In The
SUPREME COURT OF OHIO

Industrial Energy Users-Ohio and The Office of the Ohio Consumers' Counsel,	:	Case No. 14-1505
Appellants,	:	On appeal from the Public Utilities Commission of Ohio, Case Nos. 12-426-EL-SSO, *et al.*, *In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan.*
v.	:	
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

THIRD MERIT BRIEF
SUBMITTED ON BEHALF OF APPELLEE, THE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

Here the Public Utilities Commission (Commission) has appropriately balanced the public's need for a stable utility with the General Assembly's directive to bring competition to the electric industry. This is clear from the nature of this case. In the underlying appeal, parties challenge the level of the stability charge that the Commission granted to Dayton Power and Light Company (DP&L or the Company). In the cross-appeal the Company challenges the conditions placed on the receipt of that same charge. The Commission acted both lawfully and responsibly in striking the right balance by approving a reasonable stability charge subject to the correct conditions.

STATEMENT OF THE FACTS AND CASE

The relevant facts and procedural history of this controversy were initially recounted in the Commission's first merit brief that was filed on April 19, 2013. Rather than repeating what has already been stated before, the Commission has opted, in the interest of brevity, to incorporate its prior treatment of the facts and procedural history here. To the extent that any additional background information is necessary to develop a particular argument, that information will be interwoven directly into the argument itself.

ARGUMENT

Proposition of Law No. I:

> **This Court will not reverse a decision of the Public Utilities Commission where the appellant cannot show prejudice as a result of that decision. *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 402 N.E.2d 1175 (1980), syllabus.**

The Commission authorized DP&L to seek an extension of the service stability rider (SSR) (the SSR-E) of $45.8 million from January 1, 2017 through May 31, 2017. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, Pub. Util. Comm.* Nos. 12-426-EL-SSO, *et al.* (*In re DP&L SSO*) (Entry *Nunc Pro Tunc* at 2) (Sep. 6, 2013), OCC App. at 66.[1] To receive the SSR-

[1] References to the December 1, 2014 appendix of appellant, The Office of the Ohio Consumers' Counsel, are denoted "OCC App. at ___;" references to appellee's attached appendix are denoted "App. at ___."

E, DP&L would have to satisfy five conditions. Cross-Appellant DP&L objects to each of these conditions in its fifth proposition of law.

The Court need not consider DP&L's fifth proposition of law which advances concerns that are entirely premature. DP&L has not sought an extension of the SSR and it may never do so. Further, if DP&L does elect to seek an extension, that extension might be granted by the Commission. Because the conditions imposed by the Commission become operative only when an extension is sought, it is entirely possible that these conditions will never have any effect. Only time will tell. As this Court has reasoned:

> In *Ohio Contract Carriers Assn. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 23 O.O. 369, 42 N.E.2d 758, syllabus, we held that "[a]ppeal lies only on behalf of a party aggrieved by the final order appealed from. Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant." We explained that a "final order" under former G.C. 544, now R.C. 4903.13, is one "affecting a substantial right" (see R.C. 2505.02; *Hall China Co. v. Pub. Util. Comm.* [1977], 50 Ohio St.2d 206, 4 O.O.3d 390, 364 N.E.2d 852), and characterized the interest necessary to create a substantial right as a "'present interest'" and an "'immediate and pecuniary'" interest. *Id.*, 140 Ohio St. at 161-162, 23 O.O. at 369-370, 42 N.E.2d at 759.

Ohio Domestic Violence Network v. Pub. Util. Comm., 65 Ohio St.3d 438, 439, 605 N.E.2d 13 (1992). The conditions imposed by the Commission on the availability of the SSR-E have neither pecuniary effect, nor any immediate effect at all. Therefore, no substantial right of DP&L has been affected, and no appeal lies.

In similar fashion, one could take the view that the Commission has established rules for the future availability of the SSR-E. Again, this would necessitate rejection of

DP&L's argument. Rules can only be reviewed by this Court when they have been applied. This Court has reasoned:

> As there has been no attempt to enforce the rules against the appellants, they have not been affected by the rules in any way, and the validity of the rules can be determined only when that question arises in connection with a matter that is justiciable. Consequently the appeal is premature.

