

ORIGINAL

In The
SUPREME COURT OF OHIO

Ohio Edison Company, The Cleveland	:	
Electric Illuminating Company, and	:	
The Toledo Edison Company,	:	Case No. 13-2026
	:	
Appellants,	:	On appeal from the Public Utilities
	:	Commission of Ohio, Case No. 11-
v.	:	5201-EL-RDR, <i>In the Matter of the</i>
	:	<i>Review of the Alternative Energy Rider</i>
The Public Utilities Commission of	:	<i>Contained in the Tariffs of Ohio Edison</i>
Ohio,	:	<i>Company, The Cleveland Electric</i>
	:	<i>Illuminating Company, and The Toledo</i>
Appellee.	:	<i>Edison Company.</i>

MEMORANDUM CONTRA
APPELLANTS' MOTION FOR STAY
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

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**MEMORANDUM CONTRA
APPELLANTS' MOTION FOR STAY
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THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (“FirstEnergy” or “the Companies”) made a bargain with their customers and the Public Utilities Commission of Ohio (“Commission”). The deal permitted FirstEnergy to recover its prudently incurred costs, on an accelerated basis, for procurement of renewable energy credits needed to satisfy its statutory obligations. FirstEnergy was able to recover these costs through a special rider without the delay associated with a traditional rate case. In turn, the customers could expect the Commission to review these expenses and determine whether they were indeed prudently incurred.

Now that the Commission has found that FirstEnergy did not justify some of its expenses, FirstEnergy is claiming that it is insulated from meaningful oversight by the retroactive ratemaking doctrine. FirstEnergy's argument, however, ignores an important decision of this Court that addresses this type of variable rate and permits adjustment after collection.

In its motion for a stay, FirstEnergy seeks to delay the disallowance of its excess charges. FirstEnergy must justify why such an extraordinary request should be granted. It has not done so, and the motion should be denied.

STATEMENT OF THE FACTS AND CASE

This case arises out of a Commission-ordered review into the prudence of the Companies' procurement of renewable energy credits ("RECs")¹. See *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR ("*In re FE Renewable Energy Credits*") (Opinion and Order at 2) (Aug. 7, 2013), FE Ex. A at 2.² To assist with its review, the Commission selected a pair of external auditors; one performed a management/performance audit and the other a

¹ Ohio Adm. Code 4901:1-10-01(V), App. at 17 defines a "renewable energy credit" as "the fully aggregated attributes associated with one megawatt hour of electricity generated by a renewable energy resource as defined in division (A)(35) of section 4928.01 of the Revised Code." R.C. 4928.01, App. at 4.

² References to the Exhibits attached to appellant FirstEnergy's motion for stay filed in this case on December 24, 2013 are denoted "FE App. Ex. ___ at ___." References to the appendix attached to this memorandum contra are denoted "App. at ___."

financial audit. *Id.* at 3, FE Ex. A at 3. The results of these two audits, coupled with the testimony and exhibits presented by numerous parties over the course of several days of hearing, together with the Commission’s own independent analysis, persuaded the Commission to order a disallowance of over \$43 million to the Companies’ Rider AER³ recovery balance. *Id.* at 35, FE Ex. A at 35.

The statutory backdrop for this appeal is R.C. 4928.64, which mandates, among other things, that an electric distribution utility (“EDU”) provide its customers with specified percentages of electricity that are sourced from renewable energy resources. The percentages are organized as a series of annual benchmarks that the EDU must achieve or else face a compliance payment. R.C. 4928.64(C)(2), App. at 12. Compliance with an annual benchmark may be excused, however, if the EDU can demonstrate that its costs of meeting the benchmark “exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more.” R.C. 4928.64(C)(3), App. at 12. An EDU may also be excused from meeting its benchmark by making a force majeure request with the Commission. R.C. 4928.64(C)(4)(a)-(c), App. at 12. In deciding whether to grant force majeure relief, the Commission must assess whether renewable energy resources were reasonably available in the market and whether the EDU exercised good faith in attempting to meet the benchmark. *Id.*

³ Rider AER permits the Companies to recover their “prudently incurred cost[s]” of complying with R.C. 4928.64’s renewable energy resource requirements. *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 10) (Dec. 18, 2013), FE Ex. B at 10.

Here, the Commission found that the Companies failed to show they acted prudently by paying excessive REC prices in August 2010 for the purpose of meeting their 2011 benchmark. The Commission grounded its decision in several factors. First, the Commission found the Companies acted imprudently by hastily securing 2011 RECs during market constraints that it knew would soon ease. See *In re FE Renewable Energy Credits* (Opinion and Order at 25-26) (Aug. 7, 2013), FE Ex. A at 25-26. The prudent course of action, the Commission found, was to forestall securement of 2011 RECs and await market relief which would have relaxed REC prices. *Id.* Second, the Companies failed to abide by Ohio Adm. Code 4901:1-40-03, App. at 20 in failing to report known market constraints to the Commission. *Id.* at 26, FE Ex. A at 26. Third, the Companies secured the 2011 RECs through a bilateral negotiation rather than a competitive bidding process. *Id.* Finally, the Commission found the Companies acted imprudently by failing to request force majeure relief during known constraints in the REC market. *Id.* at 27, FE Ex. A at 27. And even assuming denial of force majeure relief by the Commission, this still would have afforded the Companies extra time to secure RECs during a period of time that market constraints were expected to ease. *Id.* at 27-28, FE Ex. A at 27-28.

Taken together, the Commission explained that these factors were more than sufficient to show that the Companies' purchase of 2011 RECs during August of 2010 was imprudent and that a disallowance was necessary. *Id.* In ordering the disallowance, the Commission directed the "Companies to credit Rider AER in the amount of \$43,362,796.50, plus carrying costs, and to file tariff schedules within 60 days of the issuance of a final appealable order * * * ." *Id.* at 28, FE Ex. A at 28.

The Commission later issued a second entry on rehearing to address various arguments lodged against its original opinion and order by the Companies as well as by several intervening parties. The Commission rejected these arguments in their entirety, but amplified its prior discussion as to why the disallowance did not violate the prohibition against retroactive ratemaking. Drawing on this Court's guidance from *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982), the Commission found that the Companies' Rider AER was akin to a variable rate schedule and, thus, was not subject to the retroactive ratemaking doctrine. *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 18-24) (Dec. 18, 2013), FE Ex. B at 18-24.

ARGUMENT

An order of the Public Utilities Commission of Ohio should not be stayed by the Court absent a strong showing that the party seeking the stay will likely prevail on the merits; that, without a stay, irreparable harm would be suffered; that, if a stay is issued, substantial harm to other parties would not result; and, most importantly, that such a stay is in the public interest. *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 605 (1987) (Douglas, J. dissenting).

