BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Gas Rates.	)))	Case No. 12-1685-GA-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.	))	Case No. 12-1686-GA-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	))))	Case No. 12-1687-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 12-1688-GA-AAM

REPLY TO DUKE'S MEMORANDUM CONTRA MOTION FOR STAY BY OFFICE OF THE OHIO CONSUMERS' COUNSEL KROGER COMPANY, OHIO MANUFACTURERS' ASSOCIATION and OHIO PARTNERS FOR AFFORDABLE ENERGY

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I. INTRODUCTION

For the purpose of protecting Ohio customers, the Public Utilities Commission of Ohio ("Commission" or "PUCO") should grant a stay of its November 13, 2013 Opinion and Order ("November 13, 2013 Order" or "Order"). The stay sought by the Joint Consumer Advocates[1] is in regard to the PUCO's authorization for Duke Energy Ohio, Inc. ("Duke" or "Utility") to collect more money from its customers for environmental

[1] The Joint Consumer Advocates consist of the Office of the Ohio Consumers' Counsel ("OCC") "), Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA") and Ohio Partners for Affordable Energy ("OPAE"), (hereafter "Joint Consumer Advocates").

investigation and remediation expenses through the manufactured gas plant ("MGP") Rider.

On December 13, 2013, Duke filed a Memorandum Contra ("Memo Contra") opposing the requested stay. In its Memo Contra, Duke takes issue with the Joint Consumer Advocates' position that the PUCO has the power to issue a stay of its own Order while rehearing is pending. Duke also argues that the Joint Consumer Advocates have not demonstrated entitlement to a stay, challenging the Joint Consumer Advocates' showing that there is a likelihood of success on the merits and irreparable harm to customers, and that a stay is in the public interest.

But Duke is wrong. The PUCO has authority to issue a stay of its own orders while rehearing is pending. And the Joint Consumer Advocates have demonstrated entitlement to such relief including reliance on Ohio law that prohibits the collection of expenses related to facilities that are no longer used and useful in providing utility service to customers. Accordingly, the PUCO should reject Duke's arguments and grant Joint Consumer Advocates' Motion for a Stay. In the alternative, the PUCO should order that the rates paid by customers for Duke's deferred MGP-related investigation and remediation costs are collected subject to refund to customers.

II. ARGUMENT

A. The PUCO Has The Authority To Grant A Stay To Protect Duke's Customers During The Process Of Rehearing And Any Appeals.

Duke argues that "a utility has no choice but to collect the rates set by the order of the [PUCO]."[2] Duke relies on R.C. 4905.32 for the proposition that the utility must

[2] Memo Contra at 3.

charge customers for service rendered as specified **in its schedule filed with the PUCO which is in effect at that time.**[3] Duke further argues that the PUCO's Order was effective immediately upon journalization.[4] Duke is wrong.

As established by case law, the effective date of a Commission Order, unless otherwise stated in the Order, is 30 days from the date of the Order.[5] In the current case, the PUCO"s Order was issued on November 13, 2013. No effective date was specified in the Order. Therefore, the effective date of the Order would be December 13, 2013. In addition, the PUCO review and approval of Duke's compliance tariffs filed on December 4, 2013, has not yet occurred, so the rates for Rider MGP have not yet been set by the PUCO.

R.C. 4903.10 provides that where an application for rehearing is filed prior to the effective date of the PUCO's Order as to which rehearing is sought, the effective date of the order "shall be postponed or stayed pending disposition of the matter by the commission or by operation of law." Given that the Joint Consumer Advocates filed their Application for Rehearing within 30 days from the date of the PUCO's order, on December 2, 2013, the Joint Consumer Advocates' Application for Rehearing stays the effective date of the Commission's Order until the disposition of the matter (Application for Rehearing.)

But the PUCO is not limited to granting a stay until the PUCO acts on rehearing. R.C. 4903.10 states that by "special order of the commission," the PUCO may act to "stay

[3] R.C. 4905.32 (emphasis added).

[4] Memo Contra at 3.

[5] *Warner v. Ohio Edison Co.*, (1949) 152 Ohio St. 303, 1949 Ohio Lexis 359.

or postpone the enforcement" of its order notwithstanding that an application for rehearing is not pending.

Further, the Ohio Rules of Appellate Procedure state, in relevant part: "[a]pplication for stay of the judgment or *order* of a trial court pending appeal * * * must ordinarily be made in the first instance in the trial court."[6] In this case, Joint Consumer Advocates have requested a stay of implementation of Rider MGP. By special order of the Commission, as per R.C. 4903.10, the PUCO may effect a stay of that order as it deems appropriate, as long as that action is taken before an appeal occurs and jurisdiction is relinquished to the Supreme Court of Ohio.

