ORIGINAL

In The
SUPREME COURT OF OHIO

Ohio Partners for Affordable Energy, Ohio Consumers' Counsel and Ohio Manufacturers' Association, and The Kroger Company,	:	Case No. 14-328
Appellants,	:	On appeal from the Public Utilities Commission of Ohio, Case Nos. 12-1685-GA-AIR, *et al.*, *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

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

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

INTRODUCTION

The General Assembly has determined that orders of the Public Utilities Commission of Ohio (Commission) go into effect immediately. R.C. 4903.15, App. at 10. If an appellant wishes to prevent this, the General Assembly has created the means to do so, namely, the appellant may obtain a stay. The process for obtaining a stay of an order of the Commission has been clear for over one hundred years. To obtain a stay, an appellant must, amongst other things, post a bond. R.C. 4903.16, App. at 10. This is the balance

struck by the General Assembly – that is, Commission orders go into effect immediately unless a party posts a bond to ensure repayment.

The appellants in this case, the Office of the Ohio Consumers' Counsel (OCC), the Kroger Company, Ohio Manufacturer's Association, and Ohio Partners for Affordable Energy (collectively, Joint Movants) wish to upset this well-settled system. They prefer a stay process that dispenses altogether with the statutory bond requirement in favor of one that requires only a simple request to support such extraordinary relief. This is, however, not the will of the General Assembly. It has determined that, by the end of a fully-litigated process that may take months to complete, a utility should be allowed to begin collecting new rates immediately unless a bond is posted. No bond has been offered in this case and the motion for a stay should, therefore, be denied.

ARGUMENT

Joint Movant's failure to fulfill the statutory prerequisites of R.C. 4903.16 is fatal to their request for a stay order. *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 403, 575 N.E.2d 157, 162 (1991).

Unless otherwise specified, an order of the Commission is effective immediately upon journalization. R.C. 4903.15, App. at 10. There is no constitutional right of appeal of a Commission decision. *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 107, 163 N.E.2d 167, 170 (1959). The right to appeal was created by the General Assembly and its exercise is subject to a number of requirements delineated in Chapter 4903. One such provision, R.C. 4903.16, outlines the process to be followed by a challenging party seeking to stay execution of a Commission order:

> A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the *appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes*, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

R.C. 4903.16 (emphasis added), App. at 10.

The undertaking or bond requirement of R.C. 4903.16 has been the subject of the Court's jurisprudence on multiple occasions. The Court has determined "that there is no automatic stay of any [PUCO] order, but that it is necessary for any person aggrieved thereby to take affirmative action, and if he does so he is required to post bond." *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 163 N.E.2d 167 (1959); *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 258, 141 N.E.2d 465, 468 (1957). In *Keco*, for example, the Court found, by reference to R.C. 4903.16, that:

> From this section it is clear that the General Assembly intended that a public utility shall collect the rates set by the commission's order, giving however, to any person who feels aggrieved by such order a right to secure a stay of the collection of the new rates *after posting a bond.*

Keco, 166 Ohio St. at 257, 141 N.E.2d 468 (emphasis added). The Court has concluded that the bond requirement applies to governmental appellants, such as municipalities.

City of Columbus, supra. Even though the Court considered OCC's stay request moot, this Court's 1991 decision is nonetheless instructive for this case. *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 403-404, 575 N.E.2d 157, 162 (1991). There, the Court noted that R.C. 4903.16 would have governed the Ohio Consumers' Counsel's (OCC) stay request, that the statute's bond requirement would have applied, and that OCC's failure to post a bond would have precluded it from obtaining a stay under the statute had the Court needed to reach the issue. *Id.*

