

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Its Natural Gas Distribution Rates.)
)
 In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)
)
 In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service.)
)
 In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.)

Case No. 2014 - 0328

Appeal from the Public Utilities Commission of Ohio

Public Utilities Commission of Ohio
Case Nos. 12-1685-GA-AIR
12-1686-GA-ATA
12-1687-GA-ALT
12-1688-GA-AAM

JOINT MOTION FOR LEAVE TO INTERVENE AS APPELLEES
 AND TO FILE MEMORANDUM IN SUPPORT
 OF DUKE ENERGY OHIO'S MOTION TO LIFT THE STAY

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MEMORANDUM IN SUPPORT OF JOINT MOTION TO INTERVENE

Columbia Gas of Ohio, Inc., The East Ohio Gas Company d/b/a Dominion East Ohio (DEO) and Vectren Energy Delivery of Ohio, Inc. (VEDO) (collectively, the Utilities) respectfully file this motion for leave to intervene as appellees in this matter and to file a memorandum in support of Duke Energy Ohio's motion to lift the stay, which is attached to this motion as Attachment A.

This case is before this Court on appeal by The Kroger Company, the Office of the Ohio Consumers' Counsel (OCC), the Ohio Manufacturers' Association (OMA), and Ohio Partners for Affordable Energy (OPAЕ) (collectively Appellants) from the Public Utilities Commission of Ohio's November 13, 2013 Opinion and Order, and its January 8, 2014 Entry on Rehearing in Case No. 12-1685-GA-AIR, *etc.* Among other things, the proceedings below involved Duke Energy Ohio, Inc.'s application to increase rates for its natural gas distribution service, which the Commission approved.

The Utilities have a real and substantial interest in the outcome this appeal. They include three of Ohio's largest natural gas companies, and all are public utilities whose rates and terms of service are regulated by the Commission. Consequently, how both the Commission and the Court interpret and apply Ohio law has a significant impact on the Utilities. The Utilities have different perspectives and represent different geographical areas of the State, and they can present a broader range of views of the impacts of this case than one company alone.

The Utilities' interest in this case is twofold. First, the interpretation of certain provisions of R.C. Chapter 4909 could have a substantial impact on the regulatory treatment that the Utilities are afforded in future rate cases. Second, the Utilities seek to intervene in response to the Court's May 14, 2014 Entry, which granted Appellants' motion for a stay without requiring a bond or any other form of financial security. While the Utilities recognize that this decision may

well have reflected the Appellants' incorrect assertion that no harm would result from a stay (and thus that no bond was needed), the potential significance of this issue for the Utilities cannot be overstated. In particular, the position advanced by the Appellants—that R.C. 4903.16, the statute requiring a bond, is unconstitutional—would not only have a deleterious impact on the utility industry if adopted, it would raise wide-ranging and serious questions about the constitutionality of other long-standing laws and precedents applicable both to Commission appeals and to *all* appeals.

Given the significance of these issues, the Utilities seek party status to ensure that they may offer their perspective and assistance in resolving the important issues raised in this case. Among other means of participation, S.Ct.Prac.R. 4.01(B)(1) provides that “any . . . party may file a response to [a] motion within ten days from the date the motion is filed.” Today, Duke filed a motion to lift the stay or in the alternative to require an appropriate bond. The Utilities have prepared and wish to file a memorandum in support of that motion. The Utilities' memorandum in support is attached to this Joint Motion to Intervene, and the Utilities are filing it pending and subject to the Court's ruling on this Motion. The Utilities provide the memorandum at this time to ensure that it is timely filed under the Court's ten-day deadline and to ensure that parties opposing Duke's motion have a full and fair opportunity to respond to the Utilities' arguments. In this regard, the Utilities would note that Duke similarly filed a memorandum opposing the Appellants' motion for stay on the same day that it moved to intervene.

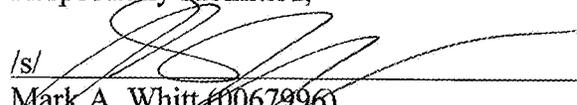
The Utilities' participation will not cause undue delay or unjustly prejudice any existing party, but will contribute to the just and expeditious resolution of the issues presented in this matter.

