

**In The  
SUPREME COURT OF OHIO**

**Duke Energy Ohio, Inc.,**

Appellant,

v.

**The Public Utilities Commission of  
Ohio,**

Appellee.

Case No. 08-0367

Appeal from the Public Utilities  
Commission of Ohio, *In the Matter of  
the Application of The Cincinnati Gas  
& Electric Company to Modify its  
Nonresidential Generation Rates to  
Provide for Market-Based Standard  
Service Offer Pricing and to Establish  
an Alternative Competitive-Bid  
Service Rate Option Subsequent to the  
Market Development Period*, Case No.  
03-93-EL-ATA, *et al.*

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**MOTION TO STRIKE  
AND  
MOTION TO DISMISS  
SUBMITTED ON BEHALF OF APPELLEE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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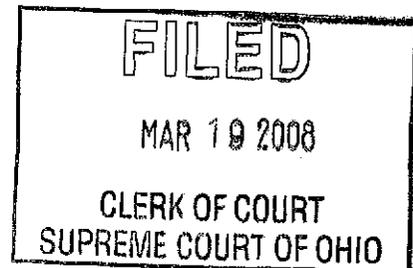
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**IN THE SUPREME COURT OF OHIO**

<b>Duke Energy Ohio, Inc.,</b>	:	Case No. 08-0367
	:	
Appellant,	:	Appeal from the Public Utilities
	:	Commission of Ohio, <i>In the Matter of</i>
v.	:	<i>the Application of The Cincinnati Gas</i>
	:	<i>&amp; Electric Company to Modify its</i>
<b>The Public Utilities Commission of</b>	:	<i>Nonresidential Generation Rates to</i>
<b>Ohio,</b>	:	<i>Provide for Market-Based Standard</i>
	:	<i>Service Offer Pricing and to Establish</i>
Appellee.	:	<i>an Alternative Competitive-Bid</i>
	:	<i>Service Rate Option Subsequent to the</i>
	:	<i>Market Development Period, Case No.</i>
	:	<i>03-93-EL-ATA, et al.</i>

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**MOTION TO STRIKE  
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THE PUBLIC UTILITIES COMMISSION OF OHIO**

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The Public Utilities Commission of Ohio, Appellee, moves pursuant to S. Ct. Prac. R. XIV, Section 4, for an order striking Duke Energy Ohio, Inc.'s notice of appeal and dismissing its appeal because the notice of appeal failed to comply with this Court's rules. The rationale for striking Duke Energy Ohio, Inc.'s notice of appeal and dismissing its appeal is explained in detail in the accompanying memorandum.

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## MEMORANDUM IN SUPPORT

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### INTRODUCTION

[T]he integrity of procedural rules is dependent upon *consistent enforcement* because the only fair and reasonable alternative thereto is complete abandonment.

*Miller v. Lint*, 62 Ohio St. 2d 209, 215, 404 N.E.2d 752, 755 (1980) (emphasis added).

On February 15, 2008, Duke Energy Ohio, Inc. (“Duke Energy”) filed a defective notice of appeal. Duke Energy’s notice of appeal did not include the certificate of filing required by S. Ct. Prac. R. XIV(2)(C)(2). Duke Energy committed the same fatal error and violated the same rule previously enforced by the Court. *Consumers’ Counsel v. Pub. Util. Comm’n*, 105 Ohio St. 3d 1211, 823 N.E.2d 872 (2005) (striking the notice of appeal and dismissing the appeal of the Ohio Consumers’ Counsel where the notice of appeal did not contain the necessary certificate of filing).

Duke Energy’s notice of appeal and its appeal are fatally flawed because Duke Energy ignored this Court’s Rules of Practice. The rule in question has been previously enforced by this Court. In furtherance of consistent enforcement of its rules, the Court should strike Duke Energy’s notice of appeal and dismiss its appeal.

## ARGUMENT

### **I. The Court should strike Duke Energy's notice of appeal and dismiss its appeal because Duke Energy violated the Court's Rules of Practice in commencing its appeal.**

In its Rules of Practice, the Court identified basic information that a notice of appeal must contain. *See, e.g.*, S. Ct. Prac. R. XIV(2)(C), Appendix at 4. Since July 1, 2004, the Court has required that every notice of appeal from final orders of the Public Utilities Commission of Ohio ("Commission") contain a certificate of filing. S. Ct. Prac. R. XIV(2)(C)(2), Appendix at 4. In relevant part, the Court's rule states:

In an appeal from the Public Utilities Commission . . . , the notice of appeal shall *also* contain a *certificate of filing* to evidence that the appellant filed a notice of appeal with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

*Id.* (emphasis added). The inclusion of the word "also" in the rule indicates that the certificate of filing is required in addition to the certificate of service. *See* S. Ct. Prac. R. XIV(2)(C)(1) and (2), Appendix at 4.

### **A. S. Ct. Prac. R. XIV(2)(C)(2) should be consistently enforced by this Court.**

S. Ct. Prac. R. XIV(2)(C)(2) should be enforced. The certificate of filing is important for the benefit of everyone involved. S. Ct. Prac. R. XIV(2)(C)(2), which requires the certificate of filing, directs the appellant's attention to the requirements of sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code, which require that the notice of appeal be properly filed with the Commission's docketing division. *See*

S. Ct. Prac. R. XIV(2)(C)(2), Appendix at 4; Ohio Admin. Code §§ 4901-1-02(A), 4901-1-36 (Anderson 2007), Appendix at 21-23, 23. The certificate of filing requirement brings the jurisdictional filing requirements directly to a would-be appellant's attention. See S. Ct. Prac. R. XIV(2)(C)(2), Appendix at 4; Ohio Admin. Code §§ 4901-1-02(A), 4901-1-36 (Anderson 2007), Appendix at 21-23, 23; S. Ct. Prac. R. II(3)(B)(1), Staff Commentary (2004 Amendments), Appendix at 11; S. Ct. Prac. R. XIV(2)(C)(2), Staff Commentary (2004 Amendments), Appendix at 14. S. Ct. Prac. R. XIV(2)(C)(2) was intended to educate appellants about these special filing requirements for appeals from final orders of the Commission. S. Ct. Prac. R. II(3)(B)(1), Staff Commentary (2004 Amendments), Appendix at 11; S. Ct. Prac. R. XIV(2)(C)(2), Staff Commentary (2004 Amendments), Appendix at 14. Additionally, the certificate of filing gives evidence to the appellee, intervenors, interested non-parties, and the Court that the appellant has satisfied the special filing requirements.

The Court's rules establish a procedural framework for the Court's consideration of appeals. The certificate of filing requirement of S. Ct. Prac. R. XIV(2)(C)(2) is a component of that framework. As a purely procedural rule, S. Ct. Prac. R. XIV(2)(C)(2) does not "abridge, enlarge, or modify any substantive right." OHIO CONST. art. IV, § 5(B), Appendix at 20. The rule does not itself grant a right to appeal or in any way determine whether an appeal may be initiated. Rather, the right to appeal from a final order of the Commission is properly conferred by statute. See Ohio Rev. Code Ann. § 4903.13 (Anderson 2007), Appendix at 21; *Midwest Fireworks Manufacturing Co. v. Deerfield Township Board of Zoning Appeals*, 91 Ohio St. 3d 174, 177, 743 N.E.2d 894, 897

(2001) (“The right to appeal an administrative decision is neither inherent nor inalienable; to the contrary, it must be conferred by statute.”). Nor does the rule even arguably affect a party’s right to appeal. The effect of S. Ct. Prac. R. XIV(2)(C)(2) is inherently procedural. It merely requires the addition of the certificate of filing to the notice of appeal.