- A. Simply because FirstEnergy agrees to post a bond does not automatically mean it is entitled to a stay.**

A stay of an agency order is considered an extraordinary remedy. It is an "intrusion into the ordinary processes of administration and judicial review." *Virginia Petroleum Jobbers Assn. v. Federal Power Comm.*, 259 F.2d 921, 925 (D.C. Cir. 1958). Accordingly, a stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926). In

1987, Justice Andrew Douglas, in dissent, offered the following standards to guide the Court's analysis of any application seeking a stay:

Orders of the Public Utilities Commission have effect on everyone in this state – individuals, business and industry. When the commission issues an order, after the thorough review generally given by the commission and its experts, a stay of that order should only be given after substantial thought and consideration – if at all, and then only where certain standards are met. These standards should include consideration of [1] whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; [2] whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; [3] whether or not, if the stay is issued, substantial harm to other parties would result; and, above all in these types of cases, [4] where lies the interests of the public.

MCI Telecommunications Corp. v. Pub. Util. Comm., 31 Ohio St.3d at 606 (1987).

The *Douglas* test is well reasoned, and comports with the standards applied by federal courts in similar cases. *See, e.g. Virginia Petroleum Jobbers Assn. v. Federal Power Comm.*, 259 F.2d 921 (D.C. Cir. 1958). The *Douglas* test is also consistent with an Ohio appellate court's approach to stays of administrative agency decisions. *Bob Krihwan Pontiac-GMC Truck, Inc. v. GMC*, 141 Ohio App. 3d 777, 783 (Franklin Cty. 2001). In *GMC*, the Franklin County Court of Appeals applied the same four factors discussed by Justice Douglas. Although the *GMC* case involved an appeal arising from R.C. 119.12, App. at 1 and did not involve the Commission, the *GMC* court's reasoning is sound and instructive here.

FirstEnergy has failed to make the necessary showing that a stay is warranted in this case. Staying a Commission order is extraordinary judicial action and not simply a

mechanical, ministerial act as FirstEnergy chooses to portray it. Unlike staying a judgment between private individuals, staying a Commission order can and here does frustrate the end result of a long and complex process at the Commission. It also affects the pocketbooks of over 500,000 customers. The Commission is charged by the General Assembly with establishing reasonable rates and charges for these customers and that is exactly what it did below. Although this Court always has jurisdiction to determine the legality of Commission orders, it should not disrupt Commission orders merely because an appellant has the financial ability to post a bond. The Court should require movant to show why the extraordinary remedy it seeks is appropriate. FirstEnergy's cursory discussion of the merits in its motion is intended simply to delay returning money properly owed to its customers.

The Court has previously denied stay requests even where appellants have agreed to post a bond. *Columbus Southern Power Co. v. Pub. Util. Comm.*, 95 Ohio St.3d 8, 2002-Ohio-1487; *Cincinnati Gas & Electric Co. v. Pub. Util. Comm.*, 99 Ohio St.3d 1539, 2003-Ohio-4671. The Court should do so here.

B. FirstEnergy has failed to show that it is likely to prevail on the merits.

FirstEnergy is challenging a Commission order that adjusts a charge for electric service. This Court has held that the Commission is given considerable discretion in setting just and reasonable rates and charges. *In re Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 68; *AT&T Commun. of Ohio, Inc. v. Pub. Util. Comm.*, 51 Ohio St.3d 150, 154-155 (1990). The Court has also recognized the difficul-

ties inherent in making rate determinations and the need to apply expert judgment to such a task. *AT&T Commun.*, 51 Ohio St.3d 154. Thus, when the Commission fixes rates or charges of a public utility, it is presumed that such rates or charges are fair and reasonable. *Id.* FirstEnergy has the heavy burden of overcoming this presumption.

The sole merit issue that FirstEnergy has chosen to address in its motion is that of retroactive ratemaking. The flaws in this argument show that FirstEnergy is unlikely to prevail in its appeal.

FirstEnergy raises the specter of retroactive ratemaking to avoid any inquiry into the propriety of its renewable energy purchases. If the Commission's examination, and partial disallowance, of FirstEnergy's use of ratepayer funds for REC purchases constitutes retroactive ratemaking, then the entire proceeding at the Commission was little more than an exercise in futility and a tremendous waste of time and money by all parties. Moreover, if the Commission is forbidden from disallowing imprudently-incurred costs, then FirstEnergy (and all other public utilities with similar riders) necessarily enjoy *carte blanche* authority to pass unlimited costs on to ratepayers. This cannot be the state of the law and, fortunately for customers, it isn't. The retroactive ratemaking doctrine is not so rigid and blind to common sense as FirstEnergy suggests.

This case does not implicate the retroactive ratemaking doctrine and FirstEnergy's reliance upon that doctrine to justify its motion is misplaced. Though the Commission cited extensively to this Court's decision in *River Gas Co. v. Pub. Util. Comm.*, 69 Ohio St.2d 509, 433 N.E.2d 568 (1982) to support the conclusion that retroactive ratemaking is

not present here,⁴ FirstEnergy ignores altogether this precedent in its motion. Dodging *River Gas* presents this Court with an incomplete account of how the retroactive ratemaking doctrine operates.

In *River Gas*, the Court held that the retroactive ratemaking doctrine did not bar the Commission from ordering a utility to deduct supplier-issued refunds from the cost of gas that it charged to customers under a variable rate schedule. *Id.* at 512-514. In reaching this conclusion the Court held that the Commission had not engaged in ratemaking. *Id.* at 512. The Court distinguished variable rate schedules from customarily-established rates, observing that the former may be varied without prior Commission approval whereas the latter, which typically arise out of base rate proceedings, may not. *Id.* at 512-513. The Court then held that even if the Commission engaged in ratemaking, it did not do so retroactively because the deduction of supplier-issued refunds was done prospectively to the utility's extant tariff.

The reasoning from *River Gas* defeats the Companies' retroactive ratemaking argument and concomitantly cuts against their claim of prevailing on the merits. First, there is no ratemaking (in the traditional sense) here. As the Commission found, Rider AER operates much like the cost recovery mechanism from *River Gas*. Rider AER is a variable rate that was established to recover, on a quarterly basis, the costs of FirstEnergy's prudently incurred renewable energy credits. Moreover, Rider AER – with only

⁴ See *In re FE Renewable Energy Credits* (Opinion and Order at 28) (Aug. 7, 2013), FE Ex. A at 28; *In re FE Renewable Energy Credits* (Second Entry on Rehearing at 18-24) (Dec. 18, 2013), FE Ex. B at 18-24.

one month of lead time – affords the Commission virtually no meaningful opportunity to review the prudence of the Companies’ REC acquisitions, and thus cost recovery under the rider is tantamount to the rate from *River Gas* which took effect without prior Commission approval.

