

**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
)	

**SECOND JOINT APPLICATION FOR REHEARING
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL,
KROGER COMPANY,
OHIO MANUFACTURERS' ASSOCIATION, AND
OHIO PARTNERS FOR AFFORDABLE ENERGY**

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OHIO PARTNERS FOR AFFORDABLE ENERGY

March 21, 2014

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. for an Increase in Gas) Case No. 12-1685-GA-AIR
Rates.)

In the Matter of the Application of Duke) Case No. 12-1686-GA-ATA
Energy Ohio, Inc., for Tariff Approval.)

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of an) Case No. 12-1687-GA-ALT
Alternative Rate Plan for Gas Distribution)
Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Approval to) Case No. 12-1688-GA-AAM
Change Accounting Methods.)

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For the purpose of protecting the 420,000 natural gas customers of Duke Energy Ohio, Inc. ("Duke" or "Utility"), the Office of the Ohio Consumers' Counsel ("OCC"), Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA") and Ohio Partners for Affordable Energy ("OPAE") (collectively, "Joint Consumer Advocates") respectively apply for rehearing of the Entry ("Entry") issued on a 3-2 vote by the Public Utilities Commission of Ohio ("PUCO") on February 19, 2014 in the above-captioned cases. The Joint Consumer Advocates respectively submit that the PUCO's Entry is unreasonable and unlawful in the following particulars:

- A. The PUCO Erred By Approving Duke's Tariffs That Unjustly, Unreasonably And Unlawfully Impose MGP¹-Related Environmental Investigation And Remediation Costs On Customers.
- B. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because Its Order That Denies The Joint Consumer Advocates' Motion To Stay Fails To Provide Findings Of Fact And Written Opinions Setting Forth The Reasons For The Denial Of The Motion To Stay Based Upon Said Findings Of Fact.
- C. If The PUCO Denied The Joint Consumer Advocates' Motion For Stay Because Of A Requirement To Post A Bond, The Denial Is Unreasonable And Unlawful Because The Bond Requirement In R.C. 4903.16 Is Unconstitutional Under The Separation Of Powers Doctrine.
- D. To The Extent That The PUCO Denied OCC's² Request For A Stay Because Of The Requirement To Post A Bond, The Denial Is Unreasonable And Unlawful Because The Public Office Exemption To The Bond Requirement (R.C. 2505.12) Applies To OCC And; Therefore, No Bond Will Be Necessary To Effect The Stay That OCC Seeks.
- E. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because Its Order That Denies The Request For Duke To Collect The MGP Rider Revenues Subject To Refund Fails To Provide Findings Of Fact And Written Opinions Setting Forth The Reasons For The Denial Of The Joint Consumer Advocates Request That Duke's Collection Of The Rate Increase Be Subject To Refund Based Upon Said Findings Of Fact.

The reasons for granting this Application for Rehearing are more fully set forth in the attached Memorandum in Support.

¹ MGP stands for manufactured gas plant.

² Kroger, OMA and OP&E are not participating in this assignment of error included in the Second Joint Application for Rehearing.

Respectfully submitted,

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OHIO PARTNERS FOR AFFORDABLE ENERGY

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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND GENERAL SUPPORT FOR CLAIMS OF ERROR

Each of the Joint Consumer Advocates respectively files this Application for Rehearing asking the PUCO to modify or reverse its Entry that was adopted by a vote of three to two. On February 19, 2014, the PUCO issued its Entry authorizing Duke to collect from customers \$55.5 million, through its proposed tariffs, in environmental investigation and remediation costs for two MGP sites that began service in the 1800's and that have not been used and useful in providing utility service in over 50 years.³

The Joint Consumer Advocates had asked the PUCO on December 2, 2013, to Stay its November 18, 2013 Opinion and Order.

³ 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. Duke Ex. No. 20(A) (Supplemental Testimony of Andrew Middleton at 25 (February 25, 2013); See also Tr. Vol. I at 183 (April 29, 2013).

