivision less the amount held in a bond retirement fund. Certain kinds of securities are excluded from the calculation of net indebtedness.

Under the act securities issued in an amount equal to the property tax replacement payments received from the School District Property Tax Replacement Fund or the Local Government Property Tax Replacement Fund are also to be excluded from the calculation of net indebtedness.

### Replacement of administrative fees

(sec. 5727.87)

Under continuing law, county auditors and county treasurers collect administrative fees for services rendered in collecting personal property and classified property taxes (secs. 319.54 and 321.26, not in the act). The fees are imposed at a percentage of the moneys collected in the county. A portion of the fees are paid to the credit of the real estate assessment fund. Since the act reduces assessment rates on electric and rural electric company tangible personal property, the amount of personal property taxes paid to the county will decrease, causing the administrative fees to decrease. The act establishes a formula to reimburse those losses.

Not later than June 1, 2002 through 2011, the county auditor must determine the administrative fee loss for each county and certify it to the county budget commission. The "administrative fee loss" is a county's loss of administrative fees due to its tax value loss, determined as follows:

(1) For years 2002 through 2006, the administrative fee loss is determined by **multiplying** the fixed-rate levy loss and fixed-sum levy loss determined for all taxing districts in the county by .9659%, if total taxes collected in the county in tax year 1998 exceeded \$150,000,000, or 1.1159%, if total taxes collected in the county in tax year 1998 were \$150,000,000 or less.

(2) For years 2007 through 2011, the administrative fee loss is determined by **subtracting from** the dollar amount of administrative fees collected in the county in tax year 1998, the dollar amount of administrative fees collected in the county in the current calendar year. (Sec. 5727.87(A)(2) and (B).)

Prior to distribution by the county treasurer of property tax replacement payments to school districts and joint vocational school districts, the county budget commission must deduct from those payments 70% of the administrative fee loss certified by the county auditor. Similarly, before distributing property tax replacement payments to local taxing units, the county budget commission must deduct from those payments 30% of the loss. (Sec. 5727.87(B).)

On or before each of the days prescribed for property tax replacement payments in years 2002 through 2011, the county budget commission pays one-half of the amount of the administrative fee loss to the county auditor, county treasurer, or real estate assessment fund as if the amount had been allowed as administrative fees, and must deposit the amount in the same funds as if allowed as administrative fees. (Sec. 5727.87(C).)

After payment of the administrative fee loss on or before August 10, 2011, all administrative fee loss payments cease.

**Removal of electric companies and rural electric companies from the public utility excise tax**

**Such companies are no longer subject to the excise tax**

(secs. 5727.01, 5727.02, 5727.05, 5727.30, 5727.31, 5727.311, 5727.32, 5727.33, 5727.38, 5727.42, 5727.47, 5727.53, 5727.61, and 5727.72; Sections 4 and 11)

Prior law required that electric companies and rural electric companies pay an excise tax on their gross receipts. The tax was computed by multiplying gross receipts by 4¾% (secs. 5727.30 and 5727.38). In tax year 2002, the act removes electric companies and rural electric companies from the public utility excise tax and subjects electric companies and combined companies, but not rural electric companies, to the corporation franchise tax (see "**Corporation franchise tax**," below). The act also amends the current definition of gross receipts to include any receipts received under Chapter 4928., the new retail electric service provisions of the act (sec. 5727.01).

Under the act, each electric company, combined company, and rural electric company must continue to pay the public utility excise tax imposed on gross receipts it receives during the period of May 1, 2000, through April 30, 2001, and any receipts it receives after April 30, 2001 from the distribution of electricity where the receipts were not subject to the kilowatt-hour tax. Receipts received after August 1, 2001 (generally, late payments), are not subject to the tax on gross receipts during the tax transition period if an electric company, combined company, or rural electric company takes reasonable collection measures to collect the gross receipts. The public utility excise tax for this period is to be assessed by the Tax Commissioner on or before the first Monday of November, 2001. Unless the company is a combined company under the act (see "**Combined companies**," below), after payment of this last assessment, it ceases to be subject to the public utility excise tax. (Section 11.)