OCC cites the *City of Columbus* case for the proposition that R.C. 4903.16 is patently designed to apply to a public utility that is dissatisfied with rate orders of the Commission. While it is correct that G.C. 614-70 did allow a public utility or railroad to place challenged rates into effect upon the posting of a bond, that early statute was in effect for only two years until its *repeal* in 1913. 102 Ohio Laws 549, 572 (Sec. 73), App. at 2, 4; 103 Ohio Laws 804, 817 (Sec. 47 – repealed), App. at 6, 7. Thereafter, the General Assembly enacted Section 548 to the General Code, that *removed* language applying the bonding requirement only to public utilities or railroads, and it essentially adopted the current structure of R.C. 4903.16. *See* 103 Ohio Laws 804, 815 (Sec. 37), App. at 6, 7. In any event, in *City of Columbus*, the Court held that: (1) appeals of final orders of the Commission are governed solely by statute; (2) there is no automatic stay of a Commission order; and, (3) a government appellant seeking to stay a Commission order must furnish the undertaking required under R.C. 4903.16. *City of Columbus, supra.*

The language of R.C. 4903.16, including the bond requirement, has remained largely unchanged since its enactment (as Section 548) into the General Code in 1913. It

has been a matter of settled law for 50 years that R.C. 4903.16 applies to any proceeding to stay a Commission order and that the bond requirement applies to governmental entities. For nearly 23 years, OCC has been aware that the bond requirement would be applied to it. *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 18. Nonetheless, OCC advances two arguments in an effort to circumvent this requirement. It argues that R.C. 4903.16 is unconstitutional because it violates the separation of powers doctrine and it asserts that, because OCC is a public office, it is not required to post a *supersedeas* bond as outlined in R.C. 2505.12. The Court should reject both arguments for the reasons that follow.

A. R.C. 4903.16 is constitutional.

The Joint Movants argue that R.C. 4903.16 is unconstitutional under a separation of powers theory. If there is a hint of déjà vu about this assertion it is because this Court has heard, and refused to accept, this assertion on several previous occasions. In the case of *In re Application of Duke Energy*, Case No. 2008-1837, OCC sought a stay, did not file a bond, and argued that R.C. 4903.16 is unconstitutional under a separation of powers theory. The Court denied the motion (*In re Application of Duke Energy*, 121 Ohio St.3d 1491, 2009-Ohio-2514, 907 N.E.2d 316 (Table). Again in *Consumers' Counsel v. Pub. Util. Comm.*, Case No. 2009-1547, OCC sought a stay, did not file a bond, and argued that R.C. 4903.16 is unconstitutional under the same separation of powers theory that it advances here. The Court denied OCC's stay request (*Consumers' Counsel v. Pub. Util. Comm.*, 124 Ohio St.3d 1490, 2010-Ohio-670, 922 N.E.2d 226 (Table). Yet a third time,

in *In re Application of the East Ohio Gas Co.*, Case No. 2009-0314, OCC sought a stay, did not file a bond, and argued that R.C. 4903.16 is unconstitutional under a separation of powers theory. The Court denied the motion (*In re Application of East Ohio Gas Co.*, 122 Ohio St.3d 1500, 2009-Ohio-4233, 912 N.E.2d 106 (Table). In sum, the arguments raised by OCC and the other joint movants here have been presented to the Court multiple times without success.

There is very good reason that the Court has not adopted the Joint Movant's argument; it is wrong as a matter of settled law. *Hocking Valley Ry. Co. v. Pub. Util. Comm'n*, 100 Ohio St. 321, 126 N.E. 397 (1919). Given the antiquity of the law, some explanation may be helpful. In 1911, the General Assembly passed the Utilities Act which established the first state-wide mechanism for regulation of utilities and created the Public Service Commission to implement that regulatory mechanism. The Utilities Act included an appeals mechanism, a portion of which was the stay provision, General Code Section 614-70. 102 Ohio Laws 549, 571 (Sec. 73), App. at 2, 3. The General Assembly reconsidered its action and very quickly, in 1913, changed the name of the administrative body to the Public Utilities Commission, repealed the original appeals process, including General Code 614-70, and substituted a new appeals process which was codified at General Code Section 544, *et seq*. 103 Ohio Laws 804, 817 (Sec. 7 – repealed), App. at 6, 8. This new appeals process included General Code Section 548 which is essentially the stay process that appears today in the Revised Code as Section 4903.16 as a result of the 1953 recodification of the General to the Revised Code. 103 Ohio Laws 804, 815 (Sec. 37), App. at 6, 7. The new appeals process established in 1913 was very quickly chal-

lenged as violative of the Ohio and United States constitutions. In *Hocking Valley*, the Court decided that:

> Section 544 *et seq.*, General Code, enacted pursuant to the provision in the judicial article of the Ohio Constitution as amended in 1912, that this court shall have such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law, provide for full judicial review of the proceedings and final orders of the Public Utilities Commission and do not violate the guaranties of the federal or state Constitution.