WHEREFORE, the Utilities respectfully request that this Court grant them leave to intervene as appellees in this proceeding.

Dated: May 20, 2014

Respectfully submitted,

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**JOINT MEMORANDUM IN SUPPORT
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JOINT MEMORANDUM IN SUPPORT

I. INTRODUCTION

The potential significance to the utility industry of a decision to stay an order of the Commission *without requiring a bond or other security* cannot be overstated. Commission orders are subject to appeal as a matter of right, and as night follows day, orders increasing rates are litigated before this Court. The appellate process necessarily takes time. But if appellants' position is accepted, and R.C. 4903.16's bond requirement is invalidated as unconstitutional, the mere fact of an appeal could inflict substantial harm on utilities, regardless of the merits of the appeal itself. More than that, such a ruling would raise serious legal questions about other important laws, including not only long-standing laws applicable to Commission appeals but also those applicable to *all* appeals.

Ohio's long-established regulatory rules have succeeded in balancing the risks of over- and under-recovery. The "rule against retroactive ratemaking" provides that neither the Commission nor the Court may authorize a utility to recover past under-charges or refund past over-charges. While it is true that under this rule, a utility may earn revenue from a rate later deemed excessive, it is equally true that utilities *never* recover the lost revenue from periods when base rates were deficient. Over time, across many cases, these offsetting effects "balance[] the equities." *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997).

The appellants' attempt to invalidate R.C. 4903.16's bond requirement would upset this long-standing balance. If their position is correct, the balance in Ohio could shift heavily towards under-recovery—and possibly non-recovery—of the investments and costs necessary to provide service. Indeed, given that appeals generally fail more often than they succeed, the appellants' position would likely do more harm (in causing the under-recovery of lawful charges) than good (in preventing the over-recovery of unlawful charges). And this interest in protecting prevailing

parties from harm is precisely the interest animating the numerous laws and court rules that condition the granting of a stay on the execution of a bond.

These consequences are serious, and the Court should consider them. But they do not provide the reason to reject the appellants' arguments. As the Utilities will show in the following argument, appellants' position that R.C. 4903.16 violates the separation of powers is simply incorrect.

II. ARGUMENT

A. **Because there is no basis for not requiring a bond, the Utilities support Duke's motion to either lift the stay or require the appellants to file an appropriately calculated bond.**

The Utilities will respond to two of the bases offered in support of staying the order without posting a bond as required by R.C. 4903.16: (1) that no harm would result to Duke, and (2) that the bond requirement itself is unconstitutional.¹

As Duke has explained, the appellants' assertion that "Duke's loss of income will have been only temporary" is not true as a matter of fact. (*See* Jt. Mot. for Stay Memo. in Supp. ("Jt. Memo.") at 23.) If an appellant in a given case could clearly demonstrate that *no* financial harm could possibly result from the imposition of a stay, a bond arguably might not be necessary. But that is not the case here, so a bond is necessary to protect Duke from harm. Duke's motion fully explains the fallacy of appellants' first basis for staying the order without posting a bond.

The other basis offered by the appellants—and on which the Utilities focus their attention in this joint memorandum—is that R.C. 4903.16's requirement of a bond is unconstitutional. This position is not tenable and, if accepted, would raise serious questions regarding the validity

¹ The Utilities are not addressing OCC's oft-rejected claim that R.C. 4903.16 does not apply to it because it is a state agency. The Utilities agree with Duke's argument on this point.

of many long-standing laws that are applicable not only to Commission appeals, but potentially to all appeals in Ohio.

B. R.C. 4903.16, the statute requiring a bond, is constitutional.

The appellants' sole argument against the constitutionality of R.C. 4903.16 is that it violates the separation of powers implicit in the Ohio Constitution. But as the Utilities will show, it is the appellants' position, not the statute, that creates a separation-of-powers problem.

1. This Court's powers are derived from the Constitution.

"[T]he foundation principle of our government" is "that the people is the source of all political power." *State ex rel. Attorney Gen. v. Covington*, 29 Ohio St. 102, 112 (1876). The Ohio Constitution confirms this explicitly: "All political power is inherent in the people." Sec. 2, Art. 1.