Regardless of the existing payment schedule for the public utility excise tax, the first payment of the tax liability for this period must be made on or before October 15, 2000, and equal one-third of the estimated liability shown in the company's report filed on or before August 1, 2000. The second payment must be made on or before March 1, 2001, and equal one-third of the tax assessed by the Tax Commissioner on or before the first Monday in November, 2000. The last payment must be made on or before June 1, 2001, and equal one-fourth of the tax assessed by the Commissioner. The final report for the period of May 1, 2000,

through April 30, 2001, must be filed on or before August 1, 2001, in accordance with continuing public utility excise tax law. (Section 11.)

**Repeal of Ohio coal tax credit**

(sec. 5727.391; Section 8)

Effective January 1, 2002, the act repeals the Ohio coal tax credit in the public utility excise tax law and reestablishes the credit in the corporation franchise tax law, to be applied against an electric company's corporation franchise tax liability. A full discussion of the credit follows in "**Ohio coal tax credit.**"

**Combined companies**

(secs. 5727.01 and 5727.03)

The act provides that any person engaged in the activity of an electric company or rural electric company that is also engaged in the activity of a heating company<sup>11</sup> or natural gas company,<sup>12</sup> or any combination thereof, is a combined company (sec. 5727.01(L)). A combined company must file a separate report of its taxable property under continuing law governing the taxation of public utility property for each listed activity of the combined company, continues to be subject to the public utility excise tax, and must file a separate statement of gross receipts. The Tax Commissioner must separately value, apportion, and assess the company's property and exclude taxable gross receipts directly attributable to the activity of an electric company or a rural electric company. The formula described below in "**Calculation of taxable property**" must be used to identify the taxable property that cannot be directly attributed to providing one of the listed activities of a combined company. The formula described in "**Calculation of taxable gross receipts**" must be used to exclude the portion of taxable gross receipts that cannot be attributed to a listed combined public utility activity.

**Calculation of taxable property.** Under the act, the taxable property to attribute to an electric company or a rural electric company activity, or a heating company or natural gas company, is the taxable cost of the property that cannot be

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<sup>11</sup> A "heating company" is defined in ongoing law as a person engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating purposes.

<sup>12</sup> Under continuing law, a "natural gas company" is a person engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state.

directly attributed to a listed activity of a combined company **multiplied** by a numerator that is the taxable cost of property that can be directly attributed to the activity of an electric company, a rural electric company, a heating company, or a natural gas company, and a denominator that is the sum of the taxable cost that can be directly attributed to all the listed activities of a combined company. (Sec. 5727.03(B).)

**Calculation of taxable gross receipts.** Under the act, beginning with the public utility excise tax assessed by the Tax Commissioner on or before the first Monday in November, 2002, the Commissioner must separate the gross receipts of a combined company attributed to the activity of an electric company or a rural electric company. From the report of gross receipts filed by a combined company, the Commissioner must exclude the taxable gross receipts directly attributable to the activity of an electric company or a rural electric company. In addition, the Commissioner must exclude the portion of taxable gross receipts that cannot be attributed to a listed combined public utility activity or another public utility activity subject to the public utility excise tax by **multiplying** those taxable gross receipts by a numerator that is the taxable gross receipts that can be attributed to an electric company or a rural electric company activity, and a denominator that is the sum of the taxable gross receipts that can be directly attributed to a listed combined company activity or another public utility activity subject to the public utility excise tax. For purposes of determining the taxable gross receipts for providing electric company or rural electric company service, the taxable gross receipts as reported and determined under the public utility excise tax law, prior to its amendment by this act, must be used. (Sec. 5727.03(A) and (C).)

### **Corporation franchise tax**

#### **Electric companies and combined companies must pay the tax**

(secs. 5733.04(P) and 5733.09; Section 12)

Prior law provided that incorporated companies that owned and operated a public utility in Ohio and paid the public utility excise tax were not subject to the corporation franchise tax (sec. 5733.09). Since the act removes electric companies from the public utility excise tax law and no longer requires that they pay that tax, they (and combined companies) thus become subject to the corporation franchise tax. For purposes of the corporation franchise tax law, the act defines any person as an "electric company" when engaged in the business of generating, transmitting, or distributing electricity within Ohio for use by others (sec. 5733.04(P)). A "combined company" has the same meaning as in the public utility property and excise tax law.