Hocking Valley Ry. Co. v. Pub. Util. Comm., 100 Ohio St. 321, 126 N.E. 397 (1919) (syllabus). Thus, the provision now known as R.C. 4903.16 is constitutional. Joint Movant's challenge is simply wrong as a matter of law.

Although the above law is quite old, this Court has discussed the topic recently. The Court has recognized that it is the prerogative of the General Assembly to establish procedures in ratemaking and only the General Assembly can change them. The Court has noted:

> To the degree that the bond requirement poses a barrier, however, it is one that must be cured by the General Assembly. Unquestionably, it is the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation. See, e.g., *Akron v. Pub. Util. Comm.* (1948), 149 Ohio St. 347, 359, 78 N.E.2d 890 ("the legislative branch of the state government may confer upon" the commission "very broad [powers]" for the "supervision, regulation and, in a large measure, control of the operation of public utilities"). And our "revisory jurisdiction" over agency proceedings is limited to that "conferred by law." Section 2(d), Article IV, Ohio Constitution.

In re Application of Columbus Southern Power, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 19 (emphasis added).

In sum, R.C. 4903.16 is constitutional. It requires a bond before a stay may issue. None has been offered, therefore the motion for a stay should be denied.

B. Nothing in R.C. 4903.16 limits or impinges in any way upon the Court's inherent judicial authority to order a stay.

Joint Movants argue that R.C. 4903.16 impinges on judicial authority. This is contradicted by the express language of R.C. 4903.16 and is contrary to a host of decisions by the Court. Again, there is no constitutional right either to appeal or to stay a Commission decision. These rights are created only by statute and, where a Commission order is the subject of the stay request, R.C. 4903.16 applies as part of the overall statutory appeals process. Although Joint Movants suggest otherwise, the statute imposes no limitation upon an appellant's ability to seek a stay or the Court's authority to grant one. Quite to the contrary, the level of any bond imposed shall be *prescribed by the Court.* These are hardly words of limitation.[1] Joint Movant's argument that the Court's inherent authority to order a stay is limited is belied by the express words of the statute. The Court decides the bond.

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[1] Case law cited by Joint Movants is clearly distinguishable from the case at bar. In the *City of Norwood* decision, the Court addressed laws that created a "*blanket proscription* on stays or injunctions against the taking and using of appropriated property pending appellate review." *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (emphasis added). In the *Hoechhausler* case also cited by the OCC, the Court similarly addressed a statute that *prohibited* a court from staying a driver's license suspension. *State v. Hoechhausler*, 76 Ohio St.3d 455, 1996-Ohio-374, 668 N.E.2d 457. These statutes imposed obvious limitations upon the authority of the judiciary. In contrast, R.C. 4903.16 obviously does not prohibit a stay. Nor does it limit the Court's discretion to grant a stay. The only requirement it imposes is that of the appellant to provide an undertaking (bond) *as the Court prescribes.*

When considering a stay request, the Court must balance competing interests and R.C. 4903.16 allows the Court to do just that. The Court determines whether a stay should be granted and, if so, the appropriate level of bond, if any, that should be posted by the challenging party. *See, e.g., MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 510 N.E.2d 806 (1987). Nothing in R.C. 4903.16 changes this. Stated simply, there is no infringement upon inherent judicial authority occasioned by the General Assembly's adoption, long ago, of a statutory stay requirement that is now embodied in R.C. 4903.16. There is nothing unconstitutional about R.C. 4903.16 *vis á vis* the separation of power doctrine as the Joint Movants allege.