Nor has the Commission done anything retroactive. Rider AER, like the schedule in *River Gas*, is still featured in the Companies’ current tariffs. It contemplates cost recovery review, and adjustments, at specified intervals. Thus, the Companies can deduct the imprudently incurred REC costs from their recovery balance on a prospective basis. This distinguishes it from *Lucas County Commissioners v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 686 N.E.2d 501 (1997), where the Court held the Commission violated the retroactive ratemaking doctrine by ordering a utility to issue refunds to consumers under an *expired* rate program. In sum, the Court should reject the Companies’ contention that the stay should be granted on the grounds that the Commission engaged in retroactive ratemaking.

FirstEnergy’s argument that withholding a stay would cause customer confusion fares no better. Initially, FirstEnergy’s effort at championing their customers’ interests, while simultaneously defending a position that, if accepted, would entitle them to recover an additional \$43 million from their customers rings hollow. It’s difficult to imagine customers rebuffing the chance at lower utility bills in favor of preserving the status quo. Under Ohio law, customers must pay only costs prudently incurred by their utility provider.

But even if the Companies ultimately prevail in this appeal, their concern about customers being confused about fluctuations in their bills is overstated. Despite the Commission's best efforts to curb bill fluctuation, it is an inevitable fact that bills will fluctuate, whether due to extreme weather conditions, changing market conditions, or shifts in customer behavior. Customers understand this and do not expect the same bill from month-to-month. Indeed, regular rate adjustments are contemplated under the Rider AER mechanism. Moreover, Rider AER is only one of many components that go into the bills the Companies send their customers. A temporary downward adjustment to Rider AER during the pendency of this appeal followed by an upward adjustment to restore the status quo – a status quo the Companies' customers have been accustomed to for quite some time now – would not cause confusion.

FirstEnergy does not even address the merits of its other assignments of error, perhaps recognizing the heavy burden it faces on these issues, which mainly concern the sufficiency of the evidence. The Court “will not reverse or modify a PUCO decision as to questions of fact if the record contains sufficient probative evidence to show that the Commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-7109 (citations omitted). FirstEnergy, as the appellant, has the burden of demonstrating that the Commission's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.* This is a heavy burden because the Court has consistently refused to substitute its judgment for that of the Commission on

evidentiary matters. *AK Steel Corp. v. Pub. Util. Comm.*, 95 Ohio St.3d 81, 2002-Ohio-1735. As explained in the Commission’s Opinion and Order and Second Entry on Rehearing, there is ample evidence in the record to justify the disallowance of FirstEnergy’s expenses for its 2011 renewable energy requirements.

C. FirstEnergy has not shown that it will suffer irreparable harm in the absence of a stay.

FirstEnergy’s claim of “harm” springs from the faulty premise that it has an absolute right to recover and retain every dollar spent on purchases of renewable energy credits. Such an entitlement does not exist under Ohio law. Rider AER was established to permit recovery of *prudently* incurred costs. As the Court has recognized, an opportunity for cost recovery does not mean that a utility has been issued a “blank check” to spend however it wishes. *In re Application of Duke Energy Ohio*, 131 Ohio St.3d 487, 2012-Ohio-1509, ¶ 8. The Commission has both the right and the duty to review these expenses and to disallow recovery where the company cannot demonstrate that its costs were prudently incurred.

In this case, the Commission permitted recovery of the majority of expenses claimed by FirstEnergy. *In re FE Renewable Energy Credits* (Opinion and Order at 21-25) (Aug. 7, 2013), FE Ex. A at 21-25. With respect to the purchases for one year, 2011, the Commission found that FirstEnergy failed to show that its purchases at a negotiated price were prudent. *Id.* at 25, FE Ex. A. at 25. Accordingly, the Commission disallowed recovery of these expenses and ordered that they be credited back to the account balance.

FirstEnergy must show that the Commission's partial disallowance of its expenses irreparably harms the utility. It has not done so. FirstEnergy has not even claimed that the disallowance will hinder its ability to raise capital or jeopardize its ability to operate as a safe and reliable utility. Rather, it simply assumes entitlement to keep this money. However, no such entitlement exists and therefore cannot be the basis for a claim of "irreparable harm," particularly where, as here, the applicable statute provided FirstEnergy with other alternatives to spending the money.

D. FirstEnergy has failed to show that a stay would not cause substantial harm to other parties.

As found by the Commission, FirstEnergy has collected excessive charges from customers, and a stay of the Commission order will unjustly penalize customers for FirstEnergy's missteps. *In re FE Renewable Energy Credits* (Opinion and Order at 25) (Aug. 7, 2013), FE Ex. A at 25. FirstEnergy has benefitted from recovery of its costs for renewable energy credits through the rider mechanism, without the expense and delay associated with a traditional rate case. To delay the return of the excess costs would harm customers, who must continue to pay those costs in their bills for electric service each month.

E. The public interest requires that the stay be denied.

As the United States Supreme Court has stated, "[t]he parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders that the legislature has made final." *Virginian Ry. Co. v.*

United States, 272 U.S. 658 (1926). The public's interest in this case is clear. The public is entitled to pay just and reasonable rates and charges for utility service. It is the Commission's responsibility to ensure this happens. After review by an outside auditor and a full hearing, the Commission determined that FirstEnergy had failed to show that some of its renewable energy purchases were prudent. As it should, the Commission then ordered that the excessive charges for these purchases should be credited back to the rider account. The public is entitled to the prompt execution of this order.

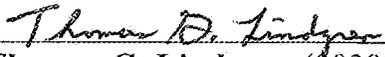
CONCLUSION

FirstEnergy has failed to show that it is entitled to extraordinary relief. Accordingly, its motion should be denied.

Respectfully submitted,

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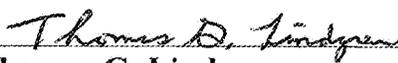
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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Contra Appellants' Motion for Stay, 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 2nd day of January, 2014.



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APPENDIX

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119.12 Appeal by party adversely affected - notice - record - hearing - judgment.

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license or registration of a licensee, or revoking or suspending a license, or allowing the payment of a forfeiture under section 4301.252 of the Revised Code may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident, except that appeals from decisions of the liquor control commission, the state medical board, state chiropractic board, and board of nursing shall be to the court of common pleas of Franklin county. If any party appealing from the order is not a resident of and has no place of business in this state, the party may appeal to the court of common pleas of Franklin county.

Any party adversely affected by any order of an agency issued pursuant to any other adjudication may appeal to the court of common pleas of Franklin county, except that appeals from orders of the fire marshal issued under Chapter 3737. of the Revised Code may be to the court of common pleas of the county in which the building of the aggrieved person is located and except that appeals under division (B) of section 124.34 of the Revised Code from a decision of the state personnel board of review or a municipal or civil service township civil service commission shall be taken to the court of common pleas of the county in which the appointing authority is located or, in the case of an appeal by the department of rehabilitation and correction, to the court of common pleas of Franklin county.

This section does not apply to appeals from the department of taxation.