The act provides that an electric company subject to the requirement under ongoing law to file an annual report with the Tax Commissioner of its taxable property or otherwise having nexus with or in Ohio under the United States Constitution, or any other corporation having any gross receipts directly attributable to providing public utility service as an electric company or having any property directly attributable to providing public utility service as an electric company, is subject to the corporation franchise tax (sec. 5733.09(A)). Electric companies and combined companies are first subject to the tax for tax year 2002 (Section 12). For that tax year, an electric company or a combined company is required to pay only two-thirds of its total corporation franchise tax liability.

**Adjustments to net income**

(secs. 5733.04(I)(3), (7), and (16), 5733.051, 5733.057, and 5733.0510)

Under the corporation franchise tax law, net income is the corporation's taxable income before operating loss deductions and special deductions, subject to certain adjustments. In determining its net income under that law, a corporation may deduct dividends or distributions received from a public utility if the corporation owns at least 80% of the utility's common stock. The act provides that these dividends or distributions are not deducted from net income if the stock is electric company stock (sec. 5733.04(I)(7)).

The act adds to the corporation franchise tax law an adjustment to net income for a "qualifying taxpayer," which is (1) a person that is an electric company or a combined company, but only if the person was subject to and paid the public utility excise tax for gross receipts received during the period of May 1, 2000, through April 30, 2001, or (2) any taxpayer not described in (1) if a person described in (1) transfers all or a portion of its assets or equity directly or indirectly to the taxpayer, the transfer occurred as part of an entity organization or reorganization, and the gain or loss with respect to the transfer is not recognized in whole or in part for federal income tax purposes under the Internal Revenue Code on account of a transfer as part of an equity organization or reorganization, or subsequent organization or reorganization. (Secs. 5733.04(I)(3) and (16) and 5733.0510(A).)

The act requires that a qualifying taxpayer adjust its net income for a qualifying asset involved in a qualifying taxable event. A "qualifying asset" means any asset shown on the qualifying taxpayer's books and records on December 31, 2000, in accordance with generally accepted accounting principles, including the cost of, or any portion of the cost of, any asset acquired after December 31, 2000, where such asset was acquired as a result of a tax-free or tax-deferred exchange of a qualifying asset. A "qualifying taxable event" means any event resulting in the

recognition for federal income tax purposes of gain or loss in connection with any direct or indirect sale, exchange, transfer, or retirement of any qualifying asset. (Sec. 5733.0510.)

If, with respect to a qualifying asset, there occurs a qualifying taxable event and if the gain or loss recognized is a type of gain or loss that is apportioned to Ohio under continuing corporation franchise tax law, the qualifying taxpayer must reduce its net income by the amount of the "book-tax differential" for that qualifying asset, if the book-tax differential is positive, or increase its net income by the absolute value of the amount of the book-tax differential for that qualifying asset, if the book-tax differential is negative. The "book-tax differential" is the difference, if any, between an asset's net book value shown on the qualifying taxpayer's books and records on December 31, 2000, in accordance with generally accepted accounting principles and such asset's adjusted basis on December 31, 2000. (Sec. 5733.0510(A)(5) and (B).)

If, with respect to a qualifying asset, there occurs a qualifying taxable event and if the gain or loss recognized is a type of gain or loss that is allocated to Ohio under the corporation franchise tax law dealing with taxation of net income (sec. 5733.051), the qualifying taxpayer must reduce its income allocated to this state by the amount of the book-tax differential for that qualifying asset, if the book-tax differential is positive, or increase its income allocated to this state by the absolute value of the amount of the book-tax differential for that qualifying asset, if the book-tax differential is negative. (Sec. 5733.0510(B)(2).)

With respect to a qualifying taxable event, if the person uses the installment sales method to recognize gain over more than one year, these adjustments cannot be made entirely in the tax year immediately following the taxable year in which the qualifying taxable event occurred, but must be made in part in such tax year and in subsequent tax years in proportion to the gain recognized for federal income tax purposes in each corresponding taxable year. (Sec. 5733.0510(B)(3).)