A stay is an extraordinary remedy, a fact recognized in the R.C. 4903.16 bond requirement. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The Court has denied a number of requests to stay orders of the Commission on appeal. *See Consumers' Counsel v. Pub. Util. Comm.*, 109 Ohio St.3d 1492, 2006-Ohio-2762, 848 N.E.2d 856 (stay denied); *Consumers' Counsel v. Pub. Util. Comm.*, 107 Ohio St.3d 1679, 839 N.E.2d 401 (2005) (stay denied); *Reading v. Pub. Util. Comm.*, 105 Ohio St.3d 1496, 825 N.E.2d 621 (2005) (stay denied); *Ameritech Ohio v. Pub. Util. Comm.*, 79 Ohio St.3d 1473, 682 N.E.2d 1002 (1997) (stay denied). The Court should find both that R.C. 4903.16 is constitutional and that its bond requirement applies to the OCC and all other Joint Movants.

C. The amount of a bond should be commensurate with the value at issue in the case.

Joint Movants argue that, if the Court requires a bond, it should be nominal in amount. While the Commission will leave it up to Duke to quantify the harm, the Commission would note that Joint Movants seek to stay (and thus delay) implementation of a fully adjudicated and lawful rate that went into effect March 3, 2014. Joint Movants' efforts, if successful, will cause monetary and other harm to Duke and its customers. Denying Duke access to the money to which it is entitled constitutes real harm, and is precisely why R.C. 4903.16 contains a bond requirement for any party that seeks to stay a Commission order. Again, a stay is extraordinary relief and obtaining one should be more than a ministerial act. While the Joint Movants grudgingly agree that they will post an unspecified "nominal" bond if forced to do so, the Court long ago rejected such an approach. *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105,163 N.E.2d 167 (1959). In discussing R.C. 4903.16, the Court noted that:

> By this latter section any stay of an order of the commission is dependent on the execution of an undertaking by the appellant, and the appellant herein is the city of Columbus which is unwilling to furnish an undertaking in more than a nominal amount.

Id. at 108.

The Court went on to conclude that:

> Since appeals from final orders of the Public Utilities Commission of Ohio are governed solely by statute and there is no statute providing for the stay of final order of the commission fixing rates or charges collectible by a public utility unless the appellant furnishes an undertaking, this court is of the opinion

> that the applications of the appellant city for stay must be denied.

Id. at 110-111. This Court has been presented with numerous requests to set the R.C. 4903.16 bond at $0. *See, Consumers' Counsel v. Pub. Util. Comm.*, Case No. 2009-1547 (124 Ohio St.3d 1490, 2010-Ohio-670, 922 N.E.2d 226 (Table)); *In re Application of Duke Energy*, Case No. 2008-1837 (121 Ohio St.3d 1491, 2009-Ohio-2514, 907 N.E.2d 316 (Table)); *In re Application of East Ohio Gas Co.*, Case No. 2009-0314 (122 Ohio St.3d 1500, 2009-Ohio-4233, 912 N.E.2d 106 (Table)). In each instance this Court has denied a stay.

The Commission respectfully submits that a proper bond level is one that is commensurate with the amount that is at issue in the case.

D. The public office exemption from a *supersedeas* bond has no application to this case.

OCC argues that because a *supersedeas* bond is not required of a governmental entity, it should not be required to post the bond required pursuant to R.C. 4903.16. The argument is nonsense and contrary to Court precedent. A *supersedeas* bond is neither sought nor required here. OCC's mistaken premise is exposed by the express language of the statute they rely upon. R.C. 2505.03(B) makes clear that where the General Assembly has designated that other sections of the Revised Code specifically apply (R.C. 4903.16 in the case of a requested stay of a Commission order), the provisions of Chapter 2505 (pertaining to *supersedeas* bonds) do not apply. Here, OCC[2] seeks to stay

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[2] The remaining Joint Movants do not join the OCC in this argument.

a Commission order that it appealed under R.C. 4903.11. The stay is sought in connection with that appeal, and therefore, R.C. 4903.16, not R.C. 2505.12, applies to OCC's stay request in this case.

This Court's jurisprudence has consistently found that both the right to appeal a Commission order (R.C. 4903.11) and to seek a stay of execution of that order (R.C. 4903.16) are statutory and that the requirements of applicable statutes must be followed. Indeed the Court has specifically found that the bond requirement of R.C. 4903.16 applies to OCC. *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 403-404 (1991) (the Court criticizes OCC for not filing for a stay and posting the R.C. 4903.16 bond). Quite recently this Court has stated:

> The difficulty for OCC is that to obtain such a stay, it must "execute an undertaking * * * conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order." R.C. 4903.16; see also *Office of Consumers' Counsel v. Pub. Util. Comm.* (1991), 61 Ohio St.3d 396, 403–404, 575 N.E.2d 157 (the bond requirement applies to OCC under "R.C. 4903.16, and this court's interpretation thereof").