Craun Transportation v. Pub. Util. Comm., 162 Ohio St. 9, 10, 120 N.E.2d 436 (1954). The conditions for the SSR-E have not been, and may never be, applied. Thus, as DP&L has failed to raise a justiciable issue, its argument should be rejected.

As the conditions have no current effect whatsoever, DP&L is essentially asking this Court for an advisory opinion. This Court has noted, "it is well-settled that this court does not indulge itself in *advisory* opinions." *Armco v. Pub. Util. Comm.*, 69 Ohio St.2d 401, 406, 433 N.E.2d 923 (1982) (emphasis added).

There are various formulations, but the bottom line is that, for this Court to hear an issue, the appellant must have been prejudiced or harmed. DP&L has not been harmed by the conditions on the SSR-E; therefore, this Court should reject its arguments. *Holladay Corp. v. Pub. Util. Comm.*, 61 Ohio St.2d 335, 402 N.E.2d 1175 (1980), Syllabus.

Proposition of Law No. II:

> **The Commission may impose terms and conditions on charges which have the effect of stabilizing or providing certainty regarding retail electric service. R.C. 4928.143(B)(2)(d), App. at 5-7.**

DP&L may seek an extension of the SSR (the SSR-E) of $45.8 million from January 1, 2017 through May 31, 2017. *In re DP&L SSO* (Entry at 2) (Sep. 6, 2013), OCC App. at 66. To receive the SSR-E, DP&L would have to satisfy five conditions. DP&L objects to each of these conditions; indeed, it argues that no conditions may be imposed. DP&L is wrong in each regard.

A. The Commission may impose conditions upon the availability of a stabilization charge under R.C. 4928.143(B)(2)(d).

The statute is perfectly clear; it provides that the Commission may impose conditions on a stability charge:

> The [electric security] plan may provide for or include, without limitation, any of the following: * * *
>
> *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*.

R.C. 4928.143(B)(2)(d) (emphasis added), App. at 6. The statute states that the Commission may include terms and conditions in an electric security plan. Here, the Commission has exercised that authority by imposing conditions on the availability of the

SSR-E. It could hardly be otherwise. The General Assembly cannot have meant to provide the blank check that DP&L seeks. The Commission must impose conditions on the availability of the SSR-E to assure that it accomplishes the statutory goals of stabilizing and providing certainty regarding retail electric service (and fulfilling the state policy goals under R.C. 4928.02 as is always required). The one cannot be done without the other. The Commission has the statutory authority to impose terms and conditions on a stability charge, and it lawfully exercised that authority here.

B. The terms and conditions that the Commission placed on the availability of the SSR-E are reasonable.

To obtain the SSR-E DP&L must:

(1) demonstrate that its financial integrity is threatened (*In re DP&L SSO* (Opinion and Order at 27) (Sep. 4, 2013), OCC App. at 37);

(2) file a distribution rate case by July 1, 2014 (*id*.);

(3) file by December 31, 2013, an application to separate its generation assets by January 1, 2017 (*In re DP&L SSO* (Fourth Entry on Rehearing at 5) (Jun. 4, 2014), OCC App. at 106);

(4) file by July 1, 2014 a proposal to implement SmartGrid and Advanced Metering Infrastructure ("AMI") (*In re DP&L SSO* (Opinion and Order at 28) (Sep. 4, 2013), OCC App. at 38)); and

(5) file by December 31, 2014, a plan to modernize its billing system (*id*.).

Each of these conditions is logically required.

The need for DP&L to show that its financial integrity is threatened is self-evident. The Company's threatened financial integrity is the premise on which the stability charge

is based. While it is clear that the charge is needed currently, circumstances may change. The record shows that there is great uncertainty beyond the three-year plan term. DP&L could be better or worse off financially at that time. The SSR-E, if exercised, would extend into this period of uncertainty, and the Commission needs to know if the stability charge would still be needed at that point in time. Therefore, it is only reasonable that the Commission require DP&L to show that this money is needed before it is paid.

Likewise, a distribution rate case is necessary to obtain a clear understanding of what the financial requirements of the regulated portion of the business are. Having rates at a correct level is certainly a part of assuring financial integrity for the Company. In order to assure that distribution rates are at the correct level, the Company must file a distribution rate case under R.C. 4909.18. This requirement is simply part and parcel of determining whether the stability charge is needed, and if so, the level at which the charge should be.