If the recognized gain or loss under this provision's apportionment or allocation formulas is zero solely because at the time of the qualifying taxable event the amount realized by the qualifying taxpayer with respect to that event equals the qualifying asset's adjusted basis, then the amount realized must be deemed to be \$1 greater than the qualifying asset's adjusted basis. (Sec. 5733.0510(B)(4).)

Whenever there is a qualifying taxable event, all qualifying regulatory assets directly or indirectly associated with a qualifying asset in connection with that event must be considered to have been disposed of as part of the event for an amount realized of \$1. Under the act, "qualifying regulatory asset" means those

qualifying assets that, as of December 31, 2000, are no longer included in Federal Energy Regulatory Commission Uniform System of Accounts 101 through 106 or are deferred expenses for operation or maintenance, or deferred costs associated with leaseback transactions on generating units, that have been authorized by a regulatory agency for recovery from customers in a future period and that, as of December 31, 2000, are subject to transition cost recovery under the act or similar laws of another state. (Sec. 5733.0510(A)(6) and (B)(5).)

The act provides that nothing in these adjustments to net income may be construed to allow for an adjustment more than once with respect to the same qualifying asset, and nothing in this new adjustment provision may be construed to allow more than one corporation to claim an adjustment with respect to the same qualifying asset. (Sec. 5733.0510(C) and (D).)

**Determination of the sales factor in calculating net income and treatment of the sale of electricity**

(secs. 5733.05(B)(2)(c) and 5733.059)

**Calculation of the sales factor.** The value of a corporation's issued and outstanding shares of stock is the base or measure of franchise tax liability. Continuing law requires that in determining the value of such stock, the corporation's net income must be calculated and allocated or apportioned to the state. As part of that calculation, property, payroll, and sales factors are determined. The sales factor is the ratio of the corporation's total sales in Ohio during the taxable year to its total sales everywhere during the year. In determining the sales factor under ongoing law, receipts received by a corporation from a public utility are eliminated from the equation where the reporting corporation owns at least 80% of the issued and outstanding common stock of the public utility. The act specifies that an electric company is not a public utility for this purpose, thus receipts received from an electric company are included in the calculation of the sales factor. (Sec. 5733.05(B)(2).)

**Apportionment of the sales factor to Ohio.** Continuing law addresses when sales must be considered as being made in Ohio, basing the determination on the type of property involved in a sale. For instance, sales of tangible personal property are in Ohio where such property is received in the state by the purchaser. The act creates a new sales factor equation that applies only to sales of electric transmission and distribution services. For purposes of the determination of net income under the corporation franchise tax and the determination of business income under the state income tax law:

(1) Sales of the transmission of electricity are in Ohio in proportion to the ratio of the wire mileage of the taxpayer's transmission lines located in Ohio

divided by the wire mileage of the taxpayer's transmission lines located everywhere. Transmission wire mileage must be weighted for the voltage capacity of each line.

(2) Sales of the distribution of electricity are in Ohio in proportion to the ratio of the wire mileage of the taxpayer's distribution lines located in Ohio divided by the wire mileage of the taxpayer's distribution lines located everywhere. Distribution wire mileage is prohibited from being weighted for the voltage capacity of each line. (Sec. 5733.059(B).)

For a person that has transmission or distribution lines in Ohio, the price charged for the transmission and distribution of electricity must be apportioned to Ohio in accordance with (1) and (2), above, if a contract for the sale of electricity includes the seller's or the seller's related member's obligation to transmit or distribute the electricity and if the sales contract separately identifies the price charged for the transmission or distribution of electricity (sec. 5733.059(C)).<sup>13</sup> Any remaining portion of the sales price of the electricity must be situated to this state in accordance with "*Situs of a sale of electricity*," below.

If the sales contract does not separately identify the price charged for the transmission or distribution of electricity, the sales price of the electricity must be situated to this state in accordance with "*Situs of a sale of electricity*," below. (Sec. 5733.059(C).)

*Situs of a sale of electricity*. The act provides that any person who makes a sale of electricity must situs the following to Ohio:

(1) A sale of electricity directly or indirectly to a customer to the extent the customer consumes the electricity in Ohio. The act defines a "customer" as a person who purchases electricity for consumption either by that person or by the person's related member, and the electricity is not for resale directly or indirectly to any person other than a related member (sec. 5733.059(A)).