II. HISTORY OF THE CASES

On August 10, 2009, Duke filed an Application with the PUCO to defer environmental investigation and remediation costs.⁴ The Commission granted Duke's Application on November 12, 2009.⁵

On June 7, 2012, Duke filed its Prefiling Notice for its request to increase natural gas distribution rates. As part of its Rate Case Application, subsequently filed on July 9, 2012, Duke sought the authority to collect from its customers investigation, remediation and carrying costs associated with Duke's environmental remediation efforts at its MGP sites.⁶

On January 4, 2013, the PUCO Staff filed its Staff Report of Investigation ("Staff Report"). On February 4, 2013, OCC, Kroger, OP&A, as well as other interested parties, filed Objections to the Staff Report as required by R.C. 4909.19. On February 25, 2013, interested parties filed testimony of their expert witnesses in support of Objections to the Staff Report of Investigation.

On April 2, 2013, a Stipulation and Recommendation ("Stipulation") was entered into among Duke, the PUCO Staff, OCC, OP&A, Kroger and OMA **for all of the issues except for MGP-related cost recovery**. As part of the Stipulation, the Signatory Parties bifurcated the issue of MGP-related cost recovery and collection, and instead agreed to litigate the MGP issues.⁷

⁴ *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs*, Case No. 09-712-GA-AAM (August 10, 2009). ("Duke Deferral Case").

⁵ Duke Deferral Case, Entry at 3-4 (November 12, 2009).

⁶ Duke Ex. No. 2 (Application, Schedule) at C-3.2 (July 9, 2012).

⁷ Joint Ex. No. 1 (Stipulation and Recommendation) at 8 (April 2, 2013).

On November 13, 2013, the PUCO issued its Order that authorized Duke to collect approximately \$55.5 million of previously deferred MGP-related environmental investigation and remediation costs from customers. On November 27, 2013, Duke filed proposed tariffs that included the MGP Rider for the collection of authorized MGP-related investigation and remediation expenses from customers.

On December 2, 2013, the Joint Consumer Advocates filed a Motion for a Stay to prevent Duke from charging MGP-related clean-up costs pending rehearing and any appeals, or in the alternative, a Motion to make Duke's impending rates charging manufactured gas plant clean-up costs to customers be collected subject to refund.

On February 19, 2014, an Entry was issued that approved the Utility's proposed tariffs that were filed on November 27, 2013, and included the MGP Rider intended for the collection of MGP-related investigation and remediation costs from customers. In that Entry, the PUCO also denied the Motion for Stay and the request to require Duke to collect revenues through the MGP Rider subject to refund.

III. STANDARD OF REVIEW

Applications for Rehearing are governed by R.C. 4903.10 and Ohio Adm. Code 4901-1-35. This statute provides that, within thirty days after the PUCO issues an order, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."⁸ Furthermore, the application for rehearing must be "in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."⁹

⁸ R.C. 4903.10.

⁹ Id.

In considering an application for rehearing, Ohio law provides that the PUCO “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.”¹⁰ Furthermore, if the PUCO grants a rehearing and determines 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 * * *.”¹¹

Joint Consumer Advocates meet the statutory requirements applicable to applications for rehearing pursuant to R.C. 4903.10. Accordingly, Joint Consumer Advocates respectfully request the PUCO grant rehearing on the matters specified below.

IV. ARGUMENTS ON ASSIGNMENTS OF ERROR

A. The PUCO Erred By Approving Duke’s Tariffs That Unjustly, Unreasonably And Unlawfully Impose MGP-Related Environmental Investigation And Remediation Costs On Customers.

The PUCO approved the proposed tariffs filed by Duke on November 27, 2013.

The PUCO stated:

With regard to our review of Duke’s proposed tariffs reflecting the authorized amount to be included in Rider MGP, which were filed on November 27, 2013, the Commission finds that such tariffs are reasonable and in compliance with our directives set forth in the November 13, 2013 Order; therefore, such tariffs should be approved. The new tariffs will become effective on a date not earlier than the date upon which complete final tariff pages are filed with the Commission.¹²

These tariffs included the MGP Rider tariff that is intended to permit Duke to collect the MGP-related investigation and remediation expenses from customers. Two Commissioners dissented from the Order, in part stating:

¹⁰ Id.