Additionally, the separation of the generating assets is important. It is the *distribution* aspect of DP&L's operations that the Commission intends to stabilize with the SSR stabilization charge. Currently, this can only be accomplished by stabilizing the Company as it is, distribution and generation together. Separation of these operations needs to occur as soon as possible to allow the focus of the stabilization to be as narrow as possible.

The SmartGrid and billing system requirements are slightly different. These requirements are intended to assure that the stabilized DP&L is properly prepared to function in the modern, evolving energy environment. It is not sufficient for DP&L to be

merely financially stable, it must also be functional. SmartGrid is the future of electric distribution. Every other regulated utility in Ohio has a program to implement it in some way. It is time for DP&L to travel this road as well. And it should be remembered that all that is required by this condition is for DP&L to make a filing to open the dialogue. That provides a venue in which all the issues – how much or how little should be done, which measures are cost effective, what timing should be, how a program will be funded – can be explored. While DP&L worries on brief that SmartGrid is not cost-effective, that question is best resolved in the docket that the fourth condition requires. The Commission must, in every order it makes, ensure the availability of adequate, reliable, safe, and efficient retail electric service. R.C. 4928.02(A), App. at 3. Having a reliable, safe and, efficient system is the foundation upon which every other aspect of the industry is dependent. SmartGrid forms a part of that. How much of a part is to be determined in the process of reviewing DP&L's application when it is filed.

The billing system requirement likewise will enhance the Company's ability to function in the competitive environment more effectively. The point of Chapter 4928 is to bring competitive forces to bear, to the extent possible, in this industry. In every order the Commission makes it must "[e]nsure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers * * *." R.C. 4928.02(C), App. at 3. This condition does exactly that. It provides the necessary support for the functioning of competitors. By including this as a condition of the availability of the SSR-E, the Commission helps to assure that DP&L is both stable *and* fully functional in a competitive environment.

In sum, each of the conditions that the Commission has required DP&L to meet before it may obtain the extension of its stability charge is reasonable. DP&L's arguments to the contrary should be rejected.

Proposition of Law No. III:

> **Where a statute does not prescribe a specific formula, the General Assembly has vested the Commission with broad discretion, and the exercise of that discretion will not be reversed unless it is manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *City of Columbus v. Pub. Util. Comm.* 10 Ohio St.3d 23, 460 N.E.2d 1117 (1984); *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.2d 71, 79, 413 N.E.2d 799 (1980); *Cleveland v. Pub. Util. Comm.*, 70 Ohio St.2d 290, 293, 436 N.E.2d 1366 (1982).**

As part of its approval of DP&L's electric security plan, the Commission imposed schedules for the Company to transfer its generating assets away from its distribution business and to increase the portion of standard service offer electricity that it acquires through an auction process (termed "blending"). In both cases, these schedules are more aggressive than DP&L would like. However, DP&L's preference is not the standard.

The General Assembly has given the Commission broad discretion as to the components that may be included in an electric security plan. The statute provides that "[t]he plan may provide for or include, without limitation, any of the following * * *." R.C. 4928.143(B)(2), App. at 5-7. This language is followed by a long list of items (subsections (a) through (i)) which could be included in a plan. Clearly, there is broad discretion as to what the Commission could include in a plan. Indeed the only check on what may be included is the overall requirement that:

> 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.

R.C. 4928.143(C)(1), App. at 7. Thus, the Commission has been given a wide range of authority to fashion a plan.

It is equally clear that such a broad grant of discretion was necessary. The General Assembly has tasked the Commission with restructuring the entire functioning of a vital industry in Ohio and to accomplish a wide variety of goals while doing so. *See* R.C. 4928.02. Under such circumstances, this Court will affirm Commission decisions unless they are so "manifestly against the weight of the evidence and so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *City of Columbus v. Pub. Util. Comm.* 10 Ohio St.3d 23, 24-25, 460 N.E.2d 1117 (1984); *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.2d 71, 79, 413 N.E.2d 799 (1980); *Cleveland v. Pub. Util. Comm.*, 70 Ohio St.2d 290, 293, 436 N.E.2d 1366 (1982) . The schedules established by the Commission for transferring the generating plant and blending are eminently reasonable.

It should be noted at the outset that DP&L cites no statute that requires the schedules to be set in the way it prefers. None exists. Rather it is a matter for judgment and discretion, and the Commission has used its judgment and discretion reasonably here.