(2) A sale of electricity directly or indirectly to a related member where the related member directly or indirectly sells electricity to a customer to the extent the customer consumes the electricity in Ohio;

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<sup>13</sup> Under continuing law, a "related member" means a person that is a related entity (generally, a stockholder) under the corporation franchise tax law, a component member as defined in the Internal Revenue Code, or a person to or from whom there is an attribution of stock ownership under the Internal Revenue Code.

(3) A sale of electricity if the seller or the seller's related member directly or indirectly delivers the electricity to a location in Ohio or directly or indirectly delivers the electricity exactly to the border of Ohio and another state;

(4) A sale of electricity if the seller or the seller's related member directly or indirectly directs the delivery of the electricity to a location in Ohio or directly or indirectly directs the delivery of the electricity exactly to the border of Ohio and another state. (Sec. 5733.059(D).)

If these situsing provisions do not fairly represent the extent of the taxpayer's or the taxpayer's related member's activity in Ohio, the taxpayer may request, or the Tax Commissioner may require, in respect to all or part of a taxpayer's or related member's sales, if reasonable: separate accounting, the exclusion of one or more additional situsing factors that will fairly represent the taxpayer's and the related member's sales in Ohio, or the inclusion of one or more additional situsing factors that will fairly represent the taxpayer's and the related member's sales in Ohio. (Sec. 5733.059(E).)

The taxpayer's request for an alternative situsing method must be in writing and filed with the annual corporate report required by continuing corporation franchise tax law, a timely filed petition for reassessment, or a timely filed amended report. An alternative situsing method is effective with the approval of the Tax Commissioner. If the situsing requirements of this provision do not fairly represent activity in this state, the Tax Commissioner may promulgate rules to situs sales using a methodology that fairly reflects sales in Ohio. (Sec. 5733.059(E) and (F).)

The act provides that nothing in this new provision may be construed to extend any statute of limitations set forth in the corporation franchise tax law. (Sec. 5733.059(E).)

Notwithstanding the law that requires the Commissioner to bear the burden of establishing by a preponderance of the evidence that the doctrines of economic reality, sham transaction, step doctrine, or substance over form apply in assessing additional taxes, penalties, or interest under the corporation franchise or state income tax law, the act provides that a person situsing a sale outside this state has the burden to establish by a preponderance of the evidence that those doctrines do not apply. (Sec. 5733.059(G).)

**Computation of the corporation franchise tax**

(sec. 5733.06)

Under ongoing law, the corporation franchise tax levied upon each corporation (but not a financial institution) is the sum of (1) and (2), below, or (3), whichever is greater:

(1) Subject to certain ownership requirements, five and one-tenth per cent on the first \$50,000 of the value of the corporation's issued and outstanding shares of stock as determined under the calculation of the corporation's net income; and

(2) Subject to certain ownership requirements, 8½% on that value so determined, in excess of \$50,000; or

(3) Subject to a cap of \$150,000, four mills times that portion of the value of the issued and outstanding shares of stock as determined under the calculation of the net book value of the corporation's assets less the net carrying value of its liabilities.

The act requires that the tax be the greater of the sum of (1) and (2), or (3), above, after the reduction, if any, provided by the following adjustments that apply solely to a combined company:

(1) The total tax calculated in (1) and (2), above, must be reduced by an amount calculated by multiplying such tax by a fraction, the numerator of which is the total taxable gross receipts attributed to providing public utility activity other than as an electric company under the combined company provision discussed above (see "***Combined companies***"), for the year upon which the taxable gross receipts are measured immediately preceding the tax year, and the denominator of which is the total gross receipts from all sources for the year upon which the taxable gross receipts are measured immediately preceding the tax year. The act provides that nothing in this provision is to be construed to exclude from the denominator any item of income described in continuing law (sec. 5733.051) regarding the taxation of the net income of a corporation.

(2) The total tax calculated in (3), above, must be reduced by an amount calculated by multiplying such tax by the fraction described immediately above in (1). (Sec. 5733.06(J).)