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and stating that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal may, but need not, set forth the specific grounds of the party's appeal beyond the statement that the agency's order is not supported by reliable, probative, and substantial evidence and is not in accordance with law. The notice of appeal shall also be filed by the appellant with the court. In filing a notice of appeal with the agency or court, the notice that is filed may be either the original notice or a copy of the original notice. Unless otherwise provided by law relating to a particular agency, notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section. For purposes of this paragraph, an order includes a determination appealed pursuant to division (C) of section 119.092 of the Revised Code. The amendments made to this paragraph by Sub. H.B. 215 of the 128th general assembly are procedural, and this paragraph as amended by those amendments shall be applied retrospectively to all appeals pursuant to this paragraph filed before the effective date of those amendments but

not earlier than May 7, 2009, which was the date the supreme court of Ohio released its opinion and judgment in *Medcorp, Inc. v. Ohio Dep't. of Job and Family Servs.* (2009), 121 Ohio St.3d 622.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. If an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in this section, the suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of the suspended order during the period of the appeal from the decision of the court of common pleas. In the case of an appeal from the state medical board or state chiropractic board, the court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order. This provision shall not be construed to limit the factors the court may consider in determining whether to suspend an order of any other agency pending determination of an appeal.

The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of the appeal.

Notwithstanding any other provision of this section, any order issued by a court of common pleas or a court of appeals suspending the effect of an order of the liquor control commission issued pursuant to Chapter 4301. or 4303. of the Revised Code that suspends, revokes, or cancels a permit issued under Chapter 4303. of the Revised Code or that allows the payment of a forfeiture under section 4301.252 of the Revised Code shall terminate not more than six months after the date of the filing of the record of the liquor control commission with the clerk of the court of common pleas and shall not be extended. The court of common pleas, or the court of appeals on appeal, shall render a judgment in that matter within six months after the date of the filing of the record of the liquor control commission with the clerk of the court of common pleas. A court of appeals shall not issue an order suspending the effect of an order of the liquor control commission that extends beyond six months after the date on which the record of the liquor control commission is filed with a court of common pleas.

Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the state medical board or state chiropractic board that limits, revokes, suspends, places on probation, or refuses to register or reinstate a certificate issued by the board or reprimands the holder of the certificate shall terminate not more than fifteen months after the date of the filing of a notice of appeal in

the court of common pleas, or upon the rendering of a final decision or order in the appeal by the court of common pleas, whichever occurs first.

Within thirty days after receipt of a notice of appeal from an order in any case in which a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed, upon motion, shall cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. The record shall be prepared and transcribed, and the expense of it shall be taxed as a part of the costs on the appeal. The appellant shall provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record.

Notwithstanding any other provision of this section, any party desiring to appeal an order or decision of the state personnel board of review shall, at the time of filing a notice of appeal with the board, provide a security deposit in an amount and manner prescribed in rules that the board shall adopt in accordance with this chapter. In addition, the board is not required to prepare or transcribe the record of any of its proceedings unless the appellant has provided the deposit described above. The failure of the board to prepare or transcribe a record for an appellant who has not provided a security deposit shall not cause a court to enter a finding adverse to the board.

Unless otherwise provided by law, in the hearing of the appeal, the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that the additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

The court shall conduct a hearing on the appeal and shall give preference to all proceedings under sections 119.01 to 119.13 of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. An appeal from an order of the state medical board issued pursuant to division (G) of either section 4730.25 or 4731.22 of the Revised Code, or the state chiropractic board issued pursuant to section 4734.37 of the Revised Code, or the liquor control commission issued pursuant to Chapter 4301. or 4303. of the Revised Code shall be set down for hearing at the earliest possible time and takes precedence over all other actions. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to a civil action. At the hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence may be introduced if the court has granted a request for the presentation of additional evidence.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of this finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The court shall award compensation for fees in accordance with section 2335.39 of the Revised Code to a prevailing party, other than an agency, in an appeal filed pursuant to this section.

The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. These appeals may be taken either by the party or the agency, shall proceed as in the case of appeals in civil actions, and shall be pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code. An appeal by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency, and, in the appeal, the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record.

The court shall certify its judgment to the agency or take any other action necessary to give its judgment effect.

4928.01 Competitive retail electric service definitions.

(A) As used in this chapter:

(1) "Ancillary service" means any function necessary to the provision of electric transmission or distribution service to a retail customer and 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.

(2) "Billing and collection agent" means 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 section 4928.08 of the Revised Code, to the extent that the agent is under contract with such utility, company, cooperative, or aggregator solely to provide billing and collection for retail electric service on behalf of the utility company, cooperative, or aggregator.

(3) "Certified territory" means the certified territory established for an electric supplier under sections 4933.81 to 4933.90 of the Revised Code.

- (4) "Competitive retail electric service" means a component of retail electric service that is competitive as provided under division (B) of this section.
- (5) "Electric cooperative" means a not-for-profit electric light company that both is or has been financed in whole or in part under the "Rural Electrification Act of 1936," 49 Stat. 1363, 7 U.S.C. 901, and owns or operates facilities in this state to generate, transmit, or distribute electricity, or a not-for-profit successor of such company.
- (6) "Electric distribution utility" means an electric utility that supplies at least retail electric distribution service.
- (7) "Electric light company" has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.
- (8) "Electric load center" has the same meaning as in section 4933.81 of the Revised Code.
- (9) "Electric services company" means 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 this state. "Electric services company" includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.
- (10) "Electric supplier" has the same meaning as in section 4933.81 of the Revised Code.
- (11) "Electric utility" means an electric light company that has a certified territory and is engaged on a for-profit basis either 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. "Electric utility" excludes a municipal electric utility or a billing and collection agent.
- (12) "Firm electric service" means electric service other than nonfirm electric service.
- (13) "Governmental aggregator" means 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 conferred under section 4928.20 of the Revised Code.
- (14) 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.

(15) "Level of funding for low-income customer energy efficiency programs provided through electric utility rates" means the level of funds specifically included in an electric utility's rates on October 5, 1999, pursuant to an order of the public utilities commission issued under Chapter 4905. or 4909. of the Revised Code and in effect on October 4, 1999, 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.

(16) "Low-income customer assistance programs" means the percentage of income payment plan program, the home energy assistance program, the home weatherization assistance program, and the targeted energy efficiency and weatherization program.

(17) "Market development period" for an electric utility means 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 section 4928.40 of the Revised Code, irrespective of whether the utility applies to receive transition revenues under this chapter.

(18) "Market power" means the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market.

(19) "Mercantile customer" means a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states.

(20) "Municipal electric utility" means a municipal corporation that owns or operates facilities to generate, transmit, or distribute electricity.

(21) "Noncompetitive retail electric service" means a component of retail electric service that is noncompetitive as provided under division (B) of this section.

(22) "Nonfirm electric service" means electric service provided pursuant to a schedule filed under section 4905.30 of the Revised Code or pursuant to an arrangement under section 4905.31 of the Revised Code, 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.

