

In The
SUPREME COURT OF OHIO

ORIGINAL

The Kroger Company, *et. al.*, : Case No. 13-521
: :
Appellants, : On appeal from the Public Utilities
: Commission of Ohio, Case Nos. Case
v. : No. 11-346-EL-SSO, Case No. 11-348-
: EL-SSO, Case No. 11-349-EL-AAM,
Public Utilities Commission of Ohio, : and 11-350-EL-AAM, *In the Matter of*
: *the Application of Columbus Southern*
Appellee, : *Power Company and Ohio Power*
: *Company for Authority to Establish a*
and : *Standard Service Offer Pursuant to*
: *§4928.143, Ohio Rev. Code, in the Form*
Ohio Power Company, : *of an Electric Security Plan, et al.*
: :
Cross-Appellant. : :

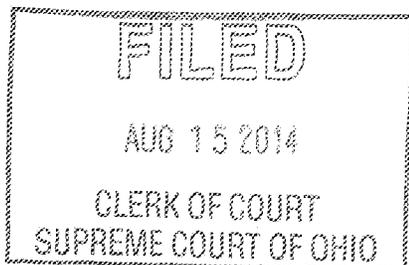
MEMORANDUM IN OPPOSITION TO
JOINT MOTION FOR A STAY
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO

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ARGUMENT

Appellants Industrial Energy Users-Ohio (“IEU-OH”), the Kroger Company (“Kroger”), and the Office of the Ohio Consumers’ Counsel (“OCC”) (collectively, “Joint Movants”) ask this Court to grant a stay of the Public Utilities Commission of

Ohio's ("Commission") August 8, 2012 Opinion and Order¹ and its January 30, 2013 Entry on Rehearing.² The orders in this case were implemented and have been in effect for nearly two years now.

Two of these same movants, Kroger and OCC³, filed a virtually identical motion in a case currently pending before this Court.⁴ Although the Court initially granted the motion in that case without requiring a bond, it subsequently granted a motion to require a bond, ordering the parties to submit briefs on the amount of the bond required.⁵ Previous to the Court's order requiring a bond, the movants in that case filed their merit brief, raising, again, the same arguments that no bond should be required.

These very arguments, therefore, are already pending before the Court, both in motion and on the merits of the case. Appellee Commission respectfully requests that

¹ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan, Case Nos. 11-346-EL-SSO, et al., ("ESP II Case")* (Opinion and Order) (Aug. 8, 2012), IEU App. at 21-106 (references to the appendix filed by appellant Industrial Energy Users-Ohio in this case on August 12, 2013 are denoted "IEU App. at ____"); references to the attached appendix are denoted "App. at ____."

² *ESP II Case* (Entry on Rehearing) (Jan. 30, 2013), IEU App. at 107-172.

³ Kroger and OCC were joined there by two appellants that have not joined this motion, the Ohio Manufacturers' Association and the Ohio Partners for Affordable Energy.

⁴ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates, et al., Case No. 14-328* (Entry) (May 14, 2014), App. at ____.

⁵ *Id.* (Entry) (Jul. 29, 2014), App. at _____. Although briefs on the issue have been filed, the time for the filing of reply briefs has not yet expired.

this motion be denied. At the very least, the Court should not issue a stay without requiring a bond adequate to ensure payment of all damages that might ensue as a result of such a stay.

A. Ohio law requires the posting of a bond to stay execution of Public Utilities Commission orders.

Ohio law is quite clear. An order of the Public Utilities Commission cannot be stayed unless a bond is posted. R.C. 4903.16, App. at 5. Appellants have not satisfied the requirements for the granting of a stay in this case, and their motion should be denied.

1. The bond requirement of R.C. 4903.16 is constitutional.

Appellants' argument that R.C. 4903.16 is unconstitutional under a separation of powers theory is without merit. Appellant Ohio Consumers' Counsel has presented this argument on three previous occasions. *In re Application of Duke Energy*, Case No. 2008-1837; *Consumers' Counsel v. Pub. Util. Comm.*, Case No. 2009-1547; and *In re Application of the East Ohio Gas Co.*, Case No. 2009-0314. On each occasion, the Court denied the stay. *In re Application of Duke Energy*, 121 Ohio St.3d 1491, 2009-Ohio-2514, 907 N.E.2d 316 (Table); *Consumers' Counsel v. Pub. Util. Comm.*, 124 Ohio St.3d 1490, 2010-Ohio-670, 922 N.E.2d 226 (Table); and *In re Application of East Ohio Gas Co.*, 122 Ohio St.3d 1500, 2009-Ohio-4233, 912 N.E.2d 106 (Table). The arguments raised by Appellants here have been presented to the Court multiple times without success.