In no event may these reductions exceed the amount of the public utility excise tax paid in accordance with ongoing law, for the year upon which the taxable gross receipts are measured immediately preceding the tax year. Continuing law (sec. 5733.057) regarding the inclusion of items of allocable income or loss from pass-through entities where a corporation has a direct or indirect ownership interest applies when calculating the adjustments. (Sec. 5733.06(J)(1) and (4).)

**Applicability of a tax credit for certain new manufacturing machinery and equipment**

(secs. 5733.33 and 5747.31(B)(3))

Under continuing law, a taxpayer is allowed a nonrefundable tax credit against corporation franchise tax liability, and an individual or estate that is a proprietor or a pass-through entity investor is allowed the same credit against state income tax liability, for the purchase and installation before December 31, 2001, of new manufacturing machinery and equipment. The act specifies that the credit does not apply to machinery or equipment acquired after December 31, 1999, that is used to transmit or distribute electricity, or is used to generate electricity if 50% or more of the electricity that the property generates is consumed, during the 120-month period commencing with the date the property is placed in service, by persons that are not related members to the person who generates the electricity. (Sec. 5733.33(A).)

The act further provides that notwithstanding the tax assessment law pertaining to the corporation franchise tax and the state income tax (secs. 5733.11 and 5747.13), the Tax Commissioner may issue an assessment against a person with respect to a tax credit claimed for new manufacturing machinery and equipment that is used to generate electricity, if the machinery or equipment subsequently does not qualify for the credit due to the 50% and 120-month qualifiers for electric generating machinery and equipment. However, this assessment provision does not apply after the 24th month following the last day of the 120-month period that commenced with the date the property is placed in service. (Sec. 5733.33(I).)

The act also adds a notice requirement for claiming this credit against state income tax liability. Any individual who qualifies for the credit must file with the Department of Development notice of intent to claim the credit in the same manner as is required under the corporation franchise tax law. (Sec. 5747.31(B)(3).)

**Ohio coal tax credit**

(secs. 4909.15(A)(4)(b), 5727.01(I), 5727.45, 5733.39, 5733.98, 5747.31, and 5747.98; repeal of sec. 5727.391; Sections 6, 8, 12, and 13)

**Under the corporation franchise tax law.** Former law allowed an electric company to claim a tax credit against the public utility excise tax for using Ohio coal. The credit was \$1 per ton of Ohio coal burned in a coal-fired electric generating unit during the taxable year (sec. 5727.391). The act repeals the credit in the public utility excise tax law and transfers it, with certain changes, to the corporation franchise tax law, beginning in tax year 2002 for Ohio coal used in

coal-fired electric generating units after April 30, 2001 (sec. 5733.39). The Ohio coal tax credit that was granted under the public utility excise tax law only applies through the last excise tax assessment issued by the Tax Commissioner on or before the first Monday in November, 2001 (Section 13).

Under the public utility excise tax law, the credit could be carried forward. Under the act, it is a nonrefundable credit that must be claimed in a particular order under the corporation franchise tax law, after other tax credits are claimed (sec. 5733.98). If the credit exceeds the corporation franchise tax after all other nonrefundable credits for the tax year, the excess cannot be allowed as a credit either against the corporation franchise taxes due for any other year or against any other tax or fee. Additionally, the act provides that an electric company or a combined company entitled to carry forward the credit against its public utility excise tax liability before the repeal of the credit cannot carry forward any amount remaining after its last public utility excise tax payment and claim that amount as a credit against its corporation franchise tax liability. (Sec. 5733.39(B) and (C); Section 13.)

The act provides that nothing in the tax credit provision may be construed to provide for carryover or carryback of any unused credit provided by any other state law or for the application of any unused credit provided by any other state law against any other tax or fee, if such law does not expressly provide either for a carryover or carryback of any unused credit or for the application of an unused credit against any other tax or fee. Additionally, the law requiring inclusion of items of allocable income or loss from pass-through entities applies to calculation of the credit. (Sec. 5733.39(B) and (C).)

Under prior law, the credit was allowed if certain conditions were met, one of which was that the coal-fired electric generating unit was owned by the company claiming the credit or leased by that company under a sale and leaseback transaction. The act requires that the unit be owned and used by the company claiming the credit or leased and used by that company under a sale and leaseback transaction. Due to the act's change in the definition, the sale and leaseback transaction no longer has to occur within the same calendar year (see "*Taxable property*," above). (Sec. 5733.39(B).)