Like all organs of state government, this Court derives its jurisdiction from the Ohio Constitution. *See, e.g., Morningstar v. Selby*, 15 Ohio 345, 362, 1846 Ohio LEXIS 192 (1846) ("Upon this question of jurisdiction, we necessarily have to recur to the original source of all our power, the constitution of the state."). "The judicial power of the state is vested in courts, the creation of which and their jurisdiction is provided for in the judicial article of the constitution, Article IV." *New Bremen v. Pub. Util. Comm.*, 103 Ohio St. 23, 30 (1921).

2. In appeals from the Commission, the Court's powers are expressly subject to legislative definition.

The constitutional source of jurisdiction pertinent to this case is Article IV, Section 2(B)(2)(d). That section grants the Court "revisory jurisdiction of the proceedings of administrative officers or agencies *as may be conferred by law*." (Emphasis added.) Interestingly, this amendment was "adopted at the same time" that the people authorized the creation of the Commission. *New Bremen*, 103 Ohio St. at 31; *see also, e.g., Cincinnati v. Pub.*

Util. Comm., 105 Ohio St. 181, 194 (1922) (the Court “does not have original jurisdiction, but can only exercise its revisory jurisdiction over the orders of the commission”). Thus, whatever its nature or extent in other contexts, the Court’s jurisdiction over agency appeals is subject to definition by the legislature.

This is why certain statutes are called “jurisdictional.” For example, in a recent review of a Board of Tax Appeals decision, the Court recognized, “Our authority to review decisions issued by the BTA emanates from Section 2(B)(2)(d), Article IV, Ohio Constitution, which states that this court’s appellate jurisdiction encompasses ‘[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies *as may be conferred by law.*’” *Polaris Amphitheater Concerts, Inc. v. Del. County Bd. of Revision*, 118 Ohio St.3d 330, 2008-Ohio-2454, ¶ 13 (emphasis sic). This meant that the Court’s “revisory jurisdiction over BTA decisions depends upon compliance with the statute.” *Id.* ¶ 8.

3. The Court has expressly upheld the bond requirement in R.C. 4903.16 on this basis.

This principle—that the Court’s appellate jurisdiction must “be conferred by law”—must be kept in mind in considering the constitutionality of R.C. 4903.16. Indeed, in a 2011 case, in a substantially identical context, the Court relied on exactly this constitutional provision in upholding the bond requirement. *See In re Appl. of Columbus S. Power*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 19.

Under R.C. 4903.16, if a stay is granted, “the appellant shall execute an undertaking [*i.e.*, a bond]” that will allow “prompt payment by the appellant of all damages caused by the delay.” In *Columbus S. Power*, OCC had asserted that it should be “relieve[d] . . . from filing a bond.” *Id.* The Court denied OCC’s request: although “the bond requirement pose[d] a barrier” to complete financial relief, it was a barrier “that must be cured by the General Assembly.” *Id.*

The Court noted that it was “[u]nquestionably . . . the prerogative of the General Assembly to establish the bounds and rules of public-utility regulation,” and it specifically explained that “our ‘revisory jurisdiction’ over agency proceedings is limited to that ‘conferred by law.’” *Id.* Thus, in upholding the bond requirement, *Columbus S. Power* expressly relied on its constitutional foundations.

In fact, *Columbus S. Power* was a harder case than this one. Unlike this case, the underlying order had already been reviewed and held unlawful. And in *Columbus S. Power*, unlike here, the bond requirement would have been much larger, given the substantially larger sum at stake. Finally, whereas only OCC sought a stay in *Columbus S. Power*, the moving parties in this case have considerable financial means. The parties seeking a stay include a consortium of “more than 1,600 Ohio manufacturing companies”² and “one of the world’s largest grocery retailers, with fiscal 2012 sales of \$96.8 billion.”³ If the Kroger Company cannot afford a bond, no one can.

None of this is to say that affordability is the issue. The issue is what the law requires, and *Columbus S. Power* has clearly upheld the law’s requirement of a bond.