(23) "Percentage of income payment plan arrears" means funds eligible for collection through the percentage of income payment plan rider, but uncollected as of July 1, 2000.

(24) "Person" has the same meaning as in section 1.59 of the Revised Code.

(25) "Advanced energy project" means any technologies, products, activities, or management practices or strategies that facilitate the generation or use of electricity or energy and that reduce or support the reduction of energy consumption or support the production

of clean, renewable energy for industrial, distribution, commercial, institutional, governmental, research, not-for-profit, or residential energy users, including, but not limited to, advanced energy resources and renewable energy resources. "Advanced energy project" also includes any project described in division (A), (B), or (C) of section 4928.621 of the Revised Code.

(26) "Regulatory assets" means the unamortized net regulatory assets that are capitalized or deferred on the regulatory books of the electric utility, pursuant to an order or practice of the public utilities commission or pursuant to generally accepted accounting principles as a result of a prior commission 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 commission 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 commission in the electric 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 commission.

(27) "Retail electric service" means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service 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.

(28) "Starting date of competitive retail electric service" means January 1, 2001.

(29) "Customer-generator" means a user of a net metering system.

(30) "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 that is fed back to the electric service provider.

(31) "Net metering system" means a facility for the production of electrical energy that does all of the following:

(a) Uses as its fuel either solar, wind, biomass, landfill gas, or hydropower, or uses a microturbine or a fuel cell;

(b) Is located on a customer-generator's premises;

(c) Operates in parallel with the electric utility's transmission and distribution facilities;

(d) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.

(32) "Self-generator" means an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.

(33) "Rate plan" means the standard service offer in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.

(34) "Advanced energy resource" means any of the following:

(a) Any method or any modification or replacement of any property, process, device, structure, or equipment that increases the generation output of an electric generating facility to the extent such efficiency is achieved without additional carbon dioxide emissions by that facility;

(b) Any distributed generation system consisting of customer cogeneration technology;

(c) Clean coal technology that includes a carbon-based product that is chemically altered before combustion to demonstrate a reduction, as expressed as ash, in emissions of nitrous oxide, mercury, arsenic, chlorine, sulfur dioxide, or sulfur trioxide in accordance with the American society of testing and materials standard D1757A or a reduction of metal oxide emissions in accordance with standard D5142 of that society, or clean coal technology that includes the design capability to control or prevent the emission of carbon dioxide, which design capability the commission shall adopt by rule and shall be based on economically feasible best available technology or, in the absence of a determined best available technology, shall be of the highest level of economically feasible design capability for which there exists generally accepted scientific opinion;

(d) Advanced nuclear energy technology consisting of generation III technology as defined by the nuclear regulatory commission; other, later technology; or significant improvements to existing facilities;

(e) Any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell;

(f) Advanced solid waste or construction and demolition debris conversion technology, including, but not limited to, advanced stoker technology, and advanced fluidized bed gasification technology, that results in measurable greenhouse gas emissions reductions

as calculated pursuant to the United States environmental protection agency's waste reduction model (WARM) ;

(g) Demand-side management and any energy efficiency improvement;

(h) Any new, retrofitted, refueled, or repowered generating facility located in Ohio, including a simple or combined-cycle natural gas generating facility or a generating facility that uses biomass, coal, modular nuclear, or any other fuel as its input;

(i) Any uprated capacity of an existing electric generating facility if the uprated capacity results from the deployment of advanced technology.

"Advanced energy resource" does not include a waste energy recovery system that is, or has been, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(35) "Air contaminant source" has the same meaning as in section 3704.01 of the Revised Code.

(36) "Cogeneration technology" means technology that produces electricity and useful thermal output simultaneously.

(37)

(a) "Renewable energy resource" means any of the following:

(i) Solar photovoltaic or solar thermal energy ;

(ii) Wind energy ;

(iii) Power produced by a hydroelectric facility ;

(iv) Geothermal energy ;

(v) Fuel derived from solid wastes, as defined in section 3734.01 of the Revised Code, through fractionation, biological decomposition, or other process that does not principally involve combustion ;

(vi) Biomass energy ;

(vii) Energy produced by cogeneration technology that is placed into service on or before December 31, 2015, and for which more than ninety per cent of the total annual energy input is from combustion of a waste or byproduct gas from an air contaminant source in this state, which source has been in operation since on or before January 1, 1985, provided that the cogeneration technology is a part of a facility located in a county having a

population of more than three hundred sixty-five thousand but less than three hundred seventy thousand according to the most recent federal decennial census ;

(viii) Biologically derived methane gas ;

(ix) Energy derived from nontreated by-products of the pulping process or wood manufacturing process, including bark, wood chips, sawdust, and lignin in spent pulping liquors.

"Renewable energy resource" includes, but is not limited to, any fuel cell used in the generation of electricity, including, but not limited to, a proton exchange membrane fuel cell, phosphoric acid fuel cell, molten carbonate fuel cell, or solid oxide fuel cell; wind turbine located in the state's territorial waters of Lake Erie; methane gas emitted from an abandoned coal mine; waste energy recovery system placed into service or retrofitted on or after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly, except that a waste energy recovery system described in division (A)(38)(b) of this section may be included only if it was placed into service between January 1, 2002, and December 31, 2004; storage facility that will promote the better utilization of a renewable energy resource ; or distributed generation system used by a customer to generate electricity from any such energy.

"Renewable energy resource" does not include a waste energy recovery system that is, or was, on or after January 1, 2012, included in an energy efficiency program of an electric distribution utility pursuant to requirements under section 4928.66 of the Revised Code.

(b) As used in division (A)(37) of this section, "hydroelectric facility" means a hydroelectric generating facility that is located at a dam on a river, or on any water discharged to a river, that is within or bordering this state or within or bordering an adjoining state and meets all of the following standards:

(i) The facility provides for river flows that are not detrimental for fish, wildlife, and water quality, including seasonal flow fluctuations as defined by the applicable licensing agency for the facility.

(ii) The facility demonstrates that it complies with the water quality standards of this state, which compliance may consist of certification under Section 401 of the "Clean Water Act of 1977," 91 Stat. 1598, 1599, 33 U.S.C. 1341, and demonstrates that it has not contributed to a finding by this state that the river has impaired water quality under Section 303(d) of the "Clean Water Act of 1977," 114 Stat. 870, 33 U.S.C. 1313.

(iii) The facility complies with mandatory prescriptions regarding fish passage as required by the federal energy regulatory commission license issued for the project, regarding fish protection for riverine, anadromous, and catadromous fish.

(iv) The facility complies with the recommendations of the Ohio environmental protection agency and with the terms of its federal energy regulatory commission license regarding watershed protection, mitigation, or enhancement, to the extent of each agency's respective jurisdiction over the facility.

(v) The facility complies with provisions of the "Endangered Species Act of 1973," 87 Stat. 884, 16 U.S.C. 1531 to 1544, as amended.