The sum of the Ohio coal tax credits allowed for all years the credit existed in the public utility excise tax law, and the sum of the credits allowed for all tax years under the credit created by the act in the corporation franchise tax law, cannot exceed 20% of the cost of the compliance facility attached to, incorporated in, or used in conjunction with the unit. If a compliance facility is used in conjunction with more than one generating unit, the Tax Commissioner must prorate its cost among the units. (Sec. 5733.39(D).)

Under prior public utility excise tax law, the Treasurer of State was required annually to credit from the GRF to the Local Government Fund and the Local Government Revenue Assistance Fund the amounts that would have been credited to those funds during the year if the Ohio coal tax credit did not exist. On January 1, 2002, the act eliminates this provision. (Sec. 5727.45; Section 6.)

Law applicable to the credit as it existed in the public utility excise tax law continues to limit the use of the credit under the corporation franchise tax law. The law provides that credits cannot be retained by the company, used to fund any dividend or distribution, or utilized for any purposes other than the defrayal of the expenses of the company in connection with the installation, acquisition, construction, and use of a compliance facility. (Sec. 4909.15(A)(4)(b).)

**Under the state income tax law.** The act also provides that an individual or estate that is a proprietor or a pass-through entity investor may claim the Ohio coal tax credit against state income tax liability. The credit is computed in the same manner as under the corporation franchise tax law and is subject to the same disallowance for the carryover or carryback of any unused credit, with adjustments to the state income tax law language to reflect the different taxpayers and terms used under that law. The credit must be claimed in a particular order under the state income tax law, after other tax credits are claimed. (Secs. 5747.31(C) and 5747.98.)

Notwithstanding law that requires the Commissioner to bear the burden of establishing by a preponderance of the evidence that the doctrines of economic reality, sham transaction, step doctrine, or substance over form apply in assessing additional taxes, penalties, or interest under the state income tax law, a taxpayer claiming the Ohio coal tax credit against state income tax liability has the burden of establishing by a preponderance of the evidence that those doctrines do not apply with respect to the credit. (Sec. 5747.31(C)(2).)

### **Municipal income tax**

(secs. 715.013 and 718.01(F)(6); Section 21)

Prior law authorized municipal corporations to levy an income tax on taxpayers and businesses within the corporation's boundaries, but no municipal corporation could levy a tax that is the same as or similar to certain other state taxes, including the public utility excise tax or the sales and use tax. Additionally, a municipal corporation could not tax the income of a public utility when the utility was subject to the public utility excise tax.

The act provides that this law does not prohibit a municipal corporation from levying a tax on the income of an electric company or combined company on

and after January 1, 2002. Thus, if a municipal corporation has a municipal income tax, it is applicable to the income of electric companies and combined companies on and after that date. The income must be computed by taking into account the adjustments to net income provided under the corporation franchise tax law, discussed above in "Adjustments to net income." For a combined company, only the income attributed from the activity of an electric company is subject to taxation by a municipal corporation. (Secs. 715.013 and 718.01(F)(6).)

The act states that it is the intent of the General Assembly to enact laws prescribing a uniform set of procedures for the taxation of electric company income by municipal corporations and to have the laws in effect prior to the time those companies become subject to municipal income taxes. (Section 21.)

**Sales of electricity continue to be exempt from the sales tax**

(secs. 5701.03(A), 5739.011(B)(8), and 5739.02(B)(43))

Under continuing law, sales in which the purpose of the consumer is to incorporate the "thing transferred" as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining, or to use or consume the "thing transferred" directly in the rendition of a public utility service, are exempt from the state sales and use tax (sec. 5739.01(E)(2), not in the act). The definition of "thing transferred" includes electricity, and machinery, equipment, and other tangible personal property used to transport or transmit electricity used in the manufacturing operation from the point of generation, if produced by the manufacturer, or from the point where the substance enters the manufacturing facility, if purchased by the manufacturer, to the manufacturing operation. Ongoing law also mandates that the state sales tax does not apply to the sale of electricity by an electric company.