4. For this reason, R.C. 4903.16 does not present separation-of-powers issues.

Nevertheless, the appellants assert that “[t]he bond requirement in R.C. 4903.16 is unconstitutional under the separation of powers doctrine.” (Jt. Memo. at 5.) But this is incorrect: any separation-of-powers concerns cut in favor of R.C. 4903.16, not against it. The provisions of R.C. 4903.16 do not strike at core judicial powers. On the contrary, the Court’s jurisdiction over

² See Case No. 12-1685-EL-AIR, Ohio Manufacturers’ Assn. Mot. to Intervene at 3 (Sept. 14, 2012).

³ See “About Kroger,” http://www.thekrogerco.com/corpnews/corpnewsinfo_history.htm (last visited May 19, 2014).

Commission appeals, the right to appeal itself, and the very activity on review *all* spring from the *legislative* power.

a. The Court’s jurisdiction over agency appeals is dependent on statutory definition.

Ohio “does not have a constitutional provision specifying the concept of separation of powers.” *State ex rel. Cydrus v. Ohio Pub. Emp. Ret. Sys.*, 127 Ohio St.3d 257, 2010-Ohio-5770, ¶ 22. Rather, “this doctrine is implicitly embedded in the entire framework of those sections . . . that define the substance and scope of powers granted to the three branches.” *Id.*

But surely this *implicit* doctrine must give way to *express* constitutional provisions. And as already discussed, the Constitution expressly provides that this Court’s jurisdiction over Commission appeals must be “conferred by law.” Ohio Const. Art. IV, Sec. 2(B)(2)(d). This means that the Court’s “revisory jurisdiction” over agency decisions “depends upon compliance with the statute.” *Polaris Amphitheater*, 118 Ohio St.3d 330, ¶ 8.

The movants are generally correct that “the judicial branch should remain independent and free from interference by other branches.” (Jt. Memo. at 5.) But the Constitution provides an exception to that general rule here, expressly *granting* authority to the General Assembly to limit the Court’s power in agency appeals. Thus, it is the appellants that would upset the separation of powers, by disregarding the people’s grant of authority to the legislature to set the terms of review for agency actions.

b. The right to appeal itself is created by statute.

Under its constitutional authority, the General Assembly has defined certain appellate rights, subject to certain conditions, for appeals from Commission orders.

It need not have provided *any* right to appeal. The Court has already held, “There is no right of appeal from a decision of a statutory board . . . except as provided by statute.” *City of*

Columbus v. Pub. Util. Comm., 170 Ohio St. 105, 107 (1959) (internal quotations omitted). But under its constitutional authority, the General Assembly has authorized appeals from Commission orders. This further shows that the legislature acts with constitutional authority in attaching conditions on the rights and remedies available on appeal.

c. Rate-setting *itself*—the underlying activity on review—is a legislative activity.

Not only are the Court’s jurisdiction and the right to appeal both subject to legislative definition, but the very activity under review is *itself* legislative in nature.

“Rate fixing is a legislative function” that “has been delegated to the Public Utilities Commission.” *Indus. Protestants v. Pub. Util. Comm.*, 165 Ohio St. 543, 544 (1956); *see also Citizens Gas Users Assn. v. Pub. Util. Comm.*, 165 Ohio St. 536, 539 (1956) (“In considering whether [rates are] unlawful or unreasonable, this court must recognize that the fixing of rates for a public utility is a legislative problem”) (citation and internal quotations omitted). This means that, unless there is a constitutional claim (such as one for confiscation under the Takings Clause) or a violation of law, an assertion that rates are “too high” or “too low” essentially presents a non-justiciable issue. For example, in *Industrial Protestants*, the doctrine compelled summary rejection of the appeal, which was founded solely on appellants’ claim that the Commission had not “exercised proper judgment” in setting rates. 165 Ohio St. at 544; *see also, e.g., In re Columbus Southern Power Co.*, 129 Ohio St.3d 568, ¶ 9 & ¶ 11 (noting that the Court is “ill-equipped” in the “absence of statutory criteria” or a “legislative command” to evaluate a claims regarding the timing and amount of rates).

All this shows that R.C. 4903.16’s requirement of a bond does not encroach on the judiciary’s constitutional grant of power. On the contrary, this issue arises in the context of legislatively created and defined jurisdiction, in a legislatively granted right of appeal, with

legislative activity under review. As a constitutional matter, these issues arise primarily in the *legislative* preserve, not the *judicial*.