There is very good reason that the Court has not adopted the Appellants' argument; it is wrong as a matter of settled law. *Hocking Valley Ry. Co. v. Pub. Util. Comm.*,

100 Ohio St. 321, 126 N.E. 397 (1919). In 1913, the General Assembly enacted essentially the current appeals process that included the stay provision.⁶ This was very quickly challenged 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, R.C. 4903.16 is constitutional. Appellants' challenge is simply wrong as a matter of law. Appellants' argument should be rejected.

2. There is no “public office exemption” to the bond requirement of R.C. 4903.16.

OCC argues that it is entitled to a “public office exemption” from the bond requirement. R.C. 2505.12, App. at 4. OCC proposes that it is a “public officer,” pointing to language in R.C. 4911.06. But its status as a “state officer” under R.C. 4911.06 is entirely unrelated to the term “public officer” as used in R.C. 2505.12. R.C. 4911.06

⁶ It 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 1-3.

states that the consumers' counsel shall be considered a state officer for purposes of section 24 of Article II, Ohio Constitution. R.C. 4911.06, App. at 5. That section of the Ohio Constitution merely explains that certain state officers are subject to impeachment. The intent of R.C. 4911.06 is, thus, to make clear that the consumers' counsel may be removed from office for certain specified reasons. R.C. 2505.12 has a distinctly different purpose. R.C. 2505.12 is contained with the title of the Revised Code dealing with appellate courts. It specifies that a supersedeas bond is not required for certain public officers. But neither R.C. 2505.12 nor R.C. 4911.06 encompasses the consumers' counsel. Therefore, the exemption from the bonding requirement is not applicable to OCC.

Furthermore, the exemption under R.C. 2505.12 would not, in any case, apply to the appeal of a Commission order, as the undertaking required by R.C. 4903.16 *is not a supersedeas bond*. A supersedeas bond is designed to ensure that the appellee receives the benefit of the judgment if successful. See R.C. 2505.09, App. at 4. The undertaking required with regard to Commission orders, on the other hand, is meant to protect against the damages caused by the delay in enforcement of a legal Commission order. The two are not comparable, making any bonding exemption inapplicable.

3. Issuance of the requested stay will cause harm to another party.

The Joint Movants claim that AEP-Ohio will not be harmed by issuance of a stay. But the Joint Movants have significantly misconstrued the facts.

A proper understanding of the context within which R.C. 4903.16 operates is important. An order of the Commission is effective immediately. R.C. 4903.15, App. at

4. Even where the Commission is reversed, its order remains in effect until the Commission issues a new order. *Cleveland Electric Illuminating Company v. Pub. Util. Comm.*, 46 Ohio St.2d 105 (1976). Where, as here, the Commission issues an order that authorizes the utility to collect some level of rate, the utility is both entitled, and, in fact, legally obligated to charge that rate until such time, even after reversal of that Commission order, that the Commission issues a new order.

This system creates the possibility of what some would view as an unfair outcome. It is possible that the Commission could order a rate increase which is imposed and collected for a period of time but the Commission order is later reversed by this Court. This leaves ratepayers in the position of having paid, quite legally, charges that are later determined to be improper going forward. Ratepayers are then unable to be repaid for these amounts already collected. The Court recognized this effect in its *Keco* decision.⁷

The *Keco* decision dealt with base rates; that is, rates that were created and continually collected until the next base rate case changed them. No interim review of those rates was ever intended or ever occurred. In more recent decades the Commission's has been to adopt adjustable rates, or riders⁸, subject to review and reconciliation, often in annual review proceedings. As these kinds of rates are designed *ab initio* to be reviewed

⁷ *Keco Industries, Inc. v. Cincinnati and Suburban Tel. Co.*, 166 Ohio St. 254 (1957).

⁸ There are certain types of riders where statutorily no adjustment is allowed. *See*, R.C. 4928.144, 4928.235(B), Appendix at 10, 10. These are not involved in this case.

and reconciled, depending on future circumstances outside of any rate case proceeding, the *Keco* logic does not apply to them.