Duke argues that, pursuant to R.C. 4903.16, a stay can only be requested from the Supreme Court of Ohio after a party has filed a notice of appeal.[7]

This interpretation is at clear odds with R.C. 4903.10, as discussed above, as well as legal precedent discussed in Joint Consumer Advocates' Motion.[8] Further, Duke's Memo Contra has no citation to PUCO rules that limit stays to those sought under R.C. 4903.16 after an appeal has been filed.

The opportunity for a stay is not exclusively available at the Ohio Supreme Court. Requests for a stay have been granted before by the PUCO pending the results of an appeal. In *In re COI of Ameritech Relative to Minimum Telephone Service Standards*, Case No. 99-938-TP-COI, the PUCO granted Ameritech's June 26, 2002, motion to stay portions of the June 20, 2002 Entry on Rehearing.[9] Ameritech contended that it would

[6] Ohio R. App. Proc. 7 (emphasis added).

[7] Memo Contra at 5.

[8] See Joint Consumer Advocates Motion for Stay at 4 (December 2, 2013).

[9] *In re COI of Ameritech Relative to Minimum Telephone Service Standards*, Case No. 99-938-TP-COI. Entry at ¶11 (July 18, 2002).

challenge the marketing provisions of the Commission's orders on appeal and believed that it was inappropriate to begin the process of changing current practices until its concerns were addressed through judicial review.[10] The PUCO ordered that the marketing provisions would not become effective until the completion of Ameritech's appeal.

The PUCO should take similar action in this proceeding pending judicial review. This would allow Joint Consumer Advocates' concerns to be addressed through judicial review before Duke could collect nearly $55.5 million from its customers for in environmental investigation and remediation costs for two MGP sites. The PUCO has also stayed proceedings on its own volition under circumstances where additional review was contemplated. In *In re Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan*, Case No. 02-1586-EL-CSS, et al. the PUCO implemented a stay pending a ruling from the Federal Energy Regulatory Commission ("FERC").[11] In that case, the PUCO stated:

> The Commission recognizes through its participation in several FERC dockets that there remains many unresolved issues * * *. Therefore, we believe that all further activity, including discovery, * * * should be stayed until more clarity is achieved regarding matters pending at FERC and elsewhere.[12]

There are equally compelling reasons for the PUCO to grant a stay in these cases.

[10] *Id.* Id. at 5.

[11] *In re Commission's Review of Columbus Southern Power Company's and Ohio Power Company's Independent Transmission Plan,* Case No. 02-1586-EL-CSS, et al. Entry at ¶9 (Feb. 20, 2003).

[12] Id.

B. The PUCO Should Protect Ohio Customers From Paying For Duke's Pollution Clean-Up Costs Because Joint Consumer Advocates Have Met The Standard For Granting A Stay.

Duke's customers should be protected from unlawful and unreasonable charges. The Joint Consumer Advocates have satisfied the four-factor test (governing a stay) that the Commission has used to determine whether a stay should be granted.[13] Accordingly, the PUCO should grant the requested stay.

Duke incorrectly argues that Joint Consumer Advocates cannot satisfy the four-factor test governing a stay.[14] Contrary to Duke's assertions, Joint Consumer Advocates' Motion for a Stay is reasonable and should prevail under the aforementioned standard or any other reasonable standard.

1. There is a strong likelihood that the Joint Consumer Advocates will prevail on the merits of their positions to protect Ohio customers from paying for Duke's pollution clean-up costs.

Duke challenges the contention that the Joint Consumer Advocates are likely to prevail on the merits, taking issue with the Joint Consumer Advocates' interpretation of the rate making statute. Specifically, Duke argues that:

> The [PUCO's] Opinion and Order is well-founded and is based upon rate-making authority in R.C. 4909.15(A)(4). * * *. The costs related to statutory compliance with environmental remediation was, as determined by the [PUCO] in this case, a normal and necessary cost of doing business.[15]

Duke; however, points to no case law indicating that contamination that occurred during the course of providing past service is a current cost of doing business. Furthermore, the

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[13] See *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604. *See also In the Matter of the Complaint of Northeast Ohio Public Energy Council*, Case No. 09-423-EL-CSS Entry at 2 (July 8, 2009) Motion for Stay Granted.

[14] Id.

[15] Memo Contra at 7.

remediation of past contamination is not a cost of current public utility service. The facilities to which this clean-up relate have not been used for 50 years or longer.[16] Current customers receive no benefit from operation of any facilities that caused the coal tar discharges being addressed.

Under the PUCO's interpretation of Ohio law, there is no point in time at which a utility is precluded from claiming costs incurred related to the provision of service in the past. Such an interpretation of Ohio law is unreasonable. The law mandates that the costs that customers pay must be related to the rendering of current public utility service.[17] These MGP clean-up costs were not caused by, and do not relate to, facilities that are being used for current distribution service, and therefore cannot legally be charged to customers.