5. The statute does not interfere with the Court's inherent powers.

For these reasons, the appellants are also wrong to assert that R.C. 4903.16 “restricts this Court’s ability to exercise its inherent authority to issue stays.” (Jt. Memo. at 5.) Again, to make this assertion, they must ignore the constitutional source of authority undergirding this appeal.

a. The Court's inherent powers aid jurisdiction, not expand it.

“It is fundamental . . . that courts have only such jurisdiction as is conferred upon them by the Constitution or by the Legislature acting within its constitutional authority.” *Humphrys v. Putnam*, 172 Ohio St. 456, 460 (1961). Thus, although inherent powers may not be *expressed in* the Constitution, that is where they find their *source*. One of the seminal cases recognizing the doctrine of inherent powers, *Hale v. State*, described them as “such powers as are necessary to the orderly and efficient exercise of *jurisdiction*.” *Hale v. State*, 55 Ohio St. 210, 213 (1896) (emphasis added); *see also, e.g., State ex rel. Ellis v. Board of Deputy State Supervisors*, 70 Ohio St. 341 (1904) (“This court has frequently exercised its inherent powers in aid of the original jurisdiction conferred by the constitution.”). Contrary to appellants’ argument, inherent powers *aid* jurisdiction; they do not expand it.

Even the cases relied upon by the appellants recognize that inherent powers must operate within the Court’s jurisdiction. For example, in *State v. Hochhausler*, the Court noted that “[i]nherent *within a court’s jurisdiction*, and essential to the orderly and efficient administration of justice, is the power to grant or deny stays.” 76 Ohio St.3d 455, 464 (1996) (emphasis added). Likewise, *Norwood v. Horney* shows that a court’s “inherent power to do all things reasonably necessary to the administration of justice” is only enjoyed “once [the court has] obtained *jurisdiction* of a cause of action” and “as an *incidental* to its constitutional grant of power.”

Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799, ¶ 121 (emphasis added; internal quotations omitted).

b. *Norwood* and *Hochhausler* are not on point.

Norwood and *Hochhausler* also reviewed entirely different laws which involved broad-brush denials of *any* right to stay. See *Norwood*, 110 Ohio St.3d 353, ¶ 125 (noting “blanket proscription on stays . . . against taking”). Indeed, *Hochhausler* specifically noted that it was “the part of [the law] that prevents ‘any court’ from granting a stay” that was “unconstitutional.” 76 Ohio St.3d at 464. And *Norwood* in particular involved a threat to an independent constitutional right (namely, under the Takings Clause). In contrast, R.C. 4903.16 neither impinges directly on an independent constitutional right nor imposes a blanket proscription on stays; it merely requires that protective conditions be satisfied before stays are granted. So *Norwood* and *Hochhausler* provide little guidance here.

In short, to the extent the Court has an inherent power to stay decisions on review, that power can only come from the Constitution. And again, the Court’s power to hear *this* case is constitutionally dependent on a legislative grant. Thus, the legislative conditions on stays should not be considered to interfere with the Court’s power. “[T]he power to grant jurisdiction includes the power to withhold it,” and the General Assembly may “exercise[] its prerogative to prescribe procedures not inconsistent with the jurisdiction granted.” *Cincinnati v. Bossert Machine Co.*, 16 Ohio St.2d 76, 79 (1968).

6. Whether the appellants agree with the substantive policy underlying the bond requirement is not relevant on review.

Whether the appellants disagree with the bond requirement or believe it to be unfair is, as a constitutional matter, not relevant. In fact, it *is* sensible to require appellants to protect prevailing parties from the financial harm caused by staying an order. But even if this

requirement *were* unwise, the Court has long recognized that this is irrelevant to constitutional questions:

[T]he question of the wisdom of the legislation [does not have] anything to do with determining its constitutionality. That question is for the Legislature, and whether the court agrees with it . . . is of no consequence. It is solely a question of power. If the Legislature has the constitutional power to enact a law, *no matter whether the law be wise or otherwise it is no concern of the court.*

Ohio Pub. Interest Action Group, Inc. v. Pub. Util. Comm., 43 Ohio St.2d 175, 183 (1975) (emphasis added); *see also, e.g., State ex rel. Tritt v. State Empl. Rels. Bd.*, 97 Ohio St.3d 280, 2002-Ohio-6437, ¶ 17 (“Because the General Assembly is the final arbiter of public policy, judicial policy preferences may not be used to override valid legislative enactments.”).