(vi) The facility does not harm cultural resources of the area. This can be shown through compliance with the terms of its federal energy regulatory commission license or, if the facility is not regulated by that commission, through development of a plan approved by the Ohio historic preservation office, to the extent it has jurisdiction over the facility.

(vii) The facility complies with the terms of its federal energy regulatory commission license or exemption that are related to recreational access, accommodation, and facilities or, if the facility is not regulated by that commission, the facility complies with similar requirements as are recommended by resource agencies, to the extent they have jurisdiction over the facility; and the facility provides access to water to the public without fee or charge.

(viii) The facility is not recommended for removal by any federal agency or agency of any state, to the extent the particular agency has jurisdiction over the facility.

(38) "Waste energy recovery system" means either of the following:

(a) A facility that generates electricity through the conversion of energy from either of the following:

(i) Exhaust heat from engines or manufacturing, industrial, commercial, or institutional sites, except for exhaust heat from a facility whose primary purpose is the generation of electricity;

(ii) Reduction of pressure in gas pipelines before gas is distributed through the pipeline, provided that the conversion of energy to electricity is achieved without using additional fossil fuels.

(b) A facility at a state institution of higher education as defined in section 3345.011 of the Revised Code that recovers waste heat from electricity-producing engines or combustion turbines and that simultaneously uses the recovered heat to produce steam, provided that the facility was placed into service between January 1, 2002, and December 31, 2004.

(39) "Smart grid" means capital improvements to an electric distribution utility's distribution infrastructure that improve reliability, efficiency, resiliency, or reduce energy

demand or use, including, but not limited to, advanced metering and automation of system functions.

(40) "Combined heat and power system" means the coproduction of electricity and useful thermal energy from the same fuel source designed to achieve thermal-efficiency levels of at least sixty per cent, with at least twenty per cent of the system's total useful energy in the form of thermal energy.

(B) For the purposes of this chapter, a retail electric service component shall be 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 an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a noncompetitive retail electric service.

4928.64 Electric distribution utility to provide electricity from alternative energy resources.

(A)

(1) As used in sections 4928.64 and 4928.65 of the Revised Code, "alternative energy resource" means an advanced energy resource or renewable energy resource, as defined in section 4928.01 of the Revised Code that has a placed-in-service date of January 1, 1998, or after; a renewable energy resource created on or after January 1, 1998, by the modification or retrofit of any facility placed in service prior to January 1, 1998; or a mercantile customer-sited advanced energy resource or renewable energy resource, whether new or existing, that the mercantile customer commits for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs as provided under division (A)(2)(c) of section 4928.66 of the Revised Code, including, but not limited to, any of the following:

(a) A resource that has the effect of improving the relationship between real and reactive power;

(b) A resource that makes efficient use of waste heat or other thermal capabilities owned or controlled by a mercantile customer;

(c) Storage technology that allows a mercantile customer more flexibility to modify its demand or load and usage characteristics;

(d) Electric generation equipment owned or controlled by a mercantile customer that uses an advanced energy resource or renewable energy resource;

(e) Any advanced energy resource or renewable energy resource of the mercantile customer that can be utilized effectively as part of any advanced energy resource plan of an electric distribution utility and would otherwise qualify as an alternative energy resource if it were utilized directly by an electric distribution utility.

(2) For the purpose of this section and as it considers appropriate, the public utilities commission may classify any new technology as such an advanced energy resource or a renewable energy resource.

(B) By 2025 and thereafter, an electric distribution utility shall provide from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract, a portion of the electricity supply required for its standard service offer under section 4928.141 of the Revised Code, and an electric services company shall provide a portion of its electricity supply for retail consumers in this state from alternative energy resources, including, at its discretion, alternative energy resources obtained pursuant to an electricity supply contract. That portion shall equal twenty-five per cent of the total number of kilowatt hours of electricity sold by the subject utility or company to any and all retail electric consumers whose electric load centers are served by that utility and are located within the utility's certified territory or, in the case of an electric services company, are served by the company and are located within this state. However, nothing in this section precludes a utility or company from providing a greater percentage. The baseline for a utility's or company's compliance with the alternative energy resource requirements of this section shall be the average of such total kilowatt hours it sold in the preceding three calendar years, except that the commission may reduce a utility's or company's baseline to adjust for new economic growth in the utility's certified territory or, in the case of an electric services company, in the company's service area in this state.

Of the alternative energy resources implemented by the subject utility or company by 2025 and thereafter:

(1) Half may be generated from advanced energy resources;

(2) At least half shall be generated from renewable energy resources, including one-half per cent from solar energy resources, in accordance with the following benchmarks:

By end of year	Renewable energy resources	Solar energy resources
2009	0.25%	0.004%
2010	0.50%	0.010%
2011	1%	0.030%
2012	1.5%	0.060%
2013	2%	0.090%
2014	2.5%	0.12%
2015	3.5%	0.15%
2016	4.5%	0.18%
2017	5.5%	0.22%
2018	6.5%	0.26%
2019	7.5%	0.3%
2020	8.5%	0.34%
2021	9.5%	0.38%
2022	10.5%	0.42%
2023	11.5%	0.46%
2024 and each calendar year thereafter	12.5%	0.5%

(3) At least one-half of the renewable energy resources implemented by the utility or company shall be met through facilities located in this state; the remainder shall be met with resources that can be shown to be deliverable into this state.

(C)

(1) The commission annually shall review an electric distribution utility's or electric services company's compliance with the most recent applicable benchmark under division (B)(2) of this section and, in the course of that review, shall identify any undercompliance or noncompliance of the utility or company that it determines is weather-related, related to equipment or resource shortages for advanced energy or renewable energy resources as applicable, or is otherwise outside the utility's or company's control.

(2) Subject to the cost cap provisions of division (C)(3) of this section, if the commission determines, after notice and opportunity for hearing, and based upon its findings in that review regarding avoidable undercompliance or noncompliance, but subject to division (C)(4) of this section, that the utility or company has failed to comply with any such benchmark, the commission shall impose a renewable energy compliance payment on the utility or company.

(a) The compliance payment pertaining to the solar energy resource benchmarks under division (B)(2) of this section shall be an amount per megawatt hour of undercompliance or noncompliance in the period under review, starting at four hundred fifty dollars for 2009, four hundred dollars for 2010 and 2011, and similarly reduced every two years thereafter through 2024 by fifty dollars, to a minimum of fifty dollars.

(b) The compliance payment pertaining to the renewable energy resource benchmarks under division (B)(2) of this section shall equal the number of additional renewable energy credits that the electric distribution utility or electric services company would have needed to comply with the applicable benchmark in the period under review times an amount that shall begin at forty-five dollars and shall be adjusted annually by the commission to reflect any change in the consumer price index as defined in section 101.27 of the Revised Code, but shall not be less than forty-five dollars.