Duke next argues that the "used and useful" standard is inapplicable in these cases because it is inconsistent with CERCLA and Ohio EPA law, and is nonsensical (because contaminants move onto and off of utility property).[18] They point to other expenses which they claim are "not directly related to utility property, real estate or personal property" but are only related to "the cost of running a viable business, such as certain taxes, travel expenses, insurance."[19]

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[16] The West End site is located on the west side of downtown Cincinnati and it was constructed by the Cincinnati Gas Light and Coke Company in 1841. Gas for lighting was first produced at the plant in 1843, and the manufacture of gas ceased in 1928. The East End site is located about four miles east of downtown Cincinnati. Construction of the East End site began in 1882 and commercial operations began in 1884, with the manufacture of gas ceasing in 1963.

[17] *In the Matter of the Application of Ohio Edison Company*, Case No. 89-1001-EL-AIR, (August 16, 1990) 1990 Ohio PUC Lexis 912; See also, *In the Matter of the Application Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Increase Rate for Distribution Service*, Case No. 07-551-EL-AIR, et al. Opinion and Order (January 21, 2009).

[18] Memo Contra at 8-9.

[19] Memo Contra at 8-9.

Duke interprets the ratemaking law in a manner that is inconsistent with established precedent, cited by Joint Consumer Advocates.[20] According to Duke, there is no required linkage between the costs of utility service and providing service through used and useful facilities. Contrary to Duke's arguments, all the expenses Duke cited as examples (on page 9 of it Memo Contra) ultimately relate to the provision of utility service through used and useful facilities. Employees are paid to provide utility services; travel expenses are incurred to train employees to provide those services or for purposes related to providing utility services through used and useful facilities. Insurance and taxes are paid in order to provide utility service through used and useful facilities. Duke is providing an incorrect interpretation of the ratemaking law. Duke argues that expenses do not have to relate to providing **current** service through **used and useful** facilities. However, Joint Consumer Advocates' interpretation in one that has been commonly accepted. Joint Consumer Advocates argue that all expenses ultimately relate to the provision of utility services through used and useful facilities in accordance with the ratemaking formula.[21]

Duke also takes issue with the Joint Consumer Advocates' position that Duke failed to carry its burden of proof, asserting that such a position is "well-worn" but not persuasive. [22] Duke argues that the Commission did "weigh" the evidence and that this is demonstrated by the "lengthy order" and discussion of the evidence.[23] Duke's suggestion that the mere length of an order and "discussion" of the evidence presented cannot

[20] Joint Consumer Advocates Motion for Stay at 5-8 (December 2, 2013).

[21] R.C. 4909.15.

[22] Memo Contra at 9.

[23] Memo Contra at 9-10.

substitute for appropriate analysis; nor can it change the utility's burden. Finally, Duke argues that since the Joint Consumer Advocate's position was rejected in first instance, it is not likely to succeed on the merits and the PUCO cannot issue a stay.[24] If that were the case, however, no stay would ever be granted. It is the improper and inconsistent application by the PUCO of the law to the facts at hand that is the measure of likelihood of success on the merits. Accordingly, the PUCO should issue the requested stay.

2. Duke's impending collection of the deferred MGP-related investigation and remediation costs from customers is likely to cause irreparable harm to customers in the absence of a Stay.

Duke argues that since the Joint Consumer Advocates have an adequate remedy at law, i.e. an appellate review, there cannot be a showing of irreparable harm with respect to a rate order.[25] Duke's argument is wrong. The PUCO has previously granted stays with respect to the implementation of rate orders.[26] Consequently, the PUCO plainly considers implementing a stay in the case where rate orders cause irreparable harm.

Here, Duke's customers affected by the Commission's Order are unlikely to recover their losses in the event the Ohio Supreme Court overturns the PUCO's decision. The PUCO should protect the Utility's customers from this harm. The Commission should stay the collection of the deferred MGP-related investigation and remediation costs until all appeals are exhausted.

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[24] Memo Contra at 10-11, citing *In the Matter of the Application of the Cincinnati Gas and Electric Company to Modify its Nonresidential Generation Rates to Provide for Market Based Standard Service Offer Pricing,* Case No. 03-93-EL-ATA, Entry at 2 (June 11, 2008).

[25] Memo Contra at 11.

[26] *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise its Depreciation Accrual Rates and Reserves,* Case No. 81-1058-EL-AIR, Entry (November 17, 1982). See also, *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company,* Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978).

3. The Stay that is needed to protect customers during the process of rehearing and appeal could be structured so not to cause substantial harm to duke.