The Court recognized exactly this point in upholding the bond requirement only a few years ago. The Court acknowledged that some might consider that the requirement to post bond results in “apparent unfairness”; but it pointed out that this “remains a policy decision mandated by the larger legislative scheme.” *Columbus S. Power*, 128 Ohio St.3d 512, ¶ 17. And what was affirmed in 2011—that OCC’s inability to secure a stay does not invalidate the requirement—remains true today.

C. Serious, unintended consequences could result from adoption of the appellants’ position.

In addition to being legally untenable, adoption of the appellant’s position would result in wide-ranging, serious consequences. Most notably, this position would raise a number of serious legal questions.

1. Invalidating the bond requirement could have widespread legal ramifications.

a. It would call into question other statutes and rules that require bonds.

Most notably, a decision that R.C. 4903.16 is unconstitutional would undermine a number of other laws requiring bonds as a condition of staying an underlying decision. There is

nothing untoward about a bond requirement. It ensures that a prevailing party is not harmed by the mere fact of the appellate process. Indeed, the Court's own rules require a party seeking a stay to "include relevant information regarding bond." S.Ct.Prac.R. 4.01(A)(2).

Reflecting this fact, a number of statutes and rules (besides R.C. 4903.16) require appellants to post bonds as a condition of granting a stay. *See* R.C. 2505.06 ("no administrative-related appeal shall be effective as an appeal . . . until the final order appealed is superseded by a bond"); R.C. 2505.09 ("an appeal does not operate as a stay of execution until . . . a supersedeas bond is executed by the appellant to the appellee"); R.C. 163.19 ("the court may grant[] a stay on appeal, provided that the owner posts a supersedeas bond in an amount the court determines"); *see also e.g.*, Civ.R. 62(B) ("When an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond. . . . The stay is effective when the supersedeas bond is approved by the court.").

But if R.C. 4903.16's bond requirement is unconstitutional for violating the separation of powers, would it also be unconstitutional in all of these other statutes? Given the numerous ways in which R.C. 4903.16 specially arises from the *legislature's* grant of power, it would be very difficult to distinguish a precedent in this case from other contexts. Despite the enormous precedential impact that invalidation would have, the appellants offer no explanation of how these other statutes could survive.

b. Invalidating R.C. 4903.16 would raise serious questions about the validity of other "limits" on appellate jurisdiction.

A decision that R.C. 4903.16 was unconstitutional would also raise serious questions regarding the status of other "jurisdictional" statutes. For example, the Court has long construed the requirement to preserve arguments on rehearing and to preserve issues in notices of appeal as

jurisdictional requirements. *See, e.g., Travis v. Pub. Util. Comm.*, 123 Ohio St. 355 (1931), syllabus para. 6 (“The filing of an application for rehearing before the Public Utilities Commission is a jurisdictional prerequisite to an error proceeding from the order of the Commission to this Court”); *Penn. R.R. Co. v. Pub. Util. Comm.*, 172 Ohio St. 154, 156 (1961) (“The filing of notice of appeal within the time prescribed by law is a jurisdictional prerequisite in perfecting an appeal.”). As discussed above, similar jurisdictional statutes apply to other agency appeals. *See, e.g., Polaris Amphitheater Concerts, Inc. v. Del. County Bd. of Revision*, 118 Ohio St.3d 330, 2008-Ohio-2454, ¶ 8 (the Court’s “revisory jurisdiction over BTA decisions depends upon compliance with the statute”).

Do these statutory requirements—which arguably “limit” the power of the Court to hear cases—violate the separation of powers? Again, the appellants do not address this issue in any way.

c. Invalidating R.C. 4903.16 would also call into question numerous rules governing financial remedies on Commission appeals.

Similarly, if the Court revises the requirements regarding bonds, it will also raise questions regarding other long-settled statutory provisions governing financial issues on appeal. For example, the Court has long and consistently held that the statutory regulatory scheme “balances the equities” by prohibiting retroactive surcharges and refunds: Title 49 “prohibit[s] utilities from charging increased rates during the pendency of commission proceedings and appeals, while also prohibiting customers from obtaining refunds of excessive rates that may be reversed on appeal.” *Lucas County Comm’rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348 (1997).

