

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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PUCO

In the Matter of the Application of The)
Cincinnati Gas & Electric Company To)
Modify its Non-Residential Generation) Case No. 03-93-EL-ATA
Rates to Provide for Market-Based)
Standard Service Offer Pricing and to)
Establish a Pilot Alternative)
Competitively-Bid Service Rate Option)
Subsequent to Market Development Period.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting) Case No. 03-2079-EL-AAM
Procedures for Certain Costs Associated)
with The Midwest Independent)
Transmission System Operator.)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting) Case No. 03-2081-EL-AAM
Procedures for Capital Investment in its) Case No. 03-2080-EL-ATA
Electric Transmission and Distribution)
System And to Establish a Capital)
Investment Reliability Rider to be Effective)
After the Market Development Period.)

**MOTION TO STAY THE COMMISSION'S ORDER
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke Energy," including its predecessor, The Cincinnati Gas and Electric Company) and pursuant to Ohio Adm. Code 4901-1-12, moves to stay the implementation of the October 24, 2007 Order on Remand ("Order" or "Remand Order") regarding the Infrastructure Maintenance Fund

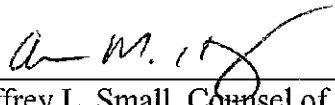
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("IMF") charge that was approved (and upheld in the December 19, 2007 Entry on Rehearing) in the above-captioned cases that were issued by the Public Utilities Commission of Ohio ("PUCO" or "Commission"). The stay is requested pending final resolution of matters addressed in the above-captioned cases by the Supreme Court of Ohio.

In order to prevent irreparable harm to Duke Energy's residential customers, the OCC requests that the Commission grant the Motion for Stay. The reasons for granting OCC's Motion are further set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Jeffrey L. Small, Counsel of Record
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: 614-466-8574
E-mail: small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

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MEMORANDUM IN SUPPORT

I. HISTORY OF THE CASE AND INTRODUCTION

A. Introduction

The duration of the cases captioned above -- the first of which began in January 2003 to establish electricity pricing after the market development period ("MDP") -- is partly the result of an appeal of that portion of the case that concluded in 2004 (hereinafter, "*Post-MDP Service Case*") and remand by the Supreme Court of Ohio

(“Court”).¹ The matters addressed by the Court that necessitated the remand have been extensively discussed in pleadings regarding the appropriate scope for the hearings that followed the remand.² The Court stated that the “portion of the commission’s first rehearing entry approving CG&E’s [now Duke Energy’s] alternative proposal is devoid of evidentiary support.”³

The Office of the Ohio Consumers’ Counsel (“OCC”) presented extensive evidence regarding the missing support for Duke Energy’s standard service offer rate proposals. The Commission should have acted upon this evidence and modified its previous entries and orders regarding the Company’s IMF charge. In *Consumers’ Counsel 2006*, the Court was concerned that “the infrastructure-maintenance fund may be some type of surcharge and not a cost component.”⁴ The Court was correct. The IMF charge was unsupported by the record at the conclusion of the *Post-MDP Service Case*, and it continues to be unsupported by the record as the result of the October 24, 2007 Order on Remand (“Order” or “Remand Order”).

B. Procedural History of These Cases

On January 10, 2003, the Company filed an application (“January 2003 Application”⁵) containing proposals to provide a market-based standard service offer and to establish an alternative competitive bidding process for the period after the market

¹ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 (“*Consumers’ Counsel 2006*”).

² See, e.g., Duke Energy’s Motion for Clarification (December 13, 2006) and the OCC’s Memorandum Contra Motion for Clarification (December 20, 2006).

³ *Consumers’ Counsel 2006* at ¶28.

⁴ *Consumers’ Counsel 2006* at ¶30.

⁵ The January 2003 Application initiated Case No. 03-93-EL-ATA.

development period for non-residential customers.⁶ Numerous parties and the Commission's staff ("Staff") filed comments on the Company's proposals in March and April 2003.