The act maintains these exemptions from the state sales and use tax, but changes the way the exemptions are reflected in the law due to the possible restructuring of electric companies and the services they will offer after deregulation is complete. The act excludes electricity from the definition of "personal property," except to the extent that the value of the electricity is included in the valuation of inventory produced for sale, for purposes of all of Ohio's tax laws (sec. 5701.03(A)), and adds to the definition of "thing transferred" machinery and equipment used to produce electricity for use in the manufacturing operation (sec. 5739.011(B)(8)).

The act further specifies that the sales and use tax does not apply to sales of tangible personal property and services to a provider of electricity used or consumed directly and primarily in generating, transmitting, or distributing electricity for use by others, including property that is or is to be incorporated into

and will become a part of the consumer's production, transmission, or distribution system and that retains its classification as tangible personal property after incorporation; fuel or power used in the production, transmission, or distribution of electricity; and tangible personal property and services used in the repair and maintenance of the production, transmission, or distribution system, including only those motor vehicles as are specially designed and equipped for such use. The exemption provided in this provision is in lieu of all other exceptions in R.C. § 5739.01(E)(2), discussed above, to which a provider of electricity may otherwise be entitled based on the use of the tangible personal property or service purchased in generating, transmitting, or distributing electricity. (Sec. 5739.02(B)(43).)

### **Generating equipment tax credit study**

(Section 16)

The act requires the Director of Development to study and report to the General Assembly concerning the desirability of implementing a tax credit program for the creation of new jobs in Ohio to manufacture or assemble generating equipment and components for global use. The Director must determine and recommend how the tax credit should be structured to encourage investments in facilities, equipment, and services related to the manufacture, assembly, shipping preparation, and transportation of generation equipment or components for global use, and to create new jobs as a result of those investments. The Director must issue a report of its findings on or before December 31, 2000, to the Senate and House of Representatives in accordance with the law regarding the filing of reports with the General Assembly (sec. 101.68(B)).

### **Miscellaneous**

(secs. 5727.47, 5727.53, and 5727.60; repeal of secs. 5727.231 and 5727.73)

Continuing law (sec. 5727.53) requires that taxes, fees, and penalties under the public utility excise tax law may be recovered in a civil action brought by the Attorney General, and when recovered, must be paid into the state treasury to the credit of the General Revenue Fund. The act provides that only such taxes, fees, and penalties that are remitted to the Treasurer of State may be recovered in that manner and, when recovered, must be paid into the state treasury in the same manner as the tax.

Ongoing law (sec. 5727.60) penalizes public utilities for failure to file a report with the Tax Commissioner under the public utility property assessment and excise tax law. The penalty for not making the report is \$10 per day for each day's omission. The act provides that if a person fails to file a report of its taxable property and a statement of its gross receipts within the time prescribed under the

provisions requiring the report or statement, including any extensions of time granted by the Tax Commissioner, a penalty of \$50 per month, not to exceed \$500, may be imposed for each month or fraction of a month elapsing between the due date of the report, including any extensions, and the date the report was filed. The penalty for failing to file the report of taxable property must be paid into the GRF. If the penalty is not paid within 15 days after notice of the penalty is mailed to the person, the Commissioner must certify the penalty as a claim to the Attorney General for collection. The penalty for failing to file the statement of its gross receipts must be deposited into the state treasury in the same manner as the public utility excise tax is deposited, and the Commissioner may collect the penalty by assessment. The Commissioner may abate this penalty in full or in part.

The act repeals an outdated provision (sec. 5727.231) that in 1990 and 1991 provided supplemental property tax assessments for school districts.

The act also repeals a provision (sec. 5727.73) that is duplicative of sec. 5727.72, as amended by the act, regarding the duty of officers, employees, and agents of public utilities to attend before the Department of Taxation, present documents, and answer questions.

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## HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-20-99	pp. 25-26
Reported, S. Ways & Means	05-18-99	pp. 434-435
Passed Senate (20-12)	05-18-99	pp. 437-447
Reported, H. Public Utilities	06-15-99	p. 835
Passed House (87-9)	06-16-99	pp. 840-841, 847-877
Senate concurred in House Amendments (29-3)	06-22-99	pp. 643-644

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