In re Application of Columbus Southern Power Co., 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 18. Only the General Assembly can change this situation. As this Court has clearly determined:

> The legislature has seen fit to attach a significant requirement to the court's stay power: the posting of a bond sufficient to protect the utility against damage. R.C. 4903.16. If the General Assembly so desired, it could remove or loosen this condition on the stay power. It has not done so, despite decades of cases refusing to grant a refund. At bottom, then, the statutory scheme creates OCC's problem. We understand the difficulty a public agency such as OCC faces in dealing with the

> bond requirement. Nevertheless, the statute is clear, and it clearly applies. Whether it is wise to apply the bond requirement to OCC is a matter for the General Assembly to consider, not this court.

Id. at ¶ 20. As this Court has already determined, OCC's argument has no merit.

If the General Assembly had intended to create an exception in R.C. 4903.16 for an appellant like OCC, it could have easily done so. It did not. Because OCC has invoked its statutory right both to appeal the Commission's decision, and to seek a stay of execution of that decision, OCC should be required to fully comply with the statutes that create this right. The Court should deny OCC's stay request.

E. As the prerequisite bond has not been offered, there is no reason for the Court to examine further.

Joint Movants spend much time in their motion discussing extraneous matters. They speculate about likelihood of success on the merits, alleged irreparable harm, and other matters. While the Commission disagrees with all of these assertions[3] it is unnecessary for the Court to consider these matters at all. In the absence of the mandatory bond, there is nothing further to discuss and the Joint Movants' request for a stay should be denied.

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[3] For example, the Commission believes there is essentially no chance that Joint Movants will succeed on appeal. The Commission made a factual finding that allowed recovery of certain costs. That factual finding was supported by evidence and, under the statutory standard of review, that finding should be affirmed.

CONCLUSION

R.C. 4903.16 requires that a bond must be provided before a Commission order may be stayed. The statute is constitutional and applies to all appellants including the OCC. A nominal bond is not sufficient. Joint Movants' request must be denied.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Contra Appellants' Joint Motion for a 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 25th day of March, 2014.

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R.C. 4903.16 10

THE STATE OF OHIO

LEGISLATIVE ACTS

PASSED

AND

JOINT RESOLUTIONS

Adopted

BY THE

SEVENTY-NINTH GENERAL ASSEMBLY

At Its Regular Session

BEGUN AND HELD IN THE CITY OF COLUMBUS,
JANUARY 2, 1911

VOLUME CII

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[House Bill No. 325.]

AN ACT

Changing the name of the Railroad Commission of Ohio, to that of the Public Service Commission of Ohio, defining the powers and duties of the latter commission with respect to public utilities, and to amend sections 501, 502 and 606 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 501, 502 and 606 of the General Code be amended to read as follows:

"Railroad" defined.

SEC. 501. The term "railroad" as used in this chapter shall include all corporations, companies, individuals, associations of individuals, their lessees, trustees, or receivers appointed by a court, which owns, operates, manages or controls a railroad or part thereof as a common carrier in this state, or which owns, operates, manages or controls any cars or other equipment used thereon, or which owns, operates, manages or controls any bridges, terminals, union depots, side tracks, docks, wharves, or storage elevators used in connection therewith, whether owned by such railroad or otherwise. Such term "railroad" shall mean and embrace express companies, water transportation companies and interurban railroad companies, and all duties required of and penalties imposed upon a railroad or an officer or agent thereof insofar as they are applicable, shall be required of and imposed upon express companies, water transportation companies and interurban railroad companies, their officers and agents. The commission shall have the power of supervision and control of express companies, water transportation companies and interurban railroad companies to the same extent as railroads.

Other companies.

Application of act.