**B. Duke Energy failed to follow S. Ct. Prac. R. XIV(2)(C)(2).**

Duke Energy failed to follow S. Ct. Prac. R. XIV(2)(C)(2) by omitting the necessary certificate of filing from its notice of appeal. *Duke Energy Ohio, Inc. v. Pub. Util. Comm’n*, No. 08-0367 (filed with the Ohio Supreme Court on February 15, 2008), Appendix at 16-19. The notice of appeal does state that Duke Energy “timely filed [the] Notice of Appeal . . . with the Clerk of the Ohio Supreme Court and the Docketing Division of the Commission.” Duke Energy’s Notice of Appeal at 2, Appendix at 17. This is not a substitute for the certificate of filing, which is required to evidence that the notice of appeal has been filed with the Commission’s docketing division *in accordance with the Ohio Administrative Code*, as mandated by the Court’s Rules of Practice. *See* S. Ct. Prac. R. XIV(2)(C)(2), Appendix at 4. The purpose of the certificate of filing has been defeated in this case. There is no certificate of filing in Duke Energy’s notice of appeal “to evidence that the appellant filed a notice of appeal with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.” *Id.* Instead, Duke Energy left this Court, its clerk, the litigants, and everyone else with an interest in this case to speculate as to whether the appeal was rightly commenced.

Just as Duke Energy's statement in the body of its notice of appeal fails to comply with S. Ct. Prac. R. XIV(2)(C)(2), the mere act of filing a defective notice of appeal with the Commission's docketing division likewise fails to satisfy the rule's special filing requirements. That act alone cannot cure the defect because it does not accomplish the function of the certificate of filing. The certificate of filing constitutes evidence of filing with the Commission's docketing division in compliance with the Ohio Administrative Code. *See id.* Filing a faulty notice of appeal fails to provide the Court, the appellee, or any other interested person with the evidence of administrative compliance required by S. Ct. Prac. R. XIV(2)(C)(2). Nor does it matter that evidence of filing with the Commission's docketing division may be available other than through the certificate of filing. The certificate of filing requirement, if satisfied, eliminates the time and effort needed to search beyond the notice of appeal to determine whether the appeal was properly commenced.

In response to Duke Energy's defective notice of appeal, the Court should protect its Rules of Practice through consistent enforcement of S. Ct. Prac. R. XIV(2)(C)(2). The Court has previously upheld the integrity of its rules by dismissing an appeal in which the rules were neglected. The Court stated:

There is no excuse for the failure of any member of the bar to understand or to comply with the rules of this court. They are promulgated so that causes coming before the court will be presented in a clear and logical manner, and any litigant availing himself of the jurisdiction of the court is subjected thereto. Not to be minimized is the necessity of compliance as an accommodation to the correct dispatch of the

court's business. But our over-arching concern is that the legitimate interests of litigants be protected to the utmost. To this end, our profession is committed, and adherence to our rules should be dedicated.

*Drake v. Bucher*, 5 Ohio St. 2d 37, 39-40, 213 N.E.2d 182, 184 (1966) (dismissing, *sua sponte*, an appeal in an action in habeas corpus where the appellant's brief failed to comply with the Rules of Practice); *see also Consumers' Counsel v. Pub. Util. Comm'n*, 105 Ohio St. 3d 1211, 823 N.E.2d 872 (2005) (dismissing an appeal where the appellant failed to include the necessary certificate of filing in its notice of appeal); *Zak v. Ohio State Dental Board*, 103 Ohio St. 3d 1412, 813 N.E.2d 684 (2004) (dismissing, *sua sponte*, an appeal where the appellant failed to file a memorandum in support of jurisdiction required by the Rules of Practice); *State v. Fisher*, 101 Ohio St. 3d 1409, 800 N.E.2d 1177 (2003) (same); *State ex rel. General Electric Co. v. Industrial Commission*, 101 Ohio St. 3d 1409, 800 N.E.2d 1176 (2003) (dismissing, *sua sponte*, an appeal where the appellant failed to file a merit brief required by the Rules of Practice). By adopting S. Ct. Prac. R. XIV(2)(C)(2), the Court effectively determined that the certificate of filing requirement should be enforced. Rules are largely ignored in the absence of enforcement. The rule should be enforced in this case.

**II. Striking Duke Energy's notice of appeal and dismissing its appeal is the appropriate remedy for Duke Energy's failure to include a certificate of filing in its notice of appeal as required by S. Ct. Prac. R. XIV(2)(C)(2).**

The proper remedy in this case is to strike Duke Energy's notice of appeal and dismiss its appeal, consistent with this Court's prior enforcement of S. Ct. Prac. R. XIV(2)(C)(2). The exact issue in this case, the appellant's failure to include the certificate of filing in its notice of appeal, has already been firmly resolved by the Court. In appealing from a final order of the Commission less than a month after S. Ct. Prac. R. XIV(2)(C)(2) took effect, the Ohio Consumers' Counsel filed a notice of appeal that did not include the certificate of filing. *Consumers' Counsel v. Pub. Util. Comm'n*, 105 Ohio St. 3d 1211, 823 N.E.2d 872 (2005). The Court struck the notice of appeal and dismissed the appeal. *Consumers' Counsel* at ¶¶ 3–5. In rendering its decision, the Court concisely stated:

On July 29, 2004, appellant filed a notice of appeal. The notice of appeal did not include the certificate of filing required by S. Ct. Prac. R. XIV(2)(C)(2). Accordingly, it is ordered by the court, *sua sponte*, that appellant's notice of appeal be, and hereby is, stricken. It is further ordered by the court that the motions to dismiss of the Public Utilities Commission and Columbia Gas of Ohio, Inc. be, and hereby are, granted. Accordingly, it is further ordered by the court that this cause be, and hereby is, dismissed.

*Id.* at ¶¶ 1–5. This prior decision of the Court squarely resolves the present case. Just as the Court dismissed the appeal of the Ohio Consumers' Counsel, the Court should likewise dismiss Duke Energy's appeal and strike its notice of appeal. There is no plausible defense for Duke Energy's failure to include the certificate of filing in its notice of

appeal, particularly where the Court has enforced S. Ct. Prac. R. XIV(2)(C)(2) by dismissal of an appeal in a prior case.