A. Auction Schedule

Turning to the auction schedule first, it is understandable that DP&L wants to delay the auction schedule. Delaying the auction schedule means that DP&L will be able to use its own generating facilities to provide power to its standard service customers longer. Not surprisingly, it wants to keep that business as long as it can. While keeping market share is good business for DP&L, it may be bad policy for ratepayers.

As the Commission found, moving this standard service offer to market-based pricing is good in itself. Indeed, moving the standard service offer to all auction pricing sooner than a market rate offer under R.C. 4928.143 would is a prime benefit that justifies approval of the ESP. *In re DP&L SSO* (Opinion and Order at 50) (Sep. 4, 2013), OCC App. at 60. As the Commission reasoned, getting to the point when all of the electricity for the standard service offer is obtained through an auction process is a primary goal of the restructuring that the General Assembly required. Once this goal is reached, all electricity will be sold at market-based prices. This is the best way to "ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service" as is required by R.C. 4928.02(A). Reasonable and economically efficient prices are set through market forces, and the Commission order gets there are soon as feasible. The Commission reasoned:

> We have held that a more rapid implementation of market rates is consistent with the policies of this state enumerated in R.C. 4928.02(A) and (B). Order at 50. Accordingly, in the Second Entry on Rehearing, we stated that our intent was to implement full market-based rates as soon as practicable and we noted that customers would benefit from a more rapid move to full market-based rates. Second Entry on Rehearing

> at 18, 19. DP&L has not persuaded the Commission that the CBP auction schedule established in the Second Entry on Rehearing is not practicable or that the CBP auction schedule jeopardizes DP&L's financial integrity.

In re DP&L SSO (Fourth Entry on Rehearing at 3) (Jun. 4, 2014), OCC App. at 104.

DP&L argues here, as it did below, that the quicker move to full market-based rates will harm its financial integrity. After hearing this argument and considering the evidence, the Commission rejected this idea. The Commission did not believe the Company's argument.[2] The entire point of the Commission approving a stability charge for DP&L is to assure that the Company's financial integrity is maintained and the record shows that will occur. A quick examination of the Second Entry on Rehearing at pages 9 and 10 (OCC App. at 76-77) reveals the great amount of conflicting evidence that the Commission considered. It made a factual determination based on conflicting evidence, and this Court will not substitute its judgment for that of the Commission. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29.

Even if the Company is ultimately shown to be correct that an earlier move to full auction causes it financial distress, there is a mechanism to deal with that situation. The Commission established a mechanism to extend the stability charge, should that be necessary to address this exact problem. *In re DP&L SSO* (Fourth Entry on Rehearing at 4)

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[2] This is not to suggest that the Commission believes that DP&L or its witnesses are untruthful. The Commission has no such belief. Rather financial projections are always highly speculative and have significant error bars associated. They are inherently guesses – educated guesses to be sure – but guesses none the less.

(Jun. 4, 2014), OCC App. at 105. Thus, the Company's financial integrity is preserved either way.

B. Schedule for Divesting Generation Plant

DP&L must divest itself of its generating assets, but these generating assets presently serve as collateral for the Company's debts. This complicates the process needed to accomplish the divestiture. Some accommodation of the debtholders interests is necessary to accomplish the transfer. The Commission has determined that this transfer can be accomplished by January 1, 2017. The Company argues that it will not have the necessary funds to resolve the debtholders' interests until the middle of the year.

Again, this is a factual dispute[3] based upon financial estimates and with all the problems that entails. There is an extensive record developed in the case and the Commission considered all of it. It reasoned:

> The Commission notes that market conditions are inherently unpredictable and subject to significant fluctuations over time. We intend to provide DP&L with the flexibility to transfer its generation assets to an affiliate or to a third-party while retaining our oversight over the divestiture as provided by R.C 4928.17(E). At the hearing in this case, DP&L witnesses testified that there are terms and conditions in certain bonds that significantly impede upon its ability to transfer its generation assets to an affiliate before September 1, 2016, and, due to adverse market conditions, DP&L will not have sufficient cash flow to refinance the bonds before 2017. DP&L Ex. 16A at 24; Tr. Vol. I at 260-262. Tr. Vol. Ill at

[3] Indeed the Court need not consider this issue at all. DP&L never sought rehearing of this issue after the Commission's Fourth Entry on Rehearing in which this schedule was established. No other party sought rehearing on this issue. Therefore this issue is not jurisdictional. R.C. 4903.10, App. at 1-2; *Forest Hills Utility Co. v. Pub. Util. Comm.*, 31 Ohio St.2d 46, 285 N.E.2d 702 (1967).