On December 9, 2003, the Commission issued an entry that stated:

As the competitive retail market for electric generation has not fully developed in the CG&E [now Duke Energy] territory, the Commission finds it advisable that CG&E file a rate stabilization plan as part of these proceedings, for the Commission's consideration.⁷

The Entry also set a procedural schedule.

On January 26, 2004, the Company filed another application ("January 2004 Application"). The January 2004 Application proposed that the Commission approve either the approach contained in the January 2003 Application (the "competitive market option," or "CMO") or a substitute plan ("ERRSP Plan") for pricing generation service that the Company submitted for approval in response to the Commission's request on December 9, 2003.⁸

The Commission's Order in the *Post-MDP Service Case* was issued on September 29, 2004. Several parties, including Duke Energy and the OCC, filed applications for rehearing on October 29, 2004. The Company asked the PUCO to either i) approve its original CMO proposal; ii) approve the Stipulation, or iii) approve a new rate plan ("New Proposal") that was proposed for the first time in the Company's Application for Rehearing. In a November 23, 2004 Entry on Rehearing, the PUCO adopted (in principal part) the New Proposal.

⁶ January 2003 Application at 1.

⁷ Entry at 5 (December 9, 2003).

⁸ January 2004 Application at 8.

The OCC initiated its appeal in the *Post-MDP Service Case* on May 23, 2005. The Court issued its opinion on November 22, 2006. The Court held, among other matters, that the PUCO erred by failing to properly support modifications to post-MDP rates in the PUCO's November Entry on Rehearing.⁹ The Court remanded the case for additional consideration by the Commission.

On November 29, 2006, the Attorney Examiner issued an Entry in the above-captioned cases that provided for a "hearing . . . to obtain the record evidence required by the court," and ordered that a pre-hearing conference be held on December 14, 2006.¹⁰ On February 2, 2007, the *Post-MDP Remand Case* was set for hearing in two phases, the first of which would address the framework for post-MDP rates. The hearing on the first phase was conducted in three days, beginning on March 19, 2007. The case was briefed in April 2007. The Remand Order in the above-captioned cases was issued on October 24, 2007.

The Remand Order reinstated all of the Commission's previous standard service offer determinations for residential customers that were set before these cases were appealed, including the IMF charge.¹¹ The OCC submitted an Application for Rehearing on November 23, 2007. The Commission rejected the OCC's assignments of error in an Entry on Rehearing dated December 19, 2007.

⁹ *Consumers' Counsel 2006* at ¶95.

¹⁰ Entry 3, ¶(7) (November 29, 2006). The proceedings on remand will be referred to as the "*Post-MDP Remand Case*" for clarity of presentation even though a single record exists for the portions of the case designated the *Post-MDP Service Case* and the *Post-MDP Remand Case*.

¹¹ The generation component charges that resulted from the *Post-MDP Service Case* were listed in OCC-sponsored testimony. OCC Remand Ex. 2(A) at 53 (Hixson).

II. THE COMMISSION SHOULD STAY ITS ORDER PENDING APPEAL TO THE SUPREME COURT OF OHIO FOR A DETERMINATION REGARDING WHETHER THE ORDER ON REMAND IS RESPONSIVE TO THE COURT'S REMAND DECISION.

A. The IMF is a Surcharge.

In *Consumers' Counsel 2006*, the Court was concerned that “the infrastructure-maintenance fund may be some type of surcharge and not a cost component.”¹² The IMF charge was unsupported by the record at the conclusion of the *Post-MDP Service Case*, and it continues to be unsupported by the record of the *Post-MDP Remand Case*. The IMF component of Duke Energy’s standard service offer is vague, ambiguous, and duplicative of other charges, and has no basis of support from the testimony in these cases.¹³