Duke mistakenly argues that Joint Consumer Advocates cannot support the claim that a stay is needed to avoid harm to other parties. However, the actual criteria being evaluated is whether granting a stay will cause substantial harm to other parties. In its Motion, the Joint Consumer Advocates suggested that, in order to protect the Utility from harm arising from a Stay – and, in particular, the potential delay to Duke in collection of MGP-related investigation and remediation costs from customers, the PUCO could authorize Duke to accrue reasonable carrying charges during the pendency of the Stay. Those carrying charges would then be collected from customers only if the PUCO's Order was upheld. Therefore, the PUCO could grant the requested stay without causing substantial harm to other parties, i.e. Duke.

4. A Stay to prevent Duke from collecting increased rates from customers (during the process of rehearing and appeal) would further the public interest.

Duke argues that Joint Consumer Advocates did not adequately address the public interest requirement. Duke argues that it is in the public interest to have affordable, reliable, safe and clean energy available to customers.[27] That is not the issue, however. The issue is whether it is in the public interest to charge customers $55.5 million for MGP-related investigation and remediation expenses under the PUCO's incorrect application of the ratemaking formula for remediating contamination that occurred in excess of 50 years ago before the PUCO's order can be reviewed.

[27] Memo Contra at 12-13.

Duke says that it is not in the public interest for the PUCO to stay its own orders because it creates uncertainty that has "negative financial consequences for the Company **and for its customers**."[28] The public interest is in ensuring that review of rate orders has significance. If customers are charged costs that can never be refunded even if it is determined that the rate order was in error, then appeals of PUCO rate orders would be meaningless. Granting a stay balances customers' interests with the interest of the utility, which will have an opportunity to recover these costs if it prevails on rehearing and in any appeal.

C. If The Commission Does Not Grant The Requested Stay, Then, In The Alternative, The MGP Rider Collections Should Be Subject To Refund.

Duke argues that the Ohio Revised Code and case law preclude a utility from refunding any part of rates collected.[29] However, that argument fails to recognize the PUCO-established policies and practices that have resulted in the collection of rates subject to refund. The PUCO has used this approach to permit it to explore the reasonableness of rates in light of events that occurred after the issuance of its orders. In one case, the PUCO granted rehearing and ordered rates to be collected subject to refund in a rate case filed by the Columbus & Southern Ohio Electric Company.[30] In another case, the PUCO ordered the collection of rates subject to refund involving the Ohio Utilities Company.[31] In that case, the utility sought a stay of the Commission's order,

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[28] Memo Contra at 14 (emphasis added).

[29] Memo Contra at 12-14.

[30] *In the Matter of the Application of Columbus & Southern Ohio Electric Company for Authority to Amend and Increase Certain of its Rates and Charges for Electric Service, Amend Certain Terms and Conditions of Service and Revise its Depreciation Accrual Rates and Reserves*, Case No. 81-1058-EL-AIR, Entry (November 17, 1982).

[31] *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry at 2 (June 7, 1978).

pending further review, which was granted under circumstances where the utility was required to collect rates subject to refund.[32]

These cases demonstrate that the PUCO has the authority to order a utility to collect revenues subject to refund. In this case, if the Commission does not stay the collection of the MGP Rider rate, then the Commission should follow precedent and make the rates subject to refund to protect Ohio customers. And Duke should be required to deposit any collections subject to refund in an interest-bearing escrow account.

III. CONCLUSION

The Joint Consumer Advocates respectfully request that the PUCO grant their Motion to Stay. In the interests of Duke's approximately 420,000 customers, the PUCO Order allowing Duke to increase distribution rates in order to recover approximately $55.5 million (on a total company basis) in MGP-related investigation and remediation expenses should be stayed pending rehearing and any judicial review of these cases.

If the PUCO declines to grant the requested stay, then any revenues Duke collects from its customers through Rider MGP should be subject to refund pending rehearing and any judicial review of the result in the these cases.

[32] *In the Matter of the Commission's Investigation of the Current Rates, Revenues, Rate Base, and Rate of Return of the Ohio Utilities Company*, Case No. 77-1073-WS-COI, Entry (June 7, 1978). The utility was also required to file an "undertaking" consisting of a promise to refund any amount collected for service rendered after the date of the Entry by a method later determined by the PUCO (either cash refund or as a credit to future bills). The undertaking was required to be under oath by an officer of the company and was to include a promise to include interest. The amount ordered for refund was the amount collected for service in excess of those rates ultimately determined to be lawful. Id.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Joint Consumer Advocates' *Reply to Duke's Memorandum Contra to Motion for Stay* was served on the persons stated below via electronic mail this 20th day of December 2013.

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Case No(s). 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, 12-1688-GA-AAM

Summary: Reply Reply to Duke's Memorandum Contra Motion for Stay by Office of the Ohio Consumers' Counsel, Kroger Company, Ohio Manufacturers' Association and Ohio Partners for Affordable Energy electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.