> 800-805; Tr. Vol. V at 1148-1150; Tr. Vol. XI at 2897. Therefore, a modified deadline of January 1, 2017, for the asset divestiture should alleviate any existing obstacles regarding the terms and conditions in DP&L's bonds and its ability to refinance such bonds. Further, a deadline of January 1, 2017, should allow DP&L to obtain terms and conditions to divest its generation assets while ensuring that the assets are divested during the period of this electric security plan. The Commission will review the specific terms and conditions of any proposed generation asset divestiture in DP&L's generation asset divestiture proceeding. *In re The Dayton Power and Light Co*., Case No. 13-2420-EL-UNC. Accordingly, the Commission will modify our decision in the Second Entry on Rehearing and direct DP&L to divest its generation assets no later than January 1, 2017.

In re DP&L SSO (Fourth Entry on Rehearing at 5-6) (Jun. 4, 2014), OCC App. at 106-107. The record is conflicting regarding the timing of a generation transfer, as the Company's position has been a moving target. This is outlined in the Commission's analysis:

> The Commission relied upon the testimony of DP&L witness Jackson that DP&L could not divest its generation assets before September 1, 2016. DP&L Ex. 16 at 4. Accordingly, the Commission ruled that DP&L must file a generation asset divestiture plan that divests its generation assets by May 31, 2017. Order at 15-16; Entry Nunc Pro Tunc at 2. However, on December 30, 2013, DP&L filed an application to divest its generation assets in Case No. 13-2420-EL-UNC. *In re The Dayton Power and Light Co*., Case No. 13-2420-EL-UNC (DP&L Divestiture Plan), Application (December 30, 2013). Subsequently, DP&L filed a supplemental application in that case representing that it has begun to evaluate the divestiture of its generation assets to an unaffiliated third party through a potential sale that could occur as early as 2014. DP&L Divestiture Plan, Supplemental Application (February 25, 2014) at 2; DP&L Ex. 16 at 4.

In re DP&L SSO (Second Entry on Rehearing at 17) (Mar. 19, 2014), OCC App. at 84.

So DP&L says it could divest not before September 1, 2016, or as early as 2014, or not

until May 31, 2017. Ultimately, the Commission reviewed all of the conflicting information in the record and chose January 1, 2017 as a way to assure that the transfer will occur as soon as it is feasible. As discussed previously, when the Commission examines conflicting evidence, this Court will not substitute its judgment. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, ¶ 29.

Additionally, it should be noted that should the Company actually face financial (or some other unanticipated kind of difficulty), the Commission has another docket, *In re The Dayton Power and Light Co*., PUCO Case No. 13-2420-EL-UNC, specifically created to deal with the details of accomplishing the transfer. All matters related to the transfer, including the timing, can be addressed there. *In re DP&L SSO* (Fourth Entry on Rehearing at 5-6) (Jun. 4, 2014), OCC App. at 106-107. In addition, the Commission has made available the extended stability charge. If the Company can make a sufficient showing of financial need to accomplish the transfer, that need can be met through the extended stability charge.

C. Summary

The Commission weighed the record to make discretionary, factual decisions about when DP&L's generation should be transferred and how soon its standard service offer should be supplied through an auction. Further the Commission has provided mechanisms which can address any problems that arise with achieving these timetables. These factual determinations are reasonable and the Court should not substitute its judgment. The Commission should be affirmed.

CONCLUSION

DP&L challenges the conditions the Commission has attached to allowing the Company to impose a stability charge for an additional year. There is no reason for the Court to address this matter now; it is pre-mature. DP&L has not sought to extend the stability charge and may never do so. If ultimately sought, the extension may be granted by the Commission. Until that occurs, no current issue exists. Even if the Court considers the conditions, it should find them perfectly reasonable.