SEC. 502. This chapter shall apply to the transportation of passengers and property between points within this state, to the receiving, switching, delivering, storing and handling of such property, and to all charges connected therewith, including icing charges and mileage charges, to all railroad companies, sleeping car companies, equipment companies, express companies, car companies, freight and freight line companies, to all associations of persons, whether incorporated or otherwise, which do business as common carriers, upon or over a line of railroad within this state, and to a common carrier engaged in the transportation of passengers or property wholly by rail or partly by rail and partly by water or wholly by water. In addition thereto the provisions of this act shall apply to the regulation of any and all other duties, services, practices and charges, of the railroad company, incident to the shipping and receiving of freight, which are proper subjects of regulation, excepting only, that they shall not apply to the regulation of commerce with foreign nations, and among the several states, and with the Indian tribes.

causes to be done, any act, matter, or thing prohibited by this act, or declared to be unlawful, or shall omit to do any act, matter or thing required by this act, or by order of the commission, such public utility or railroad shall be liable to the person, firm or corporation injured thereby in treble the amount of damages sustained in consequence of such violation, failure or omission; provided, that any recovery under this section shall in no manner affect a recovery by the state for any penalty provided for in this act. Treble damages on violations.

Section 614-69. SECTION 72. A public utility or railroad or other party in interest, dissatisfied with an order of the commission fixing or substituting or confirming any fare, toll, price, rate, charge, rental, schedule or classification, or any order fixing or substituting or confirming any regulation, practice, act or service, or any other order, finding, determination, direction or requirement of the commission, may commence an action in the court of common pleas of Franklin county or of the county in which is located the principal office of the public utility or railroad within sixty days after such order is made, against the commission as defendant, to vacate and set aside such order on the ground that the fare, toll, price, rate, charge, rental, schedule or classification fixed in such order, is unlawful or unreasonable, or that the regulation, practice, act or service, fixed in such order is unlawful or unreasonable; or that the order, finding, determination, direction or requirement of the commission is unlawful or unreasonable; in which action summons may be issued to any county or counties in this state and there served upon the adverse parties. Such action shall proceed as provided in sections 544, 545, 546, 547, 548, 549, 550, 551, 552 of the General Code, which sections shall apply to public utilities with the same force and effect as to railroads. Action to vacate order, etc.

Section 614-70. SECTION 73. Upon the commencement of any such action, the operation of the order, finding, determination, direction or requirement complained of shall not be suspended until the determination of said action, unless the court or a judge thereof, after notice of and hearing, shall otherwise order and the court or judge thereof may, after hearing, fix the terms and conditions for the suspension of said order, finding, determination, direction or requirement or any part thereof. Suspension of order, when.

Provided, however, that the commencement of such action to vacate and set aside any order of the commission with respect to any fare, toll, price, rate, charge, or rental, shall vacate and suspend the order of the commission sought to be vacated, if such public utility or railroad shall elect to charge the fare, toll, price, rate, charge, or rental in force and effect immediately prior to the entering of such order of the commission, and shall give an undertaking in such amount as the court shall determine. The undertaking shall be filed with the court and shall be pay- Bond.

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able to the state of Ohio for the use and benefit of the users affected by the order of the commission. The condition of the undertaking shall be that the public utility or railroad shall refund to each of such users, public or private, the amount collected by it in excess of the amount which shall finally be determined it was authorized to collect from such users. The court shall make all necessary orders in respect to the form of such undertaking and the manner of making such refunders.

Section 614-71. Service of order.

SECTION 74. Every order provided for in this act, shall be served upon every person or corporation to be affected thereby, either by personal delivery or a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby, or in the case of a corporation, to any officer or agent thereof, upon whom a summons may be served. It shall be the duty of every person and corporation to notify the commission forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notification must be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the commission every person or corporation upon whom it is served must if so required in the order notify the commission in like manner whether the terms of the order are accepted and will be obeyed.

Section 614-72.

SECTION 75. Nothing in this act contained shall prevent any public utility or railroad from granting the whole or any part of its property for any public purpose, or granting reduced rate or free service of any kind to the United States government, the state government or any political division or subdivision thereof, or for charitable purposes or for fairs or expositions or to any officer or employe of such public utility or railroad or his family and all contracts and agreements made or entered into by such public utility or railroad for such use, reduced rates, or free service shall be valid and enforcible at law.

