

CARPENTER LIPPS & LELAND LLP

ATTORNEYS AT LAW  
280 PLAZA, SUITE 1300  
280 NORTH HIGH STREET  
COLUMBUS, OHIO 43215

---

---

MEMORANDUM

**TO:** The Ohio Manufacturers' Association  
**FROM:** Kimberly W. Bojko, Carpenter Lipps & Leland LLP  
**DATE:** June 21, 2017  
**SUBJECT:** Sub H.B. 49 "utility credit rating" amendment

---

Sub. H.B. 49 Amendment to R.C. 4928.143

The proposed statutory revisions included in the omnibus amendment (SC5466) do not codify current industry practice. The revisions allow a utility to obtain a financial integrity charge under an electric security plan (ESP) application. The revisions also specifically state that such a charge is not a transition charge and does not violate corporate separation laws. Specifically, the amendment makes two statutory revisions that are harmful to customers.

**1) Proposed R.C. 4928.143(F) (line 251):**

New language beginning at line 251 of SC5466, is very similar to attempts previously made by the Dayton Power & Light (DP&L) to modify PUCO ratemaking laws to add new riders on customers' electric bills if a utility's financial integrity is threatened. The bill allows the PUCO to establish a rider or upwardly adjust rates to ensure that the utility achieves and maintains a **minimum** credit rating. The language goes on to state that the amount of the rate adjustment would be an amount just and reasonable to achieve and maintain a **target** credit rating. **Target** credit rating is later defined as possibly being higher than a **minimum** credit rating. Thus, the bill language seems to contradict itself as to whether the PUCO is authorized to increase rates or add new riders at a level that achieves and maintains a minimum credit rating or something even higher, a target credit rating (also determined by the PUCO).

The legislative proposal specifically makes a legal determination that the rate adjustment does not constitute a transition charge and is not subject to other limitations set forth in existing Ohio law, including corporate separation prohibitions such as providing ratepayer monies to affiliated companies. This may effectively reverse recent Supreme Court decisions that were favorable to customers regarding transition charges and would moot current or imminent appeals regarding the PUCO's recent approval of FirstEnergy's credit support rider.

**2) Proposed R.C. 4928.143(E) (line 218):**

New language inserted beginning at line 218 of SC5466, permits the Public Utilities Commission of Ohio (PUCO) to modify the significantly excessive earnings test (SEET) that is required if an ESP lasts longer than 3 years. If the SEET test is conducted in year four of the ESP and if continuing the ESP will cause the utility to earn excessive profits, the PUCO may terminate the ESP. The amendment, however, allows the PUCO to consider the utility's credit rating when testing the ESP. In essence, authorizing the PUCO to find that the SEET test would not result in excessive earnings because of the utility's low credit rating as if a low credit rating somehow nullifies the utilities' excessive earnings. This is contradictory to the current law that requires the PUCO to find that the earnings will be excessive and terminate the ESP to prevent the utility from over earning in the future.

Remember, if the utility is found to have significantly excessive earnings under another provision in the law, those excessive earnings are required to be refunded to customers. Given that none of the utilities have ever invoked this provision and conducted this test since their ESPs have only been three years or shorter so as to preclude the necessity of such test, there is no way this amendment could be seen as codifying current practice as there has been no current practice to date. The only current practice surrounding a SEET test has been pursuant to R.C. 4928.143(F), where the PUCO conducts the SEET test after the end of the ESP to determine whether significantly excessive earnings occurred.

**Conclusion:**

The referenced budget amendment is a stunning request of the General Assembly by a utility company. The utilities continue to ask for more customer-paid subsidies due to an alleged fiscal crisis due to their parent company or affiliates' bad business decisions. **Once again the utilities are asking customers to bail them out, seeking to shift ordinary business risk from shareholders to ratepayers.**