Granting the requested motion to stay in this case would stay *all* provisions of the Commission's orders. R.C. 4903.16, App. at 5. To the extent that the case before the Court involves such adjustable rates, ratepayers in this case should be indifferent to whether or not there is a stay. The orders in this case authorized a number of adjustable riders, such as:

- Continuing and modifying the Fuel Adjustment Clause⁹;
- Establishing a new Alternative Energy Rider to recover renewable energy credit expenses¹⁰;
- Establishing a Distribution Investment Rider as incentive ratemaking to facilitate and encourage investments to maintain and improve distribution reliability¹¹; and
- Establishing a storm damage recovery mechanism be created to recover any incremental expenses incurred due to major storm events.¹²

In the unlikely event that this Court would reverse the Commission's decision in the case below, a refund to customers would be possible as an adjustment under these riders.

⁹ *ESP II Case* (Opinion and Order at 17) (Aug. 8, 2012), IEU App. at 40.

¹⁰ *Id.* at 18, IEU App. at 41.

¹¹ *Id.* at 46-47, IEU App. at 69-70.

¹² *Id.* at 68-69, IEU App. at 91-92.

But the Commission's orders in this case go much further. They not only authorized base rates, similar to the *Keco* situation, they also established terms and conditions of service that fundamentally change AEP-Ohio's business model. Among other things, the Commission's orders:

- Established base generation rates¹³;
 - Provided that all energy and capacity to serve the Company's SSO load would be supplied by auction effective January 1, 2015, and proscribed auction procedures and timelines¹⁴;
 - Restructured the Company's interruptible service rates and provisions¹⁵;
 - Permitted recovery of deferred capacity costs¹⁶;
 - Established a significantly excessive earnings test (SEET) threshold¹⁷;
 - Continued the Company's Enhanced Service reliability Rider (ESSR) program, including recovery of the costs of a vegetation management plan¹⁸;
- and

¹³ *ESP II Case* (Opinion and Order at 15-16) (Aug. 8, 2012), IEU App. at 38-39.

¹⁴ *Id.* at 60, IEU App. at 83.

¹⁵ *Id.* at 26, IEU App. at 49.

¹⁶ *Id.* at 51, IEU App. at 74.

¹⁷ *Id.* at 37, IEU app. at 60.

¹⁸ *Id.* at 65, IEU App. at 88.

- Capped customer rate increases to ensure no customers are unduly burdened by any unexpected rate impacts, as well as to mitigate any customer rate changes.¹⁹

All of these provisions, in addition to the Retail Stability Rider (“RSR”) that Joint Movants oppose, would be affected by an order staying the Commission’s orders. This is particularly troubling as to stopping the auction which would otherwise likely result in lower rates for the public.

With respect to base rate issues, and with respect to non-adjustable riders like the RSR, the General Assembly anticipated the problem that arises in *Keco* situations. It did so by giving this Court the ability to impose a stay pursuant to R.C. 4903.16. When a stay is imposed by this Court, the still lawful Commission-authorized rate is not charged and ratepayers are not required to pay these charges until the case is finally resolved by the Court. The imposition of the stay, consistent with the statute that created it, allows for such a result.

But the General Assembly did not stop there. It went on to recognize that the stay itself could create unfairness. Where a stay is granted and the Commission order is ultimately affirmed by this Court, the utility has been deprived (for the pendency of the appeal) of the receipt of the amounts lawfully authorized. This is harm, and this is just the sort of harm that would arise in this case as the result of a stay of the Commission orders should the Commission ultimately be affirmed. To deal with the possibility that

¹⁹ *ESP II Case* (Opinion and Order at 70) (Aug. 8, 2012), IEU App. at 93.

fixing one potential problem might cause another, the General Assembly logically created the bonding requirement.

The purpose of the bonding requirement is clear from the language of the statute which provides in pertinent part that:

...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, App. at 5 (emphasis added). The General Assembly recognized that the failure to implement a Commission order can cause damage, fundamentally because it suspends collection of a lawful grant. Given that the kinds, and value of harm could vary tremendously, the Court has discretion to fashion a bond that is appropriate to the situation presented in the specific case. The statute provides that the bond shall be "...in such sum as the supreme court prescribes..." Thus, the Court should consider the circumstances presented in a specific case where a stay is sought and determine what sort of bond is necessary in that case to pay "...all damages caused by the delay in the enforcement of the order complained of..."