The Court determined that the Commission violated R.C. 4903.09 when it approved certain charges in the *Post-MDP Service Case* “without record evidence and without setting forth any basis for the decision.”¹⁴ The Court was particularly concerned regarding the explanation for the capacity charges as the result of the *Post-MDP Service Case*, specifically naming the IMF.¹⁵ The Remand Order purports to return to, and judge for purposes of setting standard service generation offers, the Company’s “RSP application, as filed on January 26, 2004, and subsequently modified by Duke prior to the initial hearing in these proceedings.”¹⁶ The IMF was first proposed in the Company’s later-filed Application for Rehearing, however, and reappears on pages 35-38 of the

¹² *Consumers' Counsel 2006* at ¶30.

¹³ OCC Remand Ex. 1 at 48 (Talbot).

¹⁴ *Id.* at ¶27.

¹⁵ *Id.* at ¶30.

¹⁶ Remand Order at 28.

Remand Order without an explanation based upon the modified application filed by the Company.

The Remand Order ignores the very history of these cases that it repeats in great detail. According to Duke Energy, the IMF's ancestry is clear -- it is one of two successor charges to the Reserve Margin portion in the original "annually adjusted component" charge in the Duke Energy's Stipulation Plan that was the subject of the Commission's hearing in May 2004.¹⁷ This claim conflicts with the Company's response to the OCC's discovery (entered into the record) that the IMF and "little g" both compensate the Company for existing capacity.¹⁸ The ancestry claimed by Duke Energy for the IMF is incorrect: the sole successor to the charge for the Reserve Margin under the Stipulation Plan is the SRT. The Commission appears to agree, concluding from the history of the "carve[] out"¹⁹ from the originally proposed reserve margin that "the collection of costs of maintaining a reserve margin is appropriate for collection through a [non-bypassable SRT] POLR rider." The result is that an additional, non-bypassable IMF component to the POLR charge is unsupported.

The duplication of capacity charges that customers much pay is exhibited by qualitative responses to the OCC's inquiries regarding the support for capacity-related charges in the Company's standard service offer rates. OCC Witness Talbot concluded that "the basis for the IMF charge seems to be similar, if not identical, to that of the RSC charge."²⁰ Mr. Talbot stated that "[t]here appears to be over-charging for existing

¹⁷ Company Remand Ex. 3 at 26 ("The IMF was previously embedded in the reserve margin component of the Stipulated AAC price of \$52,898,560.") (Steffen).

¹⁸ OCC Remand Ex. 1, NHT Attachment 6 (quoted and analyzed in OCC Remand Ex. 1 at 42) (Talbot).

¹⁹ Remand Order at 32.

²⁰ OCC Remand Ex. 1 at 38 (Talbot).

capacity to the extent that little g and the RSC and the IMF are all recovering the costs or risks of existing capacity”²¹ and that “[t]here is no assurance that these charges are not duplicative.”²²

B. Case Law Supports Commission Action to Stay the Commission’s Order Authorizing the Collection of the IMF Charge.

The OCC requests that the Commission grant its Motion for Stay regarding the Commission’s Order authorizing the collection of the IMF charge pending a decision by the Ohio Supreme Court on the appeal. Waiting on the Ohio Supreme Court decision will provide clarity regarding the responsiveness of the Order to the decision by the Court that prompted a second hearing. Such a request for a stay has been granted by the Commission 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 Commission granted Ameritech’s June 26, 2002, motion to stay portions of the June 20, 2002 Entry on Rehearing.²³ Ameritech Ohio contended that it would 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 the company’s concerns were addressed through judicial review.²⁴ The Commission should take similar action in the above-captioned case and stay the Order, in regards to the authorization to collect the IMF charge, pending judicial review.

²¹ *Id.* at 42.

²² *Id.*

²³ *In re COI of Ameritech Relative to Minimum Telephone Service Standards*, Case No. 99-938-TP-COI. Entry at 8 (July 18, 2002).

²⁴ *Id.* *Id.* at 5.