¹¹ Id.

¹² Entry at 6 (February 19, 2014).

However, we must continue to dissent from the majority on the substantive matter of Duke's recovery of its environmental remediation expenses. **There is no basis under Ohio law for granting such recovery and, as such, we do not agree that Duke can include these expenses in its tariffs.**¹³ (Emphasis added).

As argued by Joint Consumer Advocates in this case, there is no legal basis for collecting these charges under the PUCO's rate-making law -- R.C. 4909.15 and 4909.18.¹⁴ The Joint Consumer Advocates also argued that these costs are unjust and unreasonable because the Utility failed to meet its burden of proof that the MGP-related investigation and remediation expenses were prudently incurred.¹⁵ Joint Consumer Advocates have appealed these issues to the Supreme Court of Ohio.¹⁶

For these reasons, the PUCO should not have authorized Duke to commence collection of the unjust, unreasonable and unlawful MGP-related investigation and remediation costs from Duke's customers.

B. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because Its Order That Denies The Joint Consumer Advocates' Motion To Stay Fails To Provide Findings Of Fact And Written Opinions Setting Forth The Reasons For The Denial Of The Motion To Stay Based Upon Said Findings Of Fact.

The Entry denied the Joint Consumer Advocate's Motion for Stay. However, the rationale for denying the Stay is not articulated. Instead, the PUCO repeats Duke's argument against granting the Stay. The PUCO states:

¹³ Entry at Concurring and Dissenting Opinion (February 19, 2014).

¹⁴ See OCC and OPAE Initial Brief at 11-49 (June 6, 2013), See Kroger Initial Brief at 10-11 (June 6, 2013), See OCC and OPAE Reply Brief at 2-29 (June 20, 2013), See Kroger Reply Brief at 4-14 (June 20, 2013), See OMA Reply Brief at 3-5 (June 20, 2013), See OCC, Kroger, OMA and OPAE Application for Rehearing at 5-25 (December 13, 2013).

¹⁵ See OCC and OPAE Initial Brief at 50-91 (June 6, 2013), See Kroger Initial Brief at 11-12 (June 6, 2013), See OCC and OPAE Reply Brief at 39-64 (June 20, 2013), See Kroger Reply Brief at 14-16 (June 20, 2013), See OCC, Kroger, OMA and OPAE Application for Rehearing at 27-39, 48-52 (December 13, 2013).

¹⁶ OPAE Notice of Appeal, S. Ct. Case No. 2014-0328 (March 5, 2014); OCC and OMA Second Notice of Appeal, S. Ct. Case No. 2014-0328 (March 10, 2014); Kroger Third Notice of Appeal, S. Ct. Case No. 2014-0328 (March 10, 2014).

Our ultimate analysis and application of the statute and precedent was clearly delineated in those documents. Therefore, we believe it would be both antithetical to our decision in these cases and inappropriate for us to entertain Movants' motion to stay at this time.

In stating its decision, the PUCO fails to explain why granting the request for Stay should be considered antithetical to the PUCO's decision and why it was inappropriate for the PUCO to entertain the motion for stay. It is understood that the PUCO believes its Order will be upheld on appeal. However, the PUCO failed to explain its decision in light of the irreparable harm to Duke's customers if the Order is upheld.

The Joint Consumer Advocates argued their Motion for Stay should be granted because the articulated four-factor test for a stay could be satisfied. The PUCO disagreed, stating:

Moreover, when applying the four-factor test advocated by Movants to determine whether a stay should be granted in these proceedings, we conclude that Movants have failed to satisfy the criteria, as they have failed to demonstrate a strong showing that they are likely to prevail on the merits, that they would suffer irreparable harm absent the stay, that the stay would cause substantial harm to other parties, or that the public interest requires the stay.¹⁷

Contrary to the requirements of R.C. 4903.09, the PUCO reached the conclusion on the four-factor test without any explanation of the findings of fact that support the conclusion.

Regarding the first factor, it should be pointed out that the Order was not unanimous. The dissent provides a good reason as to why the Joint Applicants should prevail. The PUCO did not consider the likelihood of the Joint Consumer Advocates' success on appeal.