Additionally, in several other recent cases, this Court has recognized that striking a document, even *sua sponte*, is the appropriate remedy where, as here, it is defective because it does not include a certificate required by S. Ct. Prac. R. XIV(2). *Zappitelli v. Miller*, 113 Ohio St. 3d 1448, 864 N.E.2d 97 (2007) (striking, *sua sponte*, a motion to set a supplemental briefing schedule where it did not contain a certificate of service); *State ex rel. Eckerly v. Industrial Commission*, 103 Ohio St. 3d 1530, 817 N.E.2d 891 (2004) (striking, *sua sponte*, a supplement to a merit brief that did not contain a certificate of service); *State v. Mollick*, 92 Ohio St. 3d 1402, 748 N.E.2d 77 (2001) (striking, *sua sponte*, a notice of court of appeals' determination of no conflict because it did not contain a certificate of service); *State v. Underwood*, 86 Ohio St. 3d 1483, 716 N.E.2d 215 (1999) (striking, *sua sponte*, a notice of appeal and dismissing the appeal where the notice of appeal did not include a certificate of service); *State ex rel. Israfil v. Montgomery County Common Pleas Court Judge Gowdown*, 86 Ohio St. 3d 1429, 713 N.E.2d 430 (1999) (striking, *sua sponte*, a motion to dismiss because it did not contain a certificate of service). In addition to striking defective documents, the Court has for many years dismissed appeals as a remedy for abandonment of its rules. *See, e.g., Zak v. Ohio State Dental Board*, 103 Ohio St. 3d 1412, 813 N.E.2d 684 (2004); *State v. Fisher*, 101 Ohio St. 3d 1409, 800 N.E.2d 1177 (2003); *State ex rel. General Electric Co. v. Industrial Commission*, 101 Ohio St. 3d 1409, 800 N.E.2d 1176 (2003); *Drake v. Bucher*, 5 Ohio St. 2d 37, 39-40, 213 N.E.2d 182, 184 (1966).

Just like the parties in the cases cited above, Duke Energy failed to file a document in accordance with the Court's Rules of Practice. Consistent with the result in these cases, the proper remedy for Duke Energy's failure to file a proper notice of appeal is to strike its notice of appeal and dismiss its appeal. In protecting the integrity of its rules, the Court has explained:

Even though we recognize that it is preferable to hear a case upon its merits, the rules of procedure must be applied consistently . . . . As we stated in *Lint*, "However hurried a court may be in its efforts to reach the merits of a controversy, the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment."

*Davis v. Immediate Medical Services, Inc.*, 80 Ohio St. 3d 10, 15, 684 N.E.2d 292, 297 (1997) (quoting *Miller v. Lint*, 62 Ohio St. 2d 209, 215, 404 N.E.2d 752, 755 (1980)).

## CONCLUSION

The exclusion of the certificate of filing in the notice of appeal deprives this Court and its clerk of the necessary information to conclude whether the appellant has properly initiated the appeal. If the notice of appeal does not contain the certificate of filing, the Court should dismiss the case swiftly and efficiently. It has done so in the past and should do so here.

Respectfully submitted,

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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Motion to Strike and Motion to Dismiss** submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 19<sup>th</sup> day of March, 2008.



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# **APPENDIX**

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**Section 3(B)**

This amendment extends the time for *amicus curiae* to file a memorandum opposing a motion for reconsideration from seven to 10 days. The change makes the rule consistent with the response time for filing a memorandum opposing a motion as set forth in the general provision contained in Rule XIV, Section 4.

**RULE XII. DISPOSITION OF APPEALS IMPROVIDENTLY ACCEPTED OR CERTIFIED; SUMMARY DISPOSITION OF APPEALS**

(A) When a case has been accepted for determination on the merits pursuant to S.Ct.Prac.R. III, the Supreme Court may later find that there is no substantial constitutional question or question of public or great general interest, or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may *sua sponte* dismiss the case as having been improvidently accepted, or summarily reverse or affirm on the basis of precedent.

(B) When the Supreme Court finds a conflict pursuant to S.Ct.Prac.R. IV, it may later find that there is no conflict or that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may *sua sponte* dismiss the case as having been improvidently certified, or summarily reverse or affirm on the basis of precedent.

Staff Commentary to Rule XII  
(2008 Amendments)

This rule has been redrafted to reflect the Court's practice when dismissing certain cases or issuing summary dispositions.

**RULE XIII. RETURN OF RECORD**

After the mandate has been issued in a case on appeal, the Clerk of the Supreme Court shall return the record to the clerk or custodian that transmitted the record under Rule V, Section 3.

Staff Commentary to Rule XIII  
(2008 Amendments)

This amendment is intended to clarify the language of the rule without changing its substance.

**RULE XIV. GENERAL PROVISIONS**

**Section 1. Filing with the Supreme Court.**

(A) Filing Defined.

The filing of documents with the Supreme Court as required by these rules shall be made by filing with the Clerk of the Supreme Court during the regular business hours of the

Clerk's Office. Documents received in the Clerk's Office after 5:00 p.m. shall not be filed until the next business day. Only submissions filed in accordance with this provision will be considered by the Supreme Court. Filing may be made in person or by mail addressed to the Clerk, but documents filed by mail shall not be considered filed until received in the Clerk's Office.

(B) Filings Treated as Public Records

Documents filed with the Supreme Court shall be treated as public records unless they have been sealed pursuant to a court order or are the subject of a motion to seal pending in the Supreme Court.

(C) Filing by Facsimile Transmission.

(1) The following documents may be filed by facsimile transmission to the Clerk:

- (a) A request for extension of time or a stipulation to an agreed extension of time that complies with Section 3 or Section 6 of this rule;
- (b) A list of additional authorities filed under S.Ct.Prac.R. VI, Section 8, or S.Ct.Prac.R. IX;
- (c) An application for dismissal;
- (d) A waiver of oral argument filed under S.Ct.Prac.R. IX, Section 3.
- (e) A notice related to attorney representation filed under S.Ct.Prac.R. I.
- (f) A notice of a court of appeals determination of no conflict filed under S.Ct.Prac.R. IV, Section 4(B).
- (g) A waiver of a memorandum in response under S.Ct.Prac.R. III, Section 2(E).

(2) Each facsimile transmission shall be accompanied by a cover page requesting that the document be filed and providing the name, telephone number, and facsimile number of the person transmitting the document.

(3) Only one copy of the document shall be transmitted. The Clerk shall provide any additional copies required to be filed by these rules. The person filing a document by facsimile transmission shall retain the original document and make it available upon request of the Supreme Court.

(4) Documents transmitted by facsimile transmission and received in the Clerk's Office on a Saturday, Sunday, or other day the Clerk's Office is closed to the public, or after 5:00 p.m. on a business day, shall be considered for filing on the next business day.

(D) Prohibition Against Untimely Filings.

No document may be filed after the filing deadlines imposed by these rules, set by Court order, or as extended in accordance with Section 3(B)(2) or Section 6(C) of this rule or with S.Ct.Prac.R. XIX. The Clerk shall refuse to file a document that is not timely tendered for filing. Motions to waive this rule are prohibited and shall not be filed.

(E) Rejection of Noncomplying Documents.

The Clerk may reject documents tendered for filing unless they are clearly legible and comply with the requirements of these rules.

**Section 2. Service of Documents; Notice When Documents Are Rejected for Filing.**

(A) Service Requirement.

(1) When a party or an *amicus curiae* files any document with the Clerk, except a complaint filed to institute an original action, that party or *amicus curiae* shall also serve a copy of the document on all parties to the case. Service on a party represented by counsel shall be made on counsel of record.

(2) Service of a copy of a notice of appeal from a decision of the Public Utilities Commission or the Power Siting Board shall be made pursuant to section 4903.13 of the Revised Code. In an appeal or a cross-appeal from the Public Utilities Commission or the Power Siting Board, a copy of the notice of appeal or cross-appeal shall also be served upon all parties to the proceeding before the Public Utilities Commission or the Power Siting Board that is the subject of the appeal or cross-appeal.