Free service or reduced rates valid, when.

Section 614-73.

SECTION 76. No franchise, permit, license or right to own, operate, manage or control any public utility, herein defined as an electric light company, gas company, water works company or heating and cooling company, shall be hereafter granted or transferred to any corporation not duly incorporated under the laws of Ohio.

Limitation.

Section 614-74.

SECTION 77. Companies formed to acquire property or to transact business which would be subjected to the provisions of this act, and companies owning or possessing franchises for any of the purposes contemplated in this act, shall be deemed and held to be subject to the provisions of this act, although no property may have been acquired, business transacted or franchises exercised.

Section 614-75.

SECTION 78. The act, omission or failure of any officer, agent or other person, acting for or employed by a public utility or railroad, while acting within the scope

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shall not take effect until the first day of March, 1914. This act shall in all other respects take effect and be in force from and after the second Monday of October, 1913.

The sections numbers on the margin hereof are designated as provided by law.
TIMOTHY S. HOGAN, *Attorney General.*

C. L. SWAIN,
Speaker of the House of Representatives.
HUGH L. NICHOLS,
President of the Senate.

Passed April 18th, 1913.
Approved May 6th, 1913.

JAMES M. COX,
Governor.

Filed in the office of the Secretary of State May 10th, 1913.
914 G.

[House Bill No. 583.]

AN ACT

To create the public utilities commission of Ohio, to prescribe its organization, its powers and its duties, and to repeal sections 487 to 499 inclusive, sections 543 to 551 inclusive, sections 614, 614-24, 614-25, 614-26, 614-69, 614-70, 614-80, 614-81 and 914-83 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

Section 487. The public utilities commission of Ohio; appointment, term, vacancies.

SECTION 1. There shall be and there is hereby created a public utilities commission of Ohio and by that name the commission may sue and be sued. The public utilities commission shall consist of three members, who shall be appointed by the governor with the advice and consent of the senate, and shall possess the powers and duties herein specified as well as all powers necessary and proper to carry out the purposes of this chapter. Immediately after this act shall take effect, the governor shall, with the advice and consent of the senate, appoint a member whose term shall expire on the first day of February, 1915; another whose term shall expire on the first day of February, 1917, and another whose term shall expire on the first day of February, 1919; and thereafter each member shall be appointed and confirmed for a term of six years. Vacancies shall be filled in the same manner for unexpired terms. One of such commissioners, to be designated by the governor, shall, during the term of the appointing governor, be the chairman of the commission. Not more than two of said commissioners shall belong to or be affiliated with the same political party.

Section 488. Removal; filing record of proceedings and decision.

SECTION 2. The governor may remove any commissioner for inefficiency, neglect of duty, or malfeasance in office, giving to him a copy of the charges against him and an opportunity to be publicly heard, in person or by counsel, in his own defense, upon not less than ten days' notice. If such commissioner shall be removed the governor shall file in the office of the secretary of state a complete statement of all charges made against such commissioner, and

warranted, or should be changed, the commission may abrogate, change or modify the same. An order or decision made after such rehearing, abrogating, changing or modifying the original order or decision shall have the same force and effect as an original order or decision, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order or decision unless so ordered by the commission.

Section 544. SECTION 33. A final order made by the commission shall be reversed, vacated or modified by the supreme court, on a petition in error, if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable. Order may be reversed.

Section 545. SECTION 34. The proceeding to obtain such reversal, vacation or modification shall be by petition in error, filed in the supreme court, by any party to the proceeding before the commission, against the public utilities commission of Ohio, setting forth the errors complained of. Thereupon unless the same is duly waived, a summons shall issue and be served, as in other cases, upon the chairman of the commission, or, in the event of his absence, upon any member of the commission, or by leaving a copy at the office of the commission at the city of Columbus. The court may permit any interested party to intervene by cross-petition in error. Proceedings in error.

Section 546. SECTION 35. Upon service or waiver of the summons in error the commission shall forthwith transmit to the clerk of the supreme court a transcript of the journal entries, original papers or transcripts thereof and a certified transcript of all evidence adduced upon the hearing before the commission in the proceeding complained of, which shall be filed in said court. Transcript.