This requires an assessment in each case as to what the correct amount is to accomplish the statutory goal, namely to make the utility whole from the damage caused by delaying or suspending implementation of the Commission order. Given that the harm

can vary widely in type and degree, this analysis must be performed on a case-by-case basis. Again, the bonding requirement is part of a legislative compromise to balance competing interests. It is not, nor should it be, viewed as punitive in nature.

Historically this Court has not been presented with a situation where it needed to do this sort of case-by-case analysis. Rather it has seen two different scenarios.

Most commonly the Court has been presented with an appellant seeking a stay and offering no bond at all. This Court has virtually always rejected this sort of application.

Although the Court has not stated a reason for doing so, the statute itself *requires* a bond.

The statute states “... the appellant shall execute an undertaking...” While a bond is mandatory, the level and terms of the bond are discretionary with the Court. Where no bond is offered in any form, a stay cannot issue as per the plain words of R.C. 4903.16.

The other scenario that the Court has seen has been where a bond in the amount of the full value of the amount at issue in the case has been offered. In these situations the Court has granted a stay. Ordinarily, it would be reasonable to assume that “...all damages caused by the delay in the enforcement of the order complained of...” should not, at least in most cases, exceed the amount at issue in the appeal.

Neither of these scenarios is particularly instructive about the situation at hand. Here the Court is attempting to do the balancing that the statute contemplates. It must determine what amount of money is necessary to make AEP-Ohio whole should the Commission order ultimately be affirmed. In determining an appropriate level of undertaking, the Court, under R.C. 4903.16, must focus upon potential harm, and not on the substantive merits of the case.

Determining the correct amount is not a simple matter. It is fairly obvious that the utility will be denied the use of the funds that would otherwise have been collected during the pendency of this case. It is difficult to assess what this might be as it cannot be known today how long the case will be pending.

But this is not the only source of uncertainty. It may be necessary for the utility to borrow funds to cover the amounts not received due to the stay. This may have an effect on the cost of debt for the company. There may be tax consequences. There may be other consequences of which the Commission is unaware. Aside from the obvious loss of the use of the funds, the Commission is not in a position to speak to what the full level of the harm that would result from the issuance of a stay of this order.

Looking to a utility's loss of use of funds alone, a nominal bond is not sufficient. But this case-by-case assessment is not limited to making the utility whole from the damage caused by delaying or suspending implementation of the Commission order. The express language of R.C. 4903.16 requires that it must be sufficient to pay for *all* damages caused by the delay. It is not difficult to see that there may be significantly more harm, not just to the Company, but to the very consumers that these movants represent.

For example, the Commission's orders directed that all energy and capacity to serve the Company's Standard Service Offer load would be supplied by auction effective January 1, 2015.²⁰ If the orders are stayed, then how are these customers to be served? And at what cost? If the Company must procure energy and capacity in the open market

²⁰ *ESP II Case* (Opinion and Order at 60) (Aug. 8, 2012), IEU App. at 83.

at this late date, the cost may be extremely high. As the caps limiting recovery of such costs from consumers imposed on the Company by the Commission's orders will also be stayed, the Company could pass these costs on to its customers. There may be more harm than this simple example, and the undertaking must ensure "the repayment of all moneys paid by any person." R.C. 4903.16, App. at 5. In short, the Commission orders for which a stay is requested are a complex product that resolves many multi-faceted and inter-related issues. At a minimum it is certain that a nominal bond would be inadequate.

B. Joint Movants do not otherwise satisfy the "test" for granting a stay.

Joint Movants rely on Justice Douglas's "four factor test" to further justify the granting of a stay.²¹ Although this "test" has never been adopted by this Court, the Commission respectfully submits that the Movants fail the test in any event.

1. There is no reasonable basis to claim that there is a strong likelihood Joint Movants will prevail on the merits.

Appellee Commission incorporates by reference the arguments contained in its Second Brief, but summarizes its position to demonstrate that Joint Movants cannot show a strong likelihood that they will prevail.