(3) In a case involving a felony, when a county prosecutor files a notice of appeal under S.Ct.Prac.R. II or an order certifying a conflict under S.Ct.Prac.R. IV, the county prosecutor shall also serve a copy of the notice or order on the Ohio Public Defender.

(B) Manner of Service.

(1) Except as otherwise provided by this rule, service may be personal, by mail, by e-mail, or by facsimile transmission. Except as provided in division (A) of this section, personal service includes delivery of the copy to counsel or to a responsible person at the office of counsel and is effected upon delivery. Service by mail is effected by depositing the copy with the United States Postal Service for mailing. Service by e-mail is effected upon the successful electronic transmission of the copy. Service by facsimile transmission is effected upon the successful electronic transmission of the copy by facsimile process.

(2) In appeals from the Board of Tax Appeals under S.Ct.Prac.R. II, Section 3(A), service of a notice of appeal or cross-appeal shall be made by certified mail.

(3) In expedited election cases under S.Ct.Prac.R. X, Section 9, service of the response, evidence, and merit briefs shall be personal, by e-mail, or by facsimile transmission.

(C) Certificate of Service; Certificate of Filing.

(1) Unless a document is filed jointly and is signed by all parties to the case, all documents presented for filing with the Clerk, except complaints filed to institute an original action, shall contain a certificate of service. The certificate of service shall state the date and manner of service, identify the names of the persons served, and be signed by the party or the *amicus curiae* who files the document. The certificate of service for a document served by facsimile transmission shall also state the facsimile number of the person to whom the document was transmitted. The Clerk shall refuse to accept for filing any document that does not contain a certificate of service, unless these rules require that the document be served by the Clerk.

(2) In an appeal from the Public Utilities Commission or the Power Siting Board, the notice of appeal shall also contain a certificate of filing to evidence that the appellant filed a notice of appeal with the docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

(D) Failure to Provide Service.

(1) When a party or *amicus curiae* fails to provide service upon a party or parties to the case in accordance with division (A) of this section, any party adversely affected may file a motion to strike the document that was not served. Within 10 days after a motion to strike is filed, the party or *amicus curiae* against whom the motion is filed may file a memorandum opposing the motion.

(2) If the Supreme Court determines that service was not made as required by this rule, it may strike the document or, if the interests of justice warrant, order that the document be served and impose a new deadline for filing any responsive document. If the Supreme Court determines that service was made as required by this rule or that service was not made but the movant was not adversely affected, it may deny the motion.

(E) Notice to Other Parties When Document Is Rejected for Filing.

If a document presented for filing is rejected by the Clerk under these rules, the party or *amicus curiae* who presented the document for filing shall promptly notify all of the parties served with a copy of the document that the document was not filed in the case.

**Section 3. Computation and Extension of Time.**

(A) Computation of Time.

In computing any period of time prescribed or allowed by these rules or by an order of the Supreme Court, the day of the act from which the designated period of time begins to run shall not be included and the last day of the period shall be included. If the last day of the period is a Saturday, Sunday, or legal holiday, the period runs until the end of the next day that is not a Saturday, Sunday, or legal holiday. Notwithstanding Civ.R. 6(A), when the

period of time prescribed or allowed is less than seven days, as in expedited election cases under S.Ct.Prac.R. X, Section 9, intermediate Saturdays, Sundays, and legal holidays shall be included in the computation. When the Clerk's Office of the Supreme Court is closed to the public for the entire day that constitutes the last day for doing an act, or before the usual closing time on that day, then that act may be performed on the next day that is not a Saturday, Sunday, or legal holiday.

(B) Extension of Time.

(1) General Prohibition Against Extensions of Time.

Except as provided in division (B)(2) of this section, the Supreme Court will not extend the time for filing a document as prescribed by these rules or by Court order, and the Clerk shall refuse to file requests for extension of time.

(2) Extension of Time to File Certain Documents.

(a) Except in expedited election cases under S.Ct.Prac.R. X, Section 9, parties may stipulate to extensions of time to file merit briefs, including reply briefs, under S.Ct.Prac.R. VI; merit briefs, including reply briefs, under S.Ct.Prac.R. XIX; or the response to a complaint or evidence under S.Ct.Prac.R. X. Each party may obtain in a case only one agreed extension of time not to exceed 20 days, provided the party has not previously obtained an extension of time from the Supreme Court under division B(2)(b) of this section. An agreed extension of time shall be effective only if a stipulation to the agreed extension of time is filed with the Clerk within the time prescribed by these rules for filing the brief or other document that is the subject of the agreement. The stipulation shall state affirmatively the new date for filing agreed to by the parties. The Clerk shall refuse to file a stipulation to an agreed extension of time that is not tendered timely in accordance with this rule, or if a request for extension of time has already been granted under Section 3(B)(2)(b) of this rule to the party filing the stipulation.

(b) In an expedited election case or any other case where a stipulation to an agreed extension of time cannot be obtained under division 3(B)(2)(a) of this section, a party may file a request for extension of time to file a brief, the response to a complaint, or evidence. The Supreme Court will grant a party only one extension of time, not to exceed 10 days, provided the request for extension of time states good cause for an extension and is filed with the Clerk within the time prescribed by the rules for filing the brief or other document that is the subject of the request. The Clerk shall refuse to file a request for extension of time that is not tendered timely in accordance with this rule, or if a stipulation to an agreed extension of time has already been filed under Section 3(B)(2)(a) of this rule by the party filing the request.

(3) Effect of Extension of Time Upon Other Parties on the Same Side.

When one party receives an extension of time under division (B)(2) of this section, the extension shall apply to all other parties on that side.

**Section 4. Motions; Responses.**

(A) Unless otherwise prohibited by these rules, an application for an order or other relief shall be made by filing a motion for the order or relief. The motion shall state with particularity the grounds on which it is based. A motion to stay a lower court's decision pending appeal shall include relevant information regarding bond and be accompanied by a copy of the lower court's decision and any applicable opinion.

(B) If a party files a motion with the Supreme Court, any other party may file a memorandum opposing the motion within 10 days from the date the motion is filed, unless otherwise provided in these rules. A reply to a memorandum opposing a motion shall not be filed by the moving party. The Clerk shall refuse to file a reply to a memorandum opposing a motion, and motions to waive this rule are prohibited and shall not be filed.

(C) The Supreme Court may act upon a motion before the deadline for filing a memorandum opposing the motion if the motion is for a procedural order, including an extension of time to file a merit brief, or if the motion requests emergency relief and the interests of justice warrant immediate consideration by the Supreme Court. Any party adversely affected by the action of the Supreme Court may file a motion to vacate the action.

**Section 5. Frivolous Actions; Sanctions; Vexatious Litigators.**

(A) If the Supreme Court, *sua sponte* or on motion by a party, determines that an appeal or other action is frivolous or is prosecuted for delay, harassment, or any other improper purpose, it may impose, on the person who signed the appeal or action, a represented party, or both, appropriate sanctions. The sanctions may include an award to the opposing party of reasonable expenses, reasonable attorney fees, costs or double costs, or any other sanction the Supreme Court considers just. An appeal or other action shall be considered frivolous if it is not reasonably well-grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(B) If a party habitually, persistently, and without reasonable cause engages in frivolous conduct under section 5(A) of this rule, the Supreme Court may, *sua sponte* or on motion by a party, find the party to be a vexatious litigator. If the Supreme Court determines that a party is a vexatious litigator under this rule, the Court may impose filing restrictions on the party. The restrictions may include prohibiting the party from continuing or instituting legal proceedings in the Supreme Court without first obtaining leave, prohibiting the filing of actions in the Supreme Court without the filing fee or security for costs required by S.Ct.Prac.R. XV, or any other restriction the Supreme Court considers just.