¹⁷ Entry at 6 (February 19, 2014).

The other three factors for a stay are absolutely satisfied. The second factor relates to irreparable harm to customers without the stay. Under the Order, Duke's consumers will be required to pay higher utility bills to finance \$55.5 million in costs that Duke expended to remediate two manufactured gas plant sites. Should the Supreme Court of Ohio reverse the PUCO's Order in consideration of the Joint Consumer Advocates' appeals, Ohioans who have paid for the MGP remediation costs during the pendency of the appeals will be left without a remedy to recover those payments. Ohioans would be irreparably harmed as they would not be able to recover their money, and Duke will benefit from the windfall. Surely the Commission would not support this unintended consequence should its Order be reversed.

The third factor for granting a stay is that the stay will not cause harm to other parties. If the PUCO issues a stay of its Order and the Court eventually reverses the PUCO, then the Utility will not be harmed. In the case which authorized Duke to defer the MGP-related investigation and remediation costs, the PUCO issued a Finding and Order that established the constraints under which Duke was authorized to accrue carrying charges on the MGP deferrals. The PUCO stated:

Duke is further authorized to accrue carrying charges on all deferred amounts between the dates the expenditures were made and the date recovery commences.¹⁸

In a 1974 U.S. Supreme Court Case, Justice Rehnquist observed "the temporary loss of income, **ultimately to be recovered**, does not usually constitute irreparable injury,"¹⁹ Duke will, in this case, if the appeals are unsuccessful, ultimately recover the \$55.5 million MGP-related investigation and remediation expenses from customers plus

¹⁸ Id., Finding and Order at 3.

¹⁹ *Sampson v. Murray* (1974), 415 U.S. 61, 90. (Emphasis added.); *See, e.g., Tilberry v. Body* (1986), 24 Ohio St. 3d 117; *Sinnott v. Aqua-Chem, Inc.* (2007), 116 Ohio St.3d 158, 161.

carrying charges accrued during the pendency of the appeals. Therefore, Duke will not suffer any damages or economic harm, let alone irreparable harm. The PUCO failed to explain how Duke would be harmed under this circumstance.

The PUCO also found granting a stay to be against the public interest. This conclusion was reached without explanation or discussion of the findings of fact that support it. It cannot be in the public interest to allow a public utility to retain revenues that are subsequently determined to be unjust or unlawful; however, that is exactly what could happen if the stay is not granted in this case.

Unfortunately for customers, it is likely that any money collected -- even though later found to be unlawfully collected -- will not be returned to customers. This is an outcome that was recently experienced in an appeal of the electric security plan (“ESP”) of Columbus Southern Power Company and Ohio Power Company (collectively “AEP”).²⁰ In regard to unlawful charges paid by AEP’s customers, the Supreme Court of Ohio found that \$368 million in unjustified provider of last resort revenues collected by AEP could not be returned to customers because of the rule against retroactive ratemaking.²¹

The precedent surrounding retroactive ratemaking has worked against customer interests in a number of cases. The general rule is that once the utility collects its costs from customers, even if later that collection is determined to be unlawful, those collections cannot be returned to customers. In *AEP*, Justice Pfeifer in his dissenting opinion reacted harshly to this outcome. Justice Pfeifer stated: “[i]t is unconscionable that a public utility should be able to retain \$368 million that it collected from customers based on assumptions that are unjustified.” Yet the only way to avoid such an unjustified outcome is to grant the requested stay. In *AEP*, the Court noted that Appellants had not

²⁰ *In re Application of Columbus S. Power Co.*, Slip Op 2014-Ohio-462 at ¶ 54 (February 13, 2014).

²¹ *Id.*

requested a stay.²² Therefore, the requested stay in this case should be granted to protect Duke's customers in the event that the PUCO's Order and Entries are found unlawful.

C. If The PUCO Denied The Joint Consumer Advocates' Motion For Stay Because Of A Requirement To Post A Bond, The Denial Is Unreasonable And Unlawful Because The Bond Requirement In R.C. 4903.16 Is Unconstitutional Under The Separation Of Powers Doctrine.