The Rate Stability Rider (RSR) is authorized by statute. The Commission found that the RSR satisfied the provisions of R.C. 4928.143.²² The RSR is a charge (meeting

²¹ Joint Motion at 11.

²² *ESP II Case* (Entry on Rehearing at 15) (Jan. 30, 2013), IEU App. at 121.

the first component of the statute) that relates to default service (the second component of the statute). And the Commission found, as a matter of fact, that the RSR promotes retail stability and certainty (the final component of the statute) “by stabilizing base generation costs at their current rates, ensuring customers have certain and fixed rates going forward.”²³

The assertions of the Joint Movants notwithstanding, the RSR does not recover transition revenues, nor does it violate R.C. 4928.38. AEP Ohio did not even seek transition revenues below. Costs associated with the RSR are permissible since AEP-Ohio was contractually obligated to remain a Fixed Resource Requirement (“FRR”) entity until May 31, 2015.²⁴ The case below concerned wholesale transactions, not retail transactions, and had nothing to do with proscribed transition costs.

The Commission found that the RSR provide benefits for both shopping and non-shopping customers by creating rate certainty and stability.²⁵ Because all customers benefit from the RSR, the Commission determined that all customers should share in the charge, and it logically approved the RSR as a non-bypassable rider.²⁶ Nothing in R.C. 4928.143(B)(2)(d), nor in any other provision in Chapter 4928, prohibits the Commission from approving the RSR on a non-bypassable basis.

²³ *ESP II Case* (Entry on Rehearing at 16) (Jan. 30, 2013), IEU App. at 122.

²⁴ *Id.* at 21, IEU App. at 127.

²⁵ *ESP II Case* (Opinion and Order at 31-32) (Aug. 8, 2012), IEU App. at 54-55.

²⁶ *Id.* at 37, IEU App. at 60.

2. Customers are not harmed by paying a lawful rate.

The Commission further submits that customers are not harmed merely because they are obliged to pay a lawful rate. There is no basis for Movants to claim that the charges being collected are “unlawful.” *Keco* holds that rates set by the Commission are lawful until such time as this Court later finds that the Commission erred in setting that particular rate.²⁷

Joint Movants’ statements do not match their behavior. While Joint Movants argue with some urgency that their customers would suffer irreparable harm if the stay is not granted, they fail to explain their inaction in seeking relief. If the harm is as great as Movants suggest, then it was incumbent upon them to seek relief in a timely fashion. The rates authorized by the Commission in this case have been in effect for nearly two years. Joint Movants filed their various Notices of Appeal nearly one and half years ago. The Fourth Brief of the Ohio Power Company was filed nearly eight (8) months ago, and the merits in this case have been fully briefed. It is disingenuous for Joint Movants to now claim irreparable harm given the tardiness of their actions.

3. A stay will cause irreparable harm to AEP-Ohio.

The Commission’s orders were intended to ensure the financial stability of AEP-Ohio, and facilitate an orderly transition toward competition. Staying those order jeopardizes both of those objectives, and would clearly harm the Company.

²⁷ *Keco v. Cincinnati & Southern Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957).

At a minimum, AEP-Ohio will lose revenues for any period of time that the RSR rate is suspended. This, of course, is the very reason that the General Assembly requires that any party that requests a stay provide a bond to ensure repayment should the challenger not prevail. A bond to cover these losses is essential to ensure that irreparable harm does not befall the Company.

4. The public interest is best served by an uninterrupted transition to a competitive market.

Joint Movants argue that the public interest supports granting their motion on the sole ground that customers can ill afford increases in essential services. But the public interest must be viewed, as it was by the Commission, in a more global perspective. The Commission approved AEP-Ohio's Electric Security Plan to provide rate stability for customers, revenue certainty for the Company, and facilitate a transition to the competitive market. This is a delicate and complex balance that would be significantly impacted if stymied at this late stage. The Commission's orders mark a significant milestone in the ongoing transition to market.

A stay granted under R.C. 4903.16 would necessarily stay the entirety of the Commission's orders. Joint Movants purport to have this Court perform out-patient surgery while the statute requires that a coma be induced, and the patient put on life-support. A stay would create considerable confusion and uncertainty that would undermine rather than promote the public interest.