Section 547. SECTION 36. No proceeding to reverse, vacate or modify a final order of the commission shall be deemed commenced unless the petition therefor is filed within sixty days after the entry of the final order complained of upon the journal of the commission. When proceeding commenced.

Section 548. SECTION 37. No proceeding to reverse, vacate or modify a final order rendered by the commission shall operate to stay execution thereof unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, shall allow such stay, in which event the plaintiff in error shall be required to execute an undertaking, payable to the state of Ohio, in such a sum as the court may prescribe, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the plaintiff in error of all damages arising from or caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm or corporation for transportation, transmission, produce, commodity or service in excess of the charges fixed by the order complained of, in the event such order be sustained. Stay of execution.

fund, and the court may make such order with respect to the compensation of the trustee as it may deem proper.

Section 551-2. SECTION 42. This act shall not affect pending actions or proceedings brought by or against the state of Ohio, the railroad commission of Ohio, the public service commission of Ohio, or by any other person or corporation, but the same may be prosecuted and defended with the same effect as though this act had not been passed or said commission abolished. Any investigation, hearing or examination undertaken, commenced, instituted or prosecuted prior to the taking effect of this act may be conducted and continued to a final determination in the same manner and with the same effect as if it had been undertaken, commenced, instituted or prosecuted in accordance with the provisions of this act. All proceedings hitherto taken by the commissions above named in any such investigation, hearing or examination and hereby ratified, approved, validated and confirmed, and all such proceedings shall have the same force and effect as if they had been undertaken, commenced, instituted and prosecuted under the provisions of this act and in the manner herein prescribed. Act shall not affect pending actions.

Section 551-3. SECTION 43. No cause of action arising under the laws of Ohio shall abate by reason of the passage of this act, whether a suit or action has been instituted thereon at the time of the taking effect of this act or not, but actions may be brought upon such causes in the same manner, under the same terms and conditions, and with the same effect as though said laws in force at the time this act takes effect had not been repealed. Abatement.

Section 551-4. SECTION 44. All orders, decisions, rules or regulations heretofore made, issued or promulgated by the commission above named shall continue in force, and have the same effect as though they had been lawfully made, issued or promulgated under the provisions of this act. Orders, decisions, etc., remain in force.

Section 551-5. SECTION 45. Each section of this act and every part thereof is hereby declared to be an independent section, and part of a section, and the holding of a section or part thereof to be void or ineffective for any cause shall not be deemed to affect any other section or part thereof. Each section independent.

Section 551-6. SECTION 46. All actions and proceedings in the supreme court, under this chapter, and all actions or proceedings to which the commission or the state of Ohio may be parties, and in which any question arises under this chapter, or under or concerning any order or decision of the commission, to reverse, vacate or modify an order of the commission, shall be taken up and disposed of by the court out of its order on the docket. Order of disposition of cases under chapter.

SECTION 47. That original sections 487 to 492 inclusive, sections 543 to 551 inclusive, sections 614, 614-24, 614-25, Repeals.

2505.03 Appeal of final order, judgment, or decree.

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

2505.12 No supersedeas bond required for certain appeals.

An appellant is not required to give a supersedeas bond in connection with any of the following:

(A) An appeal by any of the following:

(1) An executor, administrator, guardian, receiver, trustee, or trustee in bankruptcy who is acting in that person's trust capacity and who has given bond in this state, with surety according to law;

(2) The state or any political subdivision of the state;

(3) Any public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity as that officer.

(B) An administrative-related appeal of a final order that is not for the payment of money.

4903.11 Proceeding deemed commenced.

No proceeding to reverse, vacate, or modify a final order of the public utilities commission is commenced unless the notice of appeal is filed within sixty days after the date of denial of the application for rehearing by operation of law or of the entry upon the journal

of the commission of the order denying an application for rehearing or, if a rehearing is had, of the order made after such rehearing. An order denying an application for rehearing or an order made after a rehearing shall be served forthwith by regular mail upon all parties who have entered an appearance in the proceeding.

4903.15 Orders effective immediately - notice.

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

4903.16 Stay of execution.

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.