## **Section 6. Settlement Conferences.**

### **(A) Referral of Cases for Settlement Conferences.**

The Supreme Court may, *sua sponte* or on motion by a party, refer to mediation counsel for a settlement conference any case that originated in the court of appeals, any appeal from an administrative agency, any original action, or any non-felony case that the Supreme Court deems appropriate. The mediation counsel may conduct the settlement conference in person or by telephone. At the settlement conference, the parties shall explore settling the case, simplifying the issues, and expediting the procedure, and may consider any other matter that might aid in resolving the case. Unless otherwise provided by Court order, referral of a case for a settlement conference under this rule does not alter the filing deadlines prescribed by these rules.

### **(B) Attendance.**

If a case is referred for a settlement conference, each party to the case, or the representative of each party who has full settlement authority, and the attorney for each party shall attend the conference, unless excused by the mediation counsel to whom the case has been referred. If a party or an attorney fails to attend the conference without being excused, the Supreme Court may assess the party or the attorney reasonable expenses caused by the failure, including reasonable attorney fees or all or a part of the expenses of the other party. The Supreme Court may also dismiss the action, strike documents filed by the offending party, or impose any other appropriate penalty.

### **(C) Extension of Time to File Briefs or Other Documents.**

Notwithstanding Section 3(B) of this rule, the Supreme Court, *sua sponte* or upon motion by a party, may extend filing deadlines or stay the case referred under this section, if the extension or stay will facilitate settlement. A request for an extension of time shall be filed with the Clerk within the time prescribed by the rules for filing the brief or other document that is the subject of the request.

### **(D) Privileges and Confidentiality.**

The definitions contained in section 2710.01 of the Revised Code apply to Supreme Court settlement conferences. The privileges contained in section 2710.03 of the Revised Code and the exceptions contained in section 2710.05 of the Revised Code apply to mediation communications. The privileges may be waived under section 2710.04 of the Revised Code. Mediation communications are confidential, and no one shall disclose any of these communications unless all parties and the mediation counsel consent to disclosure. The Supreme Court may impose penalties for any improper disclosures made in violation of this rule.

(E) Settlement Conference Order.

At the conclusion of the settlement conference, the Supreme Court will enter an appropriate order.

Staff Commentary to Rule XIV  
(2008 Amendments)

**Section 1(B)**

This new provision alerts parties that documents filed in the Supreme Court are generally accessible by the public. However, they are not treated as public if they have been sealed by order of the Supreme Court or another court, or if they are the subject of a motion to seal still pending in the Supreme Court. If the parties believe that their filings—or portions of them—should not be considered public, it is their responsibility to seek an order to seal. Without an order or a pending motion to seal, the original filings will be made accessible for public review in the Clerk's Office, and copies of the original filings will be scanned for posting to the Supreme Court's Web site.

This provision should be considered in conjunction with Rule VIII, Section 6, which requires parties to redact social security and other personal identifying numbers from documents before filing them. If the personal identifying numbers in a document are necessary for the Supreme Court's determination of the case, the Court may order that an un-redacted copy of the document be filed under seal.

**Section 1(C)**

These amendments permit facsimile filing of a waiver of a memorandum in response filed under Rule III, Section 2(E). They also limit the information requested on a fax cover page. Finally, they eliminate an unnecessary provision addressing service of documents that are filed by facsimile. Normal service requirements for those documents still exist under Section 2 of the rule.

**Section 1(E)**

Former Section 6 of Rule VIII has been redrafted for clarity and moved to this rule because it is a rule of general applicability.

**Section 2(A)**

Because this provision addresses three distinct matters, it has been divided into divisions (1), (2), and (3).

**Sections 2(B)**

The amendment to this division provides that service of a document by e-mail, which is now commonplace, is an accepted manner of service.

**Section 3(B)(2)(b)**

This amendment clarifies that, although stipulations to extensions of time cannot be obtained in expedited election cases under division 3(B)(2)(a) of this section, parties in those cases may, under this division, still file requests for extensions of time.

**Section 6**

Amendments to this section include clarification of language and the change of title of the mediation attorney to “mediation counsel.” The amendments to division 6(D) of this section were necessary after the General Assembly enacted the Uniform Mediation Act, which changed the rules on the privileges pertaining to, and confidentiality of, mediation communications. Generally, these amendments adopt the Uniform Mediation Act’s provisions concerning privilege against disclosure, waiver and preclusion of privilege, and exceptions to privilege.

**RULE XV. FILING FEES AND SECURITY DEPOSITS**

**Section 1. Filing Fees to Institute a Case.**

The following filing fees are imposed by section 2503.17 of the Revised Code and shall be paid before a case is filed:

For filing a notice of appeal . . . . .	\$40.00
For filing a notice of cross-appeal . . . . .	\$40.00
For filing an order of a court of appeals certifying a conflict . . . . .	\$40.00
For instituting an original action . . . . .	\$40.00

**Section 2. Security Deposits in Original Actions.**

Original actions also require a deposit in the amount of \$100.00 as security for costs. The security deposit shall be paid before the case is filed. In extraordinary circumstances, the Supreme Court may require an additional security deposit at any time during the action.

**Section 3. Affidavit of Indigency in Lieu of Fees.**

An affidavit of indigency may be filed in lieu of filing fees or security deposits. The affidavit shall be executed within six months prior to being filed in the Supreme Court by the party on whose behalf it is filed. The affidavit shall state the specific reasons the party does not have sufficient funds to pay the filing fees or the security deposit. At any stage in the proceeding, the Supreme Court may review and determine the sufficiency of an affidavit of indigency. Counsel appointed by a trial or appellate court to represent an indigent party may file a copy of the entry of appointment in lieu of an affidavit of indigency. [See Appendix E following these rules for an affidavit of indigency form.]

Staff Commentary to Rule XV  
(2008 Amendments)

The amendments to Section 3 clarify the rule without changing its substance.

Staff Commentary to Rule II  
(2004 Amendments)

**Section 1(A)**

These amendments reflect current language usage by the Court and the bar, and do not reflect a change in the Court's constitutional jurisdiction or authority. Replacement of the word "allow" with the word "accept", including variations of these root words, has been made throughout the rules.

**Section 1(C)(2)**

This new division reflects the Court's treatment of appeals brought under R.C. 3515.15 as appeals of right.

**Section 2(A)(4)(c)**

This amendment clarifies that a memorandum in support of jurisdiction shall not be filed at the time of filing a motion for delayed appeal. Only after the Court grants a motion for delayed appeal may a memorandum in support of jurisdiction be filed. The amendment also specifies that if a motion for delayed appeal is granted but the appellant subsequently fails to timely file a memorandum in support of jurisdiction, the Supreme Court will dismiss the case, which reflects the Court's current practice.

**Section 2(B)(1)(d)(vii)**

This amendment clarifies the case-type designation in the notice of appeal for appeals where a court of appeals has made a determination under App. R. 26(B).