In addition, the Company challenges the schedules the Commission has established for DP&L to dispose of its generation and to procure the electricity for its standard service offer through an auction. These schedules are supported in the record. Even if these schedules cause problems for the Company, the Commission has provided mechanisms to address those problems, such as an extension of the Company's stability charge.

In sum, the Commission has done its job and should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Third Merit Brief, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served via electronic mail upon the following parties of record, this 10th day of March, 2015.

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APPENDIX

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4903.10 Application for rehearing.

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission. Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding. Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission. Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application. Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission. Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding. If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law. If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing. If, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not

affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing. No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

4909.18 Application to establish or change rate.

Any public utility desiring to establish any rate, joint rate, toll, classification, charge, or rental, or to modify, amend, change, increase, or reduce any existing rate, joint rate, toll, classification, charge, or rental, or any regulation or practice affecting the same, shall file a written application with the public utilities commission. Except for actions under section 4909.16 of the Revised Code, no public utility may issue the notice of intent to file an application pursuant to division (B) of section 4909.43 of the Revised Code to increase any existing rate, joint rate, toll, classification, charge, or rental, until a final order under this section has been issued by the commission on any pending prior application to increase the same rate, joint rate, toll, classification, charge, or rental or until two hundred seventy-five days after filing such application, whichever is sooner. Such application shall be verified by the president or a vice-president and the secretary or treasurer of the applicant. Such application shall contain a schedule of the existing rate, joint rate, toll, classification, charge, or rental, or regulation or practice affecting the same, a schedule of the modification amendment, change, increase, or reduction sought to be established, and a statement of the facts and grounds upon which such application is based. If such application proposes a new service or the use of new equipment, or proposes the establishment or amendment of a regulation, the application shall fully describe the new service or equipment, or the regulation proposed to be established or amended, and shall explain how the proposed service or equipment differs from services or equipment presently offered or in use, or how the regulation proposed to be established or amended differs from regulations presently in effect. The application shall provide such additional information as the commission may require in its discretion. If the commission determines that such application is not for an increase in any rate, joint rate, toll, classification, charge, or rental, the commission may permit the filing of the schedule proposed in the application and fix the time when such schedule shall take effect. If it appears to the commission that the proposals in the application may be unjust or unreasonable, the commission shall set the matter for hearing and shall give notice of such hearing by sending written notice of the date set for the hearing to the public utility and publishing notice of the hearing one time in a newspaper of general circulation in each county in the service area affected by the application. At such hearing, the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility. After such hearing, the commission shall, where practicable, issue an appropriate order within six months from the date the application was filed.

If the commission determines that said application is for an increase in any rate, joint rate, toll, classification, charge, or rental there shall also, unless otherwise ordered by the commission, be filed with the application in duplicate the following exhibits:

(A) A report of its property used and useful, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in rendering the service referred to in such application, as provided in section 4909.05 of the Revised Code;

(B) A complete operating statement of its last fiscal year, showing in detail all its receipts, revenues, and incomes from all sources, all of its operating costs and other expenditures, and any analysis such public utility deems applicable to the matter referred to in said application;

(C) A statement of the income and expense anticipated under the application filed;

(D) A statement of financial condition summarizing assets, liabilities, and net worth;

(E) Such other information as the commission may require in its discretion.

4928.02 State policy.

It is the policy of this state to do the following throughout this state:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

(D) Encourage innovation and market access for cost-effective supply- and demand-side retail electric service including, but not limited to, demand-side management, time-differentiated pricing, waste energy recovery systems, smart grid programs, and implementation of advanced metering infrastructure;

(E) Encourage cost-effective and efficient access to information regarding the operation of the transmission and distribution systems of electric utilities in order to promote both effective customer choice of retail electric service and the development of performance

standards and targets for service quality for all consumers, including annual achievement reports written in plain language;

(F) Ensure that an electric utility's transmission and distribution systems are available to a customer-generator or owner of distributed generation, so that the customer-generator or owner can market and deliver the electricity it produces;

(G) Recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment;

(H) Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

(K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

(M) Encourage the education of small business owners in this state regarding the use of, and encourage the use of, energy efficiency programs and alternative energy resources in their businesses;

(N) Facilitate the state's effectiveness in the global economy.

In carrying out this policy, the commission shall consider rules as they apply to the costs of electric distribution infrastructure, including, but not limited to, line extensions, for the purpose of development in this state.

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.