(c) The compliance payment shall not be passed through by the electric distribution utility or electric services company to consumers. The compliance payment shall be remitted to the commission, for deposit to the credit of the advanced energy fund created under section 4928.61 of the Revised Code. Payment of the compliance payment shall be subject to such collection and enforcement procedures as apply to the collection of a forfeiture under sections 4905.55 to 4905.60 and 4905.64 of the Revised Code.

(3) An electric distribution utility or an electric services company need not comply with a benchmark under division (B)(1) or (2) of this section to the extent that its reasonably expected cost of that compliance exceeds its reasonably expected cost of otherwise producing or acquiring the requisite electricity by three per cent or more. The cost of compliance shall be calculated as though any exemption from taxes and assessments had not been granted under section 5727.75 of the Revised Code.

(4)

(a) An electric distribution utility or electric services company may request the commission to make a force majeure determination pursuant to this division regarding all or part of the utility's or company's compliance with any minimum benchmark under division (B)(2) of this section during the period of review occurring pursuant to division (C)(2) of this section. The commission may require the electric distribution utility or electric services company to make solicitations for renewable energy resource credits as part of its default service before the utility's or company's request of force majeure under this division can be made.

(b) Within ninety days after the filing of a request by an electric distribution utility or electric services company under division (C)(4)(a) of this section, the commission shall determine if renewable energy resources are reasonably available in the marketplace in sufficient quantities for the utility or company to comply with the subject minimum benchmark during the review period. In making this determination, the commission shall

consider whether the electric distribution utility or electric services company has made a good faith effort to acquire sufficient renewable energy or, as applicable, solar energy resources to so comply, including, but not limited to, by banking or seeking renewable energy resource credits or by seeking the resources through long-term contracts. Additionally, the commission shall consider the availability of renewable energy or solar energy resources in this state and other jurisdictions in the PJM interconnection regional transmission organization or its successor and the midwest system operator or its successor.

(c) If, pursuant to division (C)(4)(b) of this section, the commission determines that renewable energy or solar energy resources are not reasonably available to permit the electric distribution utility or electric services company to comply, during the period of review, with the subject minimum benchmark prescribed under division (B)(2) of this section, the commission shall modify that compliance obligation of the utility or company as it determines appropriate to accommodate the finding. Commission modification shall not automatically reduce the obligation for the electric distribution utility's or electric services company's compliance in subsequent years. If it modifies the electric distribution utility or electric services company obligation under division (C)(4)(c) of this section, the commission may require the utility or company, if sufficient renewable energy resource credits exist in the marketplace, to acquire additional renewable energy resource credits in subsequent years equivalent to the utility's or company's modified obligation under division (C)(4)(c) of this section.

(5) The commission shall establish a process to provide for at least an annual review of the alternative energy resource market in this state and in the service territories of the regional transmission organizations that manage transmission systems located in this state. The commission shall use the results of this study to identify any needed changes to the amount of the renewable energy compliance payment specified under divisions (C)(2)(a) and (b) of this section. Specifically, the commission may increase the amount to ensure that payment of compliance payments is not used to achieve compliance with this section in lieu of actually acquiring or realizing energy derived from renewable energy resources. However, if the commission finds that the amount of the compliance payment should be otherwise changed, the commission shall present this finding to the general assembly for legislative enactment.

(D)

(1) The commission annually shall submit to the general assembly in accordance with section 101.68 of the Revised Code a report describing all of the following:

(a) The compliance of electric distribution utilities and electric services companies with division (B) of this section ;

(b) The average annual cost of renewable energy credits purchased by utilities and companies for the year covered in the report;

(c) Any strategy for utility and company compliance or for encouraging the use of alternative energy resources in supplying this state's electricity needs in a manner that considers available technology, costs, job creation, and economic impacts.

The commission shall begin providing the information described in division (D)(1)(b) of this section in each report submitted after the effective date of the amendment of this section by S.B. 315 of the 129th general assembly. The commission shall allow and consider public comments on the report prior to its submission to the general assembly. Nothing in the report shall be binding on any person, including any utility or company for the purpose of its compliance with any benchmark under division (B) of this section, or the enforcement of that provision under division (C) of this section.

(2) The governor, in consultation with the commission chairperson, shall appoint an alternative energy advisory committee. The committee shall examine available technology for and related timetables, goals, and costs of the alternative energy resource requirements under division (B) of this section and shall submit to the commission a semiannual report of its recommendations.

(E) All costs incurred by an electric distribution utility in complying with the requirements of this section shall be bypassable by any consumer that has exercised choice of supplier under section 4928.03 of the Revised Code.

4901:1-10-01 Definitions.

As used in this chapter:

(A) "Applicant" means a person who requests or makes application for service.

(B) "Commission" means the public utilities commission of Ohio.

(C) "Competitive retail electric service provider" means a provider of competitive retail electric service, subject to certification under section 4928.08 of the Revised Code.

(D) "Consolidated billing" means that a customer receives a single bill for electric services provided during a billing period for services from both an electric utility and a competitive retail electric service provider.

(E) "Consumer" means any person who receives service from an electric utility or a competitive retail electric service provider.

- (F) "Critical customer" means any customer or consumer on a medical or life-support system who has provided appropriate documentation to the electric utility that an interruption of service would be immediately life-threatening.
- (G) "Customer" means any person who has an agreement, by contract and/or tariff with an electric utility or by contract with a competitive retail electric service provider, to receive service.
- (H) "Customer premises" means the residence(s), building(s), or office(s) of a customer.
- (I) "Director of the service monitoring and enforcement department" means the director of the service monitoring and enforcement department of the commission or the director's designee.
- (J) "Electric distribution utility" shall have the meaning set forth in division (A)(6) of section 4928.01 of the Revised Code.
- (K) "Electric light company" shall have the meaning set forth in division (A)(4) of section 4905.03 of the Revised Code.
- (L) "Electric services company" shall have the meaning set forth in division (A)(9) of section 4928.01 of the Revised Code.
- (M) "Electric utility" as used in this chapter shall have the meaning set forth in division (A)(11) of section 4928.01 of the Revised Code.
- (N) "Electric utility call center" means an office or department or any third party contractor of an electric utility designated to receive customer calls.
- (O) "Fraudulent act" means an intentional misrepresentation or concealment by the customer or consumer of a material fact that the electric utility relies on to its detriment. Fraudulent act does not include tampering.
- (P) "Governmental aggregation program" means the aggregation program established by the governmental aggregator with a fixed aggregation term, which shall be a period of not less than one year and no more than three years.
- (Q) "Major event" encompasses any calendar day when an electric utility's system average interruption duration index (SAIDI) exceeds the major event day threshold using the methodology outlined in section 4.5 of standard 1366-2003 adopted by the institute of electric and electronics engineers (IEEE) in "IEEE Guide for Electric Power Distribution Reliability Indices." The threshold will be calculated by determining the SAIDI associated with adding 2.5 standard deviations to the average of the natural logarithms of the electric utility's daily SAIDI performance during the most recent five-year period. The computation for a major event requires the exclusion of transmission outages. For pur-

poses of this definition, the SAIDI shall be determined in accordance with paragraph (C)(3)(e)(iii) of rule 4901:1-10-11 of the Administrative Code.