**Section 2(B)(2)**

This amendment requires that, in an appeal of right, a notice of appeal must contain a date-stamped copy of the court of appeals judgment entry being appealed and specifically defines "date-stamped copy." In some courts of appeals, opinions are released on a given date but the court does not immediately file its judgment entry with the clerk for journalization. Those courts wait ten days from the date of release before filing the judgment entry under App. R. 22(E). This practice has led to confusion among parties and attorneys as to which date should be utilized for purposes of perfecting an appeal to the Supreme Court. The amendment is intended to eliminate this confusion by requiring notices of appeal in appeals of right to have attached the court of appeals judgment entry reflecting the date the judgment entry was filed by the court of appeals under App. R. 22(E).

**Section 2(B)(3)**

This amendment further reinforces the requirement contained in S. Ct. Prac. R. IV, Section 4(A), that a notice of a pending motion to certify a conflict must accompany a party's notice of appeal if a motion to certify a conflict is pending at the court of appeals.

### **Section 3(B)(1)**

Under R.C. 4903.13, when appealing a decision of the Public Utilities Commission, the appellant must file a notice of appeal with the commission. Under Sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code, filing with the commission is accomplished only by filing with the docketing division of the commission.

This amendment adopts the requirement of the Ohio Administrative Code that, to file with the commission, the appellant must file with the commission's docketing division. Placing this external requirement directly in the Court's rule should help litigants address the nuances of public utility appeals by pointing out an administrative requirement they might not otherwise be aware of. However, by including this requirement in the rule, the Court is also imposing a new jurisdictional requirement for perfecting an appeal of a commission decision; unless the appellant files a notice of appeal with the docketing division itself, the Supreme Court will not have jurisdiction to hear the appeal. See also, S. Ct. Prac. R. XIV, Section 2(C)(2), *infra*. That rule has been amended to require placing a "certificate of filing" on the notice of appeal filed in the Supreme Court to demonstrate compliance with the new requirement in this amendment.

### **Section 3(B)(2)**

Under R.C. 4903.13, the Supreme Court may permit any interested party to intervene "by cross-appeal" in the appeal of a decision of the Public Utilities Commission. The former rule implied that a cross-appellant would have to file its cross-appeal within the same 60-day time parameter established in R.C. 4903.11 for filing the first appeal. This amendment allows a cross-appeal to be filed either within that 60-day timeframe or, if later, within ten days after the first appellant's notice of appeal is filed. Under the amendment, an interested party can wait to see if an appeal is filed by the 60<sup>th</sup> day and, if so, will still have sufficient time—ten more days—to prepare and file a cross-appeal. This ten-day period is consistent with time allotted for filing a cross-appeal from a court of appeals decision. See S. Ct. Prac. R. II, Section 2(A)(2)(a).

### **Section 6**

This new section has been added to require the appellant to file a case information statement at the time of filing the notice of appeal. Case information statements are intended to assist the Court in case management and issues tracking.

## **RULE III. DETERMINATION OF JURISDICTION ON CLAIMED APPEALS OF RIGHT AND DISCRETIONARY APPEALS**

### **Section 1. Memorandum in Support of Jurisdiction.**

(A) In a claimed appeal of right or a discretionary appeal, the appellant shall file a memorandum in support of jurisdiction with the notice of appeal. [See Appendix F following these rules for a sample memorandum.]

(B) A memorandum in support of jurisdiction shall contain all of the following:

(1) A table of contents, which shall include the proposition(s) of law stated in syllabus form as set forth in *Drake v. Bucher* (1966), 5 Ohio St. 2d 37, at 39;

administrative agency, any original action, or any non-felony case that the Supreme Court deems appropriate. The mediation attorney may conduct the settlement conference in person or by telephone. At the settlement conference, the parties shall explore settling the case, simplifying the issues, and expediting the procedure, and may consider any other matter that might aid in resolving the case. Referral of a case for a settlement conference under this rule does not alter the filing deadlines prescribed by these rules.

(B) Attendance.

If a case is referred for a settlement conference, each party to the case, or the representative of each party who has full settlement authority, and the attorney for each party shall attend the conference, unless excused by the mediation attorney to whom the case has been referred. If a party or an attorney fails to attend the conference without being excused, the Supreme Court may assess the party or the attorney reasonable expenses caused by the failure, including reasonable attorney fees or all or a part of the expenses of the other party. The Supreme Court may also dismiss the action, strike documents filed by the offending party, or impose any other appropriate penalty.

(C) Extension of Time to File Briefs or Other Documents.

On motion by a party, the Supreme Court may, notwithstanding Section 3(B) of this rule, extend filing deadlines in, or stay the case referred under this section, if the extension or stay will facilitate settlement. A request for an extension of time shall be filed with the Clerk within the time prescribed by the rules for filing the brief or other document that is the subject of the request.

(D) Confidentiality.

Unless disclosable by the order entered under Section 6(E) of this rule, statements uttered during the settlement conference are confidential. Unless all participants consent to disclosure, no one, including the mediation attorney, a party, or a party's attorney, shall disclose to the Supreme Court any statement uttered in a settlement conference. The Supreme Court may impose penalties for any improper disclosure made in violation of this provision.

(E) Settlement Conference Order.

At the conclusion of the settlement conference, the Supreme Court will enter an appropriate order.

Staff Commentary to Rule XIV  
(2004 Amendments)

**Section 1(B)**

The most significant of amendments in this section is an expansion of the types of documents that may be filed by facsimile transmission. Other amendments include various clarifications of language.

### **Section 1(C)**

This division has been amended to explicitly include extensions of time in cases referred to a mediation attorney obtained under S. Ct. Prac. R. XIV, Section 6(C). Although the Court has always interpreted this section to include such extensions, the inclusion was not explicit in the rule. The amended language also reflects that some filing deadlines are imposed by Court order, rather than by the Rules of Practice.

### **Section 2(A)**

The first change to this division imposes the service requirement on *amici curiae*, which previously had been implied in the rule, but not specifically stated. The redaction of the word attorney does not mean that the provision is inapplicable to attorneys; rather, the change reflects the redundancy of the phrase “an attorney or a party” since the rule would automatically apply to an attorney representing a party.

The remaining amendments to this division relate to serving a copy of a notice of appeal in public utility cases. Under R.C. 4903.13, a notice of appeal of a decision of the Public Utilities Commission must be served, unless waived, upon the chair of the commission or, in the absence of the chair, upon another commissioner or by leaving a copy at the commission office in Columbus. By referencing R.C. 4903.13, the amendments incorporate this statutory service requirement into the Court’s rule.

The amendments also require that the notice of appeal or cross-appeal be served on all parties to the proceeding before the commission, even if those persons or entities are not technically parties to the Supreme Court appeal. Under R.C. 4903.13, an appeal of a decision of the Public Utilities Commission is filed “against the commission.” Therefore, the commission is the named appellee in the appeal, and the real party in interest is not named at all. By requiring that all parties to the commission proceeding be served, the rule ensures that the real parties in interest will be notified when an appeal has been filed. These parties can then decide in a timely fashion whether to intervene and participate in the appeal before the Supreme Court.

Because appeals of Power Siting Board decisions are handled in accordance with R.C. 4903.13, the amendments addressing Public Utilities Commission appeals apply as well to appeals from the Power Siting Board. See R.C. 4906.12.