The Commission 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 Commission implemented a stay pending clarity from the Federal Energy Regulatory Commission ("FERC"). In that case, the Commission stated:

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

There are equally compelling reasons for the Commission granting a stay in this case.

As further described below, customers could be forced to pay over and over again for the IMF charges requested by Duke Energy in its controversial pleadings that were submitted in 2004. These IMF charges, and the circumstances under which they were negotiated with parties to these cases, remained controversial before the Court. In reversing the Commission's decision the Court was troubled by the Commission's approval of the Company's proposals, and may well be troubled by the outcome of these cases on remand. Therefore, the Commission should stay the Order authorizing the collection of the IMF charge from customers in this proceeding, and lift the stay only after a decision has been rendered by the Court.

C. Irreparable Harm will be Suffered by Residential Customers in the Absence of Action by the Commission.

Duke Energy's residential customers will be irreparably harmed by the absence of a stay while this case is pending before the Ohio Supreme Court. Without a change in the status of existing case law in Ohio, it certainly can be expected that Duke

Energy will argue that there is no mechanism that will permit the retroactive refund of overpayments by customers where the Commission acts within its jurisdiction and by procedures prescribed by the Revised Code and where customer payments are not made subject to refund.²⁵ As noted by the Ohio Supreme Court:

Where the charges collected by the carrier were based upon rates which had theretofore been established or approved by the public authority, the fact that such rates are subsequently reduced affords no right of action for damages or for the recovery of the difference between the old and new rates upon the ground that the prior rate was unreasonable.²⁶

Therefore, Duke Energy and others can be expected to argue that precedent supports a result on appeal that will not provide refunds to customers even in the event that the Court decides an appeal in favor of the OCC.

In addition to the immediate effect of IMF charges upon customers, the General Assembly is proceeding upon legislation that would change the statutory structure under which generation rates are set. The legislation, currently in the form of Sub. S.B. 221 that was passed by the Ohio Senate and is being considered by the Ohio House of Representatives, would change Ohio law regarding the establishment of standard service generation rates. As currently proposed, Sub. S.B. 221 would change rates based upon baseline generation rates approved by the Commission in “rate plan” cases.²⁷ Therefore, Duke Energy customers could pay for the increase in generation rates over and over again in the form of baseline generation rates unless those rates are stayed by the Commission.

²⁵See, e.g., *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254 (1957), par. 2 of the syllabus.

²⁶Id. at 258.

²⁷<http://www.lsc.state.oh.us/coderev/sen127.nsf/221>, Sub. S.B. 221 at line 1959.

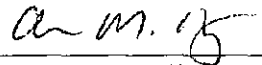
Without a stay, implementation of the generation rates in the above-captioned cases will cause Duke Energy's residential customers to suffer irreparable harm even in the event that the OCC prevails on the appeal of these cases.

III. CONCLUSION

The Order in the *Post-MDP Service Case* was not supported by evidence submitted during the hearing in 2004, and the Company did not provide the additional evidence to support the level of its standard service charges. The Commission's Order that approved the IMF charge that has been levied against customers should be stayed pending a decision on this matter by the Supreme Court of Ohio.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Jeffrey L. Small, Counsel of Record
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: 614-466-8574
E-mail small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion for Stay has been served upon the below-named persons via electronic transmittal, as well as by U.S. Mail, this 15th day of February 2008.



Ann M. Hotz
Assistant Consumers' Counsel

cmooney2@columbus.rr.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
sam@mwncmh.com
dneilsen@mwncmh.com
jclark@mwncmh.com
barthroyer@aol.com
mhpetricoff@vssp.com

mchristensen@columbuslaw.org
paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
mdortch@kravitzllc.com
Thomas.McNamee@puc.state.oh.us
ricks@ohanet.org
anita.schafer@duke-energy.com

WTPMLC@aol.com
tschneider@mgsglaw.com
cgoodman@