CONCLUSION

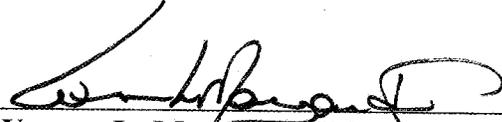
Appellants respectfully submit that the Joint Movants have not demonstrated that they are entitled to a stay of the Commission's orders in this case. It is disingenuous for these movants to claim that they will suffer irreparable harm when, all the while having done nothing to seek such relief for almost two years since the orders were implemented.

Should the Court choose to stay the Commission's orders, the Court must look to this specific situation in this case and determine what bond amount will be sufficient to cover "all damages caused by the delay in the enforcement of the order complained of." Given the complexity of the orders that would be stayed, it is clear that the level of the bond must be more than a merely nominal amount, and must consider all consequential damage that may result. While R.C. 4903.16 requires a bond as part of the stay process, the level and terms of the obligation reside with the Court.

In sum, the motion should be denied.

Respectfully submitted,

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Ohio Attorney General
William L. Wright (00108010)
Section Chief



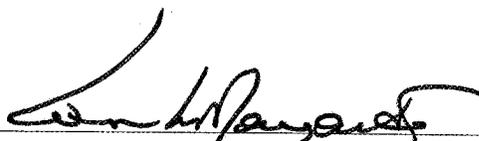
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**Counsel for Appellee,
The Public Utilities Commission of Ohio**

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Opposition to Joint Motion for a Stay on Behalf of Appellee Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 15th day of August, 2014.



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APPENDIX

**APPENDIX
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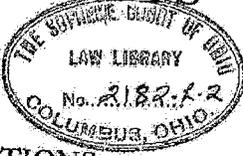
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THE OHIO



LEGISLATIVE ACTS

PASSED



AND

JOINT RESOLUTIONS

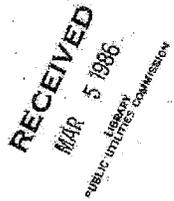
Adopted

BY THE

EIGHTIETH GENERAL ASSEMBLY

At Its Regular Session

WHICH BEGAN JANUARY 6, 1913.



VOLUME CIII

Cincinnati, Ohio:
The Espinghorn Publishing Company,
State Printers,
1913.

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 sectional numbers on the margin hereof are designated as provided by Rep. TIMOTHY E. HOAGAN, Attorney General.

C. I. 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.
314 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 490 inclusive, sections 543 to 551 inclusive, sections 614, 614-34, 614-25, 614-26, 614-35, 614-79, 614-80, 614-81 and 614-82 of the General Code.

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

Section 487.
The public utilities commission of Ohio, as herein defined, shall be known as the public utilities commission.

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 548.
Removal: After 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 32. 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 33. 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 proceedings 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.

2505.09 Stay of execution - supersedeas bond.

Except as provided in section 2505.11 or 2505.12 or another section of the Revised Code or in applicable rules governing courts, an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee, with sufficient sureties and in a sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved, except that the bond shall not exceed fifty million dollars excluding interest and costs, as directed by the court that rendered the final order, judgment, or decree that is sought to be superseded or by the court to which the appeal is taken. That bond shall be conditioned as provided in section 2505.14 of the Revised Code.

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.

4903.15 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.

4911.06 Consumers' counsel considered state officer.

The consumers' counsel shall be considered a state officer for the purpose of section 24 of Article II, Ohio constitution.

4928.143 Application for approval of electric security plan - testing.

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20 , division (E) of section 4928.64 , and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including

the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Consistent with sections 4928.23 to 4928.2318 of the Revised Code, both of the following:

(i) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code;

(ii) Provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)

(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under

division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)

(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141 , division (B) of section 4928.64 , or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-

ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments, in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b)

of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

4928.144 Phase-in of electric distribution utility rate or price.

The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.

4928.235 Duration of final financing order.

(A)

(1) A final financing order shall remain in effect until the phase-in-recovery bonds issued under the final financing order and all financing costs related to the bonds have been paid in full.

(2) A final financing order shall remain in effect and unabated notwithstanding the bankruptcy, reorganization, or insolvency of the electric distribution utility or any affiliate of the electric distribution utility or the commencement of any judicial or nonjudicial proceeding on the final financing order.

(B) A final financing order is irrevocable and the public utilities commission may not reduce, impair, postpone, or terminate the phase-in-recovery charges authorized in the final financing order or impair the property or the collection or recovery of phase-in costs.