### **Section 2(B)(1)-(3)**

The amendments in division (B)(1) clarify the various means of service of documents and define when service is effected. The new divisions (B)(2) and (B)(3) specify special service requirements in Board of Tax Appeals and expedited election cases, respectively. For commentary regarding the requirement in expedited election cases, see Staff Commentary to Rule X, Section 9, *supra*.

### **Section 2(C)(1)**

The amendments in this division include making the provision applicable to *amici curiae*. See Staff Commentary to Rule XIV, Section 2(A), *supra*. Further, the language “proof of service” has been changed to “certificate of service” to more accurately reflect the expectations

of the Court. That is, the Court expects merely a certification that the document has been served and does not require “proof” that it was served as that term is generally understood.

**Section 2(C)(2)**

This amendment is related to the amendments in S. Ct. Prac. R. II, Section 3(B)(1). The amendment requires that a “certificate of filing” be included on a notice of appeal from either a Public Utilities Commission or a Power Siting Board decision. The certificate of filing will evidence that the appellant has filed the notice of appeal with the docketing division of the commission, satisfying the new jurisdictional requirement under S. Ct. Prac. R. II, Section 3(B)(1). See Staff Commentary to S. Ct. Prac. R. II, Section 3(B)(1).

**Section 2(D)**

See Staff Commentary to Rule XIV, Section 2(A), *supra*.

**Section 2(E)**

See Staff Commentary to Rule XIV, Section 2(A), *supra*.

**Section 3(B)(1)**

The amended language reflects that some filing deadlines are imposed by Court order, rather than by the Rules of Practice.

**Section 3(B)(2)(a)**

The first amendment under this division eliminates the ability to file a stipulated extension of time in expedited election cases filed under S. Ct. Prac. R. X, Section 9. In 1996, when the Court amended S. Ct. Prac. R. X, Section 9, to incorporate an abbreviated briefing and evidence schedule for expedited election cases, the Staff and Committee Notes to S. Ct. Prac. R. XIV, Section 3, stated that the simultaneous amendment to S. Ct. Prac. R. X, Section 9, “deliberately sets an abbreviated briefing schedule *which should not be extended by a general rule.*” (Emphasis added). Nevertheless, some parties file stipulations for extension of time in expedited election cases.

Unlike other cases, expedited election cases implicate the rights of electors underlying the statutory absentee ballot time limits of R.C. 3505.01 and 3509.01. *State ex rel. Ascani v. Stark Cty. Bd. of Elections* (1998), 83 Ohio St.3d 490, 494, 700 N.E.2d 1234; *State ex rel. Dematine v. Cuyahoga Cty. Bd. of Elections* (2000), 90 Ohio St.3d 523, 527-528, 740 N.E.2d 242. Permitting the parties in expedited election cases to stipulate extensions of time under S. Ct. Prac. R. XIV, Section 3(B)(2)(a), could prejudice the rights of electors affected by these cases. Therefore, this amendment has been added to specifically prohibit stipulated extensions of time in expedited election cases. The parties are, however, still permitted to seek an extension by permission of the Court, by filing a request for extension of time under S. Ct. Prac. R. XIV, Section 3(B)(2)(b).

The second amendment under this division clarifies that a party cannot obtain a stipulation for extension of time under this division if that party has already been granted a request for extension of time under S. Ct. Prac. R. XIV, Section 3(B)(2)(b).

**Section 3(B)(2)(b)**

This amendment clarifies that a party cannot file a request for extension of time under this division if that party has already filed a stipulated extension of time under S. Ct. Prac. R. XIV, Section 3(B)(2)(a).

**Section 4**

An amendment to division (A) would require that a motion for stay include relevant bond information and be accompanied by the lower court decision that would be the subject of the stay. This information is not always provided with motions for stay but is necessary for the Court to make an informed ruling. The amendment in division (B) reinforces the rule that a reply to a memorandum opposing a motion shall not be filed by prohibiting the Clerk from filing both replies and motions to waive the prohibition. Other amendments in this section further clarify the language of the rule.

**Section 5**

The amendments in division (A) of this section are intended to clarify the language of the rule. A new division (B) has also been added to address the Court's procedure for addressing repeated violations of the prohibition against frivolous conduct.

**Section 6**

The references to "master commissioner" in this section have been replaced with "mediation attorney." This change reflects a change in the Court's administrative structure wherein the attorneys overseeing mediation are no longer a part of the Office of Master Commissioners. The separation of the two entities ensures that the mediation attorney overseeing the settlement conference is neutral and removed from any later merit decision that the Court may eventually make.

The amendment to division (A) includes the statement that filing deadlines imposed by the rules are not altered when a case is referred for a settlement conference. The parties in a case are still required to file pleadings, memoranda, briefs, or other documents in a timely manner. Parties may seek an extension to a deadline under Section 6(C) of the rule provided they remain in mediation. However, such requests for extension must be filed within the deadline for filing the document that is the subject of the extension. Neither the mediation attorney nor the Clerk is responsible for advising parties of their deadlines under the rules. The amendment in division (C) clarifies that the extension provisions apply only to those cases referred to a mediation attorney under this section.

**RULE XV. DOCKET FEES AND SECURITY DEPOSITS**

**Section 1. Docket Fees to Institute an Action.**

The following docket fees are imposed by section 2503.17 of the Revised Code and shall be paid before the document is filed or the case is docketed:

IN THE SUPREME COURT OF OHIO

Duke Energy Ohio, Inc. : No. 08-0367  
: :  
Appellant, : Appeal from the Public  
: Utilities Commission of  
v. : Ohio  
: :  
The Public Utilities Commission of Ohio, : Public Utilities Commission  
: of Ohio  
Appellee. : Case Nos. 03-93-EL-ATA  
: 03-2079-EL-AAM  
: 03-2081-EL-AAM  
: 03-2080-EL-ATA

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NOTICE OF APPEAL  
OF  
Duke Energy Ohio, Inc.

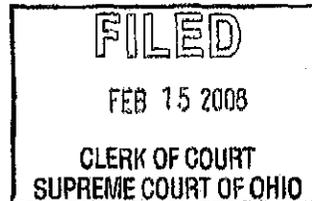
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COUNSEL FOR APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

Notice of Appeal of Appellant Duke Energy Ohio, Inc.

Appellant, Duke Energy Ohio, Inc. (DE-Ohio), hereby gives notice of its appeal, pursuant to R.C. 4903.11 and 4903.13, to the Supreme Court of Ohio from an Entry of the Public Utilities Commission of Ohio (Commission) issued in Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, 03-2080-EL-ATA. These cases involve DE-Ohio's Application to establish its Market-Based Standard Service Offer (MBSSO) pursuant to R.C. 4928.14. The Commission's October 24, 2007, Order on Remand permits certain non-residential customers to avoid paying any charges for capacity despite the right to return to DE-Ohio to obtain competitive retail generation service.

DE-Ohio timely filed its Application for Rehearing in accordance with R.C. 4903.10 on November 23, 2007. The Commission denied DE-Ohio's Application for Rehearing in its Entry on Rehearing December 19, 2007. Thereafter, DE-Ohio timely filed this Notice of Appeal with respect to Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, 03-2080-EL-ATA, with the Clerk of the Ohio Supreme Court and the Docketing Division of the Commission.