(R) "Mercantile customer" shall have the meaning set forth in division (A)(19) of section 4928.01 of the Revised Code.

(S) "Outage coordinator" means the commission's emergency-outage coordinator.

(T) "Person" shall have the meaning set forth in division (A)(24) of section 4928.01 of the Revised Code.

(U) "Postmark" means a mark, including a date, stamped or imprinted on a piece of mail which services to record the date of its mailing, which in no event shall be earlier than the date on which the item is actually deposited in the mail. For electronic mail, postmark means the date the electronic mail was transmitted.

(V) "Renewable energy credit" means the fully aggregated attributes associated with one megawatt hour of electricity generated by a renewable energy resource as defined in division (A)(35) of section 4928.01 of the Revised Code.

(W) "Slamming" means the transfer of or requesting the transfer of a customer's competitive electric service to another provider without obtaining the customer's consent.

(X) "Staff" means the commission staff or its authorized representative.

(Y) "Sustained outage" means the interruption of service to a customer for more than five minutes.

(Z) "Tampering" means to interfere with, damage, or by-pass a utility meter, conduit, or attachment with the intent to impede the correct registration of a meter or the proper functions of a conduit or attachment so far as to reduce the amount of utility service that is registered on or reported by the meter. Tampering includes the unauthorized reconnection of a utility meter, conduit, or attachment that has been disconnected by the utility.

(AA) "Transmission outage" means an outage involving facilities that would be included in rate setting by the federal energy regulation commission.

(BB) "Universal service fund" means a fund established pursuant to section 4928.51 of the Revised Code, for the purpose of providing funding for low-income customer assistance programs, including the percentage of income payment plan program, customer education, and associated administrative costs.

(CC) "Voltage excursions" are those voltage conditions that occur outside of the voltage limits as defined in the electric utility's tariffs and are beyond the control of the electric utility.

4901:1-40-03 Requirements.

(A) All electric utilities and affected electric services companies shall ensure that, by the end of the year 2024 and each year thereafter, electricity from alternative energy resources equals at least twenty-five per cent of their retail electric sales in the state.

(1) Up to half of the electricity supplied from alternative energy resources may be generated from advanced energy resources.

(2) At least half of the electricity supplied from alternative energy resources shall be generated from renewable energy resources, including solar energy resources, in accordance with the following annual benchmarks:

Annual benchmarks for alternative energy resources generated from renewable and solar energy resources

<u>By end of year:</u>	<u>Renewable energy resources</u>	<u>Solar energy resources</u>
<u>2009</u>	<u>0.25%</u>	<u>0.004%</u>
<u>2010</u>	<u>0.50%</u>	<u>0.01%</u>
<u>2011</u>	<u>1.0%</u>	<u>0.03%</u>
<u>2012</u>	<u>1.5%</u>	<u>0.06%</u>
<u>2013</u>	<u>2.0%</u>	<u>0.09%</u>
<u>2014</u>	<u>2.5%</u>	<u>0.12%</u>
<u>2015</u>	<u>3.5%</u>	<u>0.15%</u>
<u>2016</u>	<u>4.5%</u>	<u>0.18%</u>
<u>2017</u>	<u>5.5%</u>	<u>0.22%</u>
<u>2018</u>	<u>6.5%</u>	<u>0.26%</u>
<u>2019</u>	<u>7.5%</u>	<u>0.30%</u>
<u>2020</u>	<u>8.5%</u>	<u>0.34%</u>
<u>2021</u>	<u>9.5%</u>	<u>0.38%</u>
<u>2022</u>	<u>10.5%</u>	<u>0.42%</u>
<u>2023</u>	<u>11.5%</u>	<u>0.46%</u>
<u>2024 and each year thereafter</u>	<u>12.5%</u>	<u>0.50%</u>

(a) At least half of the annual renewable energy resources, including solar energy resources, shall be met through electricity generated by facilities located in this state. Facilities located in the state shall include a hydroelectric generating facility that is located on a river that is within or bordering this state, and wind turbines located in the state's territorial waters of Lake Erie.

(b) To qualify towards a benchmark, any electricity from renewable energy resources, including solar energy resources, that originates from outside of the state must be shown to be deliverable into this state.

(3) All costs incurred by an electric utility in complying with the requirements of section 4928.64 of the Revised Code, shall be avoidable by any consumer that has exercised

choice of electricity supplier, during such time that a customer is served by an electric services company.

(B) The baseline for compliance with the alternative energy resource requirements shall be determined using the following methodologies:

(1) For electric utilities, the baseline shall be computed as an average of the three preceding calendar years of the total annual number of kilowatt-hours of electricity sold under its standard service offer to any and all retail electric customers whose electric load centers are served by that electric utility and are located within the electric utility's certified territory. The calculation of the baseline shall be based upon the average, annual, kilowatt-hour sales reported in that electric utility's three most recent forecast reports or reporting forms.

(2) For electric services companies, the baseline shall be computed as an average of the three preceding calendar years of the total annual number of kilowatt-hours of electricity sold to any and all retail electric consumers served by the company in the state, based upon the kilowatt-hour sales in the electric services company's most recent quarterly market-monitoring reports or reporting forms.

(a) If an electric services company has not been continuously supplying Ohio retail electric customers during the preceding three calendar years, the baseline shall be computed as an average of annual sales data for all calendar years during the preceding three years in which the electric services company was serving retail customers.

(b) For an electric services company with no retail electric sales in the state during the preceding three calendar years, its initial baseline shall consist of a reasonable projection of its retail electric sales in the state for a full calendar year. Subsequent baselines shall consist of actual sales data, computed in a manner consistent with paragraph (B)(2)(a) of this rule.

(3) An electric utility or electric services company may file an application requesting a reduced baseline to reflect new economic growth in its service territory or service area. Any such application shall include a justification indicating why timely compliance based on the unadjusted baseline is not feasible, a schedule for achieving compliance based on its unadjusted baseline, quantification of a new change in the rate of economic growth, and a methodology for measuring economic activity, including objective measurement parameters and quantification methodologies.

(C) Beginning in the year 2010, each electric utility and electric services company annually shall file a plan for compliance with future annual advanced- and renewable-energy benchmarks, including solar, utilizing at least a ten-year planning horizon. This plan, to be filed by April fifteenth of each year, shall include at least the following items:

- (1) Baseline for the current and future calendar years.
- (2) Supply portfolio projection, including both generation fleet and power purchases.
- (3) A description of the methodology used by the company to evaluate its compliance options.
- (4) A discussion of any perceived impediments to achieving compliance with required benchmarks, as well as suggestions for addressing any such impediments.