(C)

(1) Except as provided in division (C)(2) of this section, under a final financing order, the electric distribution utility retains sole discretion regarding whether to assign, sell, or otherwise transfer phase-in-recovery property, or to cause phase-in-recovery bonds to be

issued, including the right to defer or postpone such assignment, sale, transfer, or issuance.

(2) Subsequent to a financing order being issued or becoming final and taking effect, but before phase-in-recovery bonds have been issued, if market conditions are such that customers will not realize cost savings from the issuance of the phase-in-recovery bonds, the electric distribution utility shall not proceed with the securitization under the issued or final financing order.

4928.38 Commencing and terminating transition revenues.

Pursuant to a transition plan approved under section 4928.33 of the Revised Code, an electric utility in this state may receive transition revenues under sections 4928.31 to 4928.40 of the Revised Code, beginning on the starting date of competitive retail electric service. Except as provided in sections 4905.33 to 4905.35 of the Revised Code and this chapter, an electric utility that receives such transition revenues shall be wholly responsible for how to use those revenues and wholly responsible for whether it is in a competitive position after the market development period. The utility's receipt of transition revenues shall terminate at the end of the market development period. With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market. The commission shall not authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code.

FILED

MAY 14 2014

CLERK OF COURT
SUPREME COURT OF OHIO

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.

Case No. 2014-0328

ENTRY

In the Matter of the Application of Duke
Energy Ohio, Inc., for Tariff Approval.

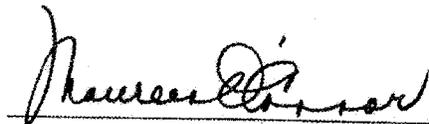
In the Matter of the Application of Duke
Energy Ohio, Inc., for Approval of an
Alternative Rate Plan for Gas Distribution
Service.

In the Matter of the Application of Duke
Energy Ohio, Inc., Approval to Change
Accounting Methods.

This cause is pending before the court as an appeal from the Public Utilities
Commission of Ohio.

Upon consideration of appellants' joint motion for stay, it is ordered by the court that
the motion is granted and no bond for the stay is required.

(P.U.C.O.; Nos. 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, and 12-
1688-GA-AAM)



Maureen O'Connor
Chief Justice

The Supreme Court of Ohio

FILED
JUL 29 2014
CLERK OF COURT
SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates.

Case No. 2014-0328

ENTRY

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., Approval to Change Accounting Methods.

This cause is pending before the court as an appeal from the Public Utilities Commission of Ohio.

Upon consideration of intervening appellee Duke Energy Ohio Inc.'s motion to lift the stay or require bond, it is ordered by the court that the motion to lift stay is denied but the motion to require bond is granted. The parties shall submit briefs on the amount of bond required by R.C. 4903.16. Appellants, appellee, and intervening appellee, Duke Energy Ohio, Inc., shall file briefs addressing the appropriate amount of the bond within fifteen days of the date of this order. The parties may file reply briefs to the initial briefs within ten days of the filing of the initial briefs.

Upon consideration of the joint motion for leave to intervene and for leave to file a memorandum in support of Duke Energy Ohio's motion to lift the stay of The East Ohio Gas Company d/b/a Dominion East Ohio, Vectren Energy Delivery of Ohio, Inc., and Columbia Gas of Ohio, Inc., it is ordered by the court that the motions are denied.

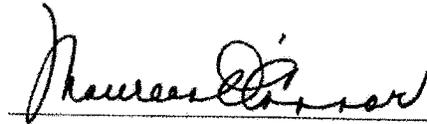
Upon consideration of the joint motion of appellants to strike Duke Energy Ohio Inc.'s May 20, 2014 motion to lift the stay or require bond, it is ordered by the court that the motion is denied.

Upon consideration of the joint motion of appellants to strike the memorandum of The East Ohio Gas Company d/b/a Dominion East Ohio, Vectren Energy Delivery of

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Ohio, Inc., and Columbia Gas of Ohio, Inc. in support of Duke Energy Ohio Inc.'s motion to lift the stay, it is ordered by the court that the motion is granted.

(P.U.C.O.; Nos. 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT and 12-1688-GA-AAM)

A handwritten signature in black ink, appearing to read "Maureen O'Connor", written over a horizontal line.

Maureen O'Connor
Chief Justice