DE-Ohio's Allegations of Error

DE-Ohio complains and alleges that the Commission's October 24, 2007, Order on Remand and December 19, 2007, Entry on Rehearing in Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, 03-2080-

EL-ATA are unlawful, unjust, and unreasonable for the following reasons as set forth in DE-Ohio's Application for Rehearing:

- (1) The Commission, without statutory authority, modified DE-Ohio's unavoidable MBSSO price. Specifically, DE-Ohio objects that the Order makes the Infrastructure Maintenance Fund (IMF) and System Reliability Tracker (SRT) avoidable for non-residential switched load that agrees to remain off DE-Ohio's standard MBSSO price through 2008 even though such customers may return to DE-Ohio at the monthly average hourly locational marginal price (LMP MBSSO price).<sup>1</sup>
- (2) The Commission's Order, contrary to statute, deprives non-residential switched load that agrees to remain off DE-Ohio's standard MBSSO price through 2008 of Provider of Last Resort (POLR) reliability service.
- (3) By enabling switched load to avoid paying the IMF and SRT, the Commission's Order conflicts with statutory policy because it requires DE-Ohio to subsidize the competitive retail electric service market.

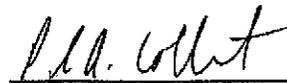
WHEREFORE, DE-Ohio respectfully requests that the Supreme Court of Ohio reverse the Commission's October 24, 2007, Order on

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<sup>1</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Rehearing at 4) (April 13, 2005).

Remand and December 19, 2007, Entry on Rehearing in Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, 03-2080-EL-ATA because they are unlawful, unjust, and unreasonable. In order to correct the errors complained of herein the Court should remand this case to the Commission with instructions to all customers to pay the IMF and SRT to assure that DE-Ohio may offer firm generation service to all customers, POLR service, as set forth in R.C. 4928.14.

Respectfully submitted,

  
Paul A. Colbert, Associate General  
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Rocco D'Ascenzo, Counsel  
Duke Energy Ohio, Inc.  
139 Fourth Street, Room 25 ATII  
Cincinnati, OH 45202  
(513) 419-1827

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing pleading was served on the following either electronically or by first class U.S. mail, postage prepaid, upon the following, this 15th day of February, 2008.

  
Paul A. Colbert

Duane W. Lucky, Section Chief  
Public Utilities Commission of Ohio  
180 East Broad Street, 9<sup>th</sup> Floor  
Columbus, Ohio 43266-0573

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ARTICLE IV: JUDICIAL

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administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts.

(1968, am. 1973)

*POWERS AND DUTIES OF SUPREME COURT; RULES.*

§5 (A)(1) In addition to all other powers vested by this article in the Supreme Court, the Supreme Court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the Supreme Court

(2) The Supreme Court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concur-

rent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the Supreme Court. The Supreme Court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the Supreme Court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing or disqualification matters involving judges of courts established by law.

(1968, am. 1973)

*ELECTION OF JUDGES; COMPENSATION.*

§6 (A)(1) The chief justice and the justices of the Supreme Court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the Supreme Court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the Supreme Court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges and judges of divisions thereof,

### **4903.13 Reversal of final order - notice of appeal.**

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

### **4901-1-02 Filing of pleadings and other papers.**

(A) The official address of the commission's docketing division is: "Public Utilities Commission of Ohio, Docketing Division, 180 East Broad Street, Columbus, Ohio 43215-3793." Except as discussed in paragraph (B) of this rule, all applications, complaints, reports, pleadings, or other papers to be filed with the commission shall be mailed or delivered to the commission's docketing division at that address, together with the number of copies required by paragraph (C) of this rule. Additional copies shall be supplied to the commission or the attorney examiner assigned to the case, if requested. No pleading or other paper shall be considered filed with the commission until it is received and date-stamped by the docketing division. An application for an increase in rates filed under section 4909.18 of the Revised Code, a complaint concerning an ordinance rate filed by a public utility under section 4909.34 of the Revised Code, and a petition filed by a public utility under section 4909.35 of the Revised Code shall not be considered filed until the date, as determined by the commission, upon which the application, complaint, or petition complied with the requirements of rule 4901-7-01 of the Administrative Code.

(B) A party may file documents with the commission via facsimile transmission (fax) under the following conditions:

(1) The following documents may not be delivered via facsimile transmission:

(a) The application, complaint, or other initial pleading which is responsible for the opening of a case;

(b) An application for rehearing which may be filed under section 4903.10 of the Revised Code or a memorandum contra an application for rehearing filed pursuant to rule 4901-1-35 of the Administrative Code.

(c) A notice of appeal of a commission order to the Ohio supreme court which may be filed pursuant to section 4903.13 of the Revised Code.

(2) All documents sent via facsimile transmission must include:

(a) A transmission sheet which states the date of transmission, case number, case title, brief description of the document, and number of pages following the transmission sheet.

(b) The name and telephone number of the document originator and facsimile operator.

(3) The originator of the document or their facsimile transmission operator must contact the commission's docketing division at (614) 466-4095 prior to sending a facsimile transmission. A party must notify the docketing division of its intent to send a document by facsimile transmission by four p.m. on the date the document is to be sent. The party must be prepared to commence transmission at the time the docketing division is notified.

(4) All documents must be sent to the facsimile machine in the commission's docketing division at (614) 466-0313. If that machine is inoperable, directions for alternative arrangements will be given when the contact required under paragraph (B)(3) of this rule is made. Unrequested documents sent to any of the commission's other facsimile machines will not be relayed to the docketing division by commission employees.

(5) Excluding the transmission sheet, all documents transmitted by facsimile transmission must be thirty pages or less.

(6) All documents must be legible when received. If the document is illegible, docketing division will contact the sender to resolve the problem. The person making a facsimile filing shall bear all risk of transmitting a document by facsimile transmission, including all risk of equipment failure.

(7) No document received via facsimile transmission will be given confidential treatment by the commission.

(8) If a document is filed via facsimile transmission, the party must make arrangements for the original signed document and the required number of copies of the pleading to be delivered to the commission no later than the next business day.

(9) Because a document sent to the commission by facsimile transmission will be date-stamped, and thus filed, the day it is received by the docketing division, the originator of the document shall serve copies of the document upon other parties to the case no later than the date of filing.

(C) In addition to the original, any person filing a pleading or other document for inclusion in a case file must submit the required number of copies of the pleading or document. Information regarding the number of copies required by the commission may be obtained by going to the commission's web site at [www.puco.ohio.gov](http://www.puco.ohio.gov) and searching case filing requirements under the docketing information system (DIS) section, by calling the docketing division at 614-466-4095, or by visiting the docketing division at the offices of the commission. As an alternative, a filer may submit twenty copies of the filing.

(D) A failure to submit the number of copies required by paragraph (B) or (C) of this rule shall not invalidate or delay the effective date of a filing if the person making the filing submits the number of copies needed to correct any deficiency within two business days after notification of such deficiency by the docketing division.

(E) Unless a request for a protective order is made concurrently with or prior to the reception by the commission's docketing division of any document that is case-related, the document will be considered a public record.

**4901-1-36 Supreme court appeals.**

Consistent with the requirements of section 4903.13 of the Revised Code, a notice of appeal of a commission order to the Ohio supreme court must be filed with the commission's docketing division within the time period prescribed by the court and served, unless waived, upon the chairman of the commission, or, in his absence, upon any public utilities commissioner, or by leaving a copy at the offices of the commission at Columbus. A notice of appeal of a commission order to the Ohio supreme court may not be delivered via facsimile transmission.