The PUCO discusses in its Entry the bond requirement at the Court. The PUCO states:

Moreover, Duke states the Supreme Court has affirmed that the collection of rates pursuant to a Commission order will not be stayed absent an application to the Court and the posting of a bond.²³

The PUCO failed to explain its rationale for denying the Stay based on the bond requirement. However, if the PUCO's relied upon the bond requirement, this would be unreasonable and unlawful because the bond requirement is unconstitutional.

When the Ohio General Assembly enacted R.C. 4903.16, it unconstitutionally encroached upon the Supreme Court of Ohio's authority. R.C. 4903.16 is unconstitutional because the bond requirement restricts the Court's ability to exercise its inherent authority to issue stays, thereby violating the separation of powers doctrine. The Ohio Constitution inherently embraces the separation of powers doctrine.²⁴ The statute prevents the Court from averting irreparable injury to the public pending the outcome of an appeal. For these reasons, the Joint Consumer Advocates have requested that the Court declare the bond requirement in R.C.4903.16 unconstitutional. Appellants' Motion for Stay, Ohio Supreme Court Case No. 2014-0328 (March 17, 2014).

²² *In re Application of Columbus S. Power Co.*, Slip Op. 2014-Ohio-462 at ¶ 56-57 (February 13, 2014).

²³ Entry at 4 (February 19, 2014).

²⁴ *State v. Bodyke*, 126 Ohio St.3d 266, 275, 2010-Ohio-2424, 933 N.E.2d 753; *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115; *State v. Hochhausler*, 76 Ohio St.3d 455, 668 N.E.2d 457 (1996).

While the PUCO cannot resolve constitutional issues, to the extent that the PUCO relied on Duke's argument that the Joint Consumer Advocates' request for Stay should be denied because of the bonding requirement, that reasoning cannot stand up to scrutiny. Moreover, the Entry fails to address specifically the findings of fact that are relied upon in denying the Stay, and the PUCO should therefore grant rehearing on this issue. The PUCO should grant rehearing, and grant the request for a Stay.

D. To The Extent That The PUCO Denied OCC's²⁵ Request For A Stay Because Of The Requirement To Post A Bond, The Denial Is Unreasonable And Unlawful Because The Public Office Exemption To The Bond Requirement (R.C. 2505.12) Applies To OCC And; Therefore, No Bond Will Be Necessary To Effect The Stay That OCC Seeks.

Ohio law provides for an exemption that relieves the OCC from having to post a bond -- or "execute an undertaking" as bonding is referred to in R.C. 4903.16 -- in furtherance of a requested stay. A public officer is not required to post a supersedeas bond when acting in a representative capacity for the State.²⁶ R.C. 2505.12 provides:

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:

* * *

(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. R.C. 2505.12. (Emphasis added.)

²⁵ Kroger, OMA and OPAE are not participating in this assignment of error included in the Second Joint Application for Rehearing.

²⁶ It is easy to understand why the Ohio General Assembly has exempted state public officers from having to post a bond to effect a stay pending an appeal. In this case, Duke's collection of \$55 million from its customers is the subject of this appeal. If OCC were required to post a \$55 million bond in order to obtain a stay, OCC understands that it would have to pay an annual premium for the bond of approximately \$832,500 during the first year the appeal is pending plus a pro-rated amount for increments of a year after the first year that the appeal remains pending. In addition to this cost that is not affordable for OCC, in order to get a bond OCC would be subject to an indemnification provision that would put the OCC (or possibly the State) at risk of having to pay up to \$55 million in the event the bond was forfeited. R.C. 2505.12 removes that cost and potential liability to the state when a stay is sought during an appeal.