These provisions also reflect the General Assembly’s guidance and will. *See id.* Given that they also arguably “limit” the Court’s power to accord relief in any given case, do these

long-upheld rules and understandings also violate the separation of powers? Yet again, the appellants do not address this question at all.

2. Invalidation of the bond requirement could also increase the risks and costs of providing utility service.

In addition to raising a number of serious legal questions, invalidating the bond requirement could also impose substantial harm on utilities. The bond requirement is designed to protect the prevailing party from being harmed by the mere fact of the appellate process. So staying an order that approves rate recovery, without requiring a bond, will by definition cause harm. This harm will usually be direct and financial—not only in the lost time value of money, but in most cases in the absolute loss of the recovery of Commission-approved rates.

Moreover, if rates are neither allowed to go into effect nor subject to recompense through a bond this will drastically increase “regulatory lag,” that is, the lag “caused by the lengthiness of the regulatory process” “between the time costs increase and the time those costs may be recovered through increased rates.” *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181, 186 (1981). And for rates that update annually—such as the riders used by Columbia, DEO, and VEDO to finance the replacement of aging infrastructure—a stay without bond would likely result in *no recovery*. Such rates are only in effect for around 12 months, so unless the rules regarding refunds and retroactive ratemaking are also modified, a stay without bond would mean that the utility would *never* actually recover under an approved annual rate.

These are not the only possible consequences if appellants’ position is adopted. Operational planning and capital budgeting could also be disturbed, as it would increase the difficulty of projecting the dates of recovery. The financial risks of non-recovery could also be ill-received by the investment community and potentially result in downgrades by rating agencies. Utilities need rate recovery to finance their services and capital investment, and even

perceived risks of non-recovery could drive up the cost of capital. And the appellants seem to forget that such increases in costs are ultimately shared by ratepayers.

To be clear, the Utilities are not suggesting that the resulting harm in and of itself justifies rejecting the appellants' arguments to invalidate R.C. 4903.16. Their arguments should be rejected because they lack merit. But the consequences that could result from invalidating R.C. 4903.16 show that this issue deserves the most serious attention.

D. If the Court decides not to require a bond, the Utilities respectfully request an explanation of the basis of decision.

Compounding all of these concerns is the lack of explanation for *why* a bond was not required. The reason is not self-evident. As discussed above, the appellants presented three rationales: one constitutional (that R.C. 4903.16 violates the separation of powers), one statutory (that OCC is statutorily exempt from posting a bond), and one factual (that Duke would not be harmed by a stay). The order granting the stay does not explain whether the bond requirement was waived for one of these reasons, all of these reasons, some other reason, or some combination thereof.

Given the serious financial risks attached to this issue, the Utilities respectfully request that the Court either inform interested parties on what basis the bond requirement was waived or permit the parties and intervenors to address the issue in supplemental briefing. The decision not to require a bond has raised many questions. First and foremost is the extent to which the Court intended—or did not intend—to uproot settled law on the bond requirement.

Absent further action or explanation by this Court, one possible explanation for the Court's decision is that OCC is not subject to the bond requirement. Unless the Court clarifies otherwise, OCC will inevitably seek a stay of *every* future Commission order granting a rate increase. Will OCC be required to post a bond in these future cases? And either way, will such

rulings also apply to parties aligned with OCC? Or may private corporations circumvent the bond requirement by persuading OCC to join their case?

Finally, the other legal basis—a declaration of unconstitutionality—is no trivial matter. If this is the basis for the Court’s decision, the legislature and interested members of the public are entitled to know. Absent an understanding of *why* the Court believes the statute to be unconstitutional, the General Assembly cannot take whatever remedial action it deems necessary, such as amending R.C. 4903.16 in a way that addresses the Court’s concerns.

III. CONCLUSION

For the foregoing reasons, the Utilities support Duke’s motion to lift the stay or, in the alternative, to require a bond conditioned for the prompt payment by the appellants of all damages caused by the delay in the enforcement of the order.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion for Leave to Intervene was served by electronic mail this 20th day of May 2014 to the following:

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