According to R.C. 4911.06, the Consumers' Counsel "shall be considered a state officer * * *." R.C. 4911.06. Furthermore, according to R.C. 4911.02, the Consumers' Counsel may "institute, intervene in, or otherwise participate in proceedings in both state and federal courts * * * on behalf of the residential consumers." R.C. 4911.02. Thus, in filing a request for a stay of execution, the Consumers' Counsel acts in a representative capacity and, as a public officer, is not required to post a supersedeas bond. In fact, the Supreme Court of Ohio has even granted a stay for an entity other than a public officer without requiring that a bond be posted by the appellant. In *MCI Telecommunications Corp. v. PUCO*, (1987), a stay was granted in a utility case by the Court without the posting of a bond despite the fact that the appellant was not a public entity. 31 Ohio St.3d 604, 605, 510 N.E.2d 806 (1987) (Douglas, J., dissenting). Similarly, the PUCO should grant OCC's request for stay of execution in this case.

R.C. 2505.12 should be read in pari materia with R.C. 4903.16 as noted by Justice Herbert in his dissent in *Columbus v. Pub. Util. Comm. of Ohio*, 170 Ohio St. 105, 111 (1959) (Herbert, J., dissenting). There, Justice Herbert concluded that the City of Columbus, as a political subdivision of the state of Ohio, should not be required to post a bond to obtain a stay, or that a nominal bond should be sufficient.²⁷ Thus, the PUCO should stay the operation of its Order and Entries pending final decision, without regard to the bond requirement on the OCC.²⁸ Justice Herbert wrote, "It is the view of the writer * * * that the Legislature never intended to handicap in this manner a municipality seeking to protect its citizens who are consumers of public utility products."²⁹

²⁷ *Columbus v. Pub. Util. Comm. of Ohio*, 170 Ohio St. 105, 111 (1959).

²⁸ *Id.* at 111.

²⁹ *Id.* at 112.

If the PUCO denied the request for a Stay because of the requirement to post a bond that denial is unjust and unreasonable because OCC is not required to post a supersedeas bond in that OCC is acting in a representative capacity as a public officer of the State. Accordingly, no bond will be necessary to affect a stay.

E. The PUCO Erred By Failing To Comply With The Requirements Of R.C. 4903.09, Because Its Order That Denies The Request For Duke To Collect The MGP Rider Revenues Subject To Refund Fails To Provide Findings Of Fact And Written Opinions Setting Forth The Reasons For The Denial of The Joint Consumer Advocates' Request That Duke's Collection of The Rate Increase Be Subject to Refund Based Upon Said Findings Of Fact.

The Entry also fails to adequately set forth the reasons for denying the request for Duke to collect MGP Rider revenues subject to refund. The Entry dismisses this request in a single sentence. The PUCO states:

As for Movants' alternative proposal that the Rider MGP would be subject to refund, the Commission, likewise, finds that such a determination would be contrary to our decision in these cases approving Duke's request to recover the MGP-related costs.³⁰

The PUCO did not explain the relevance of its statement that granting the alternative proposal would be contrary to its decision. Again, it is understood that the PUCO believes its Order will be upheld on appeal. However, in considering a request for a stay, the PUCO needed to consider the circumstance that its Order is not upheld.

The appeal process could take two years or more, and the authorized \$55.5 million MGP-related investigation and remediation costs will be collected over three years. The Entry denies Duke's customers an opportunity to recoup unjust and unreasonable charges in the event of a reversal at the Court.³¹ It should be considered unconscionable for a utility to retain revenues collected from customers that are

³⁰ Entry at 6 (February 19, 2014).

³¹ *In re Keco Industries* 166 Ohio St. 25. (The rule against retroactive ratemaking would preclude subsequent recovery of previously collected revenues under a PUCO approved tariff.)

subsequently found to be unreasonable or unlawful. Unfortunately, that is what would happen under Ohio law if a stay is not granted.³² The PUCO has the authority³³ and should take steps to prevent that unconscionable eventuality from occurring in this case. The PUCO should grant rehearing, and order the MGP Rider revenues be collected subject to refund.

V. CONCLUSION

For all the reasons stated above, the PUCO should grant rehearing in these cases and grant the Joint Consumer Advocates' Motion for A Stay.

³² *In re Application of Columbus S. Power Co.*, Slip Op. 2014-Ohio-462 at ¶ 54 (February 13, 2014).

³³ *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).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Second Joint Application for Rehearing* was served on the persons stated below, electronically this 21st day of March, 2014.

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Summary: App for Rehearing Second Joint Application for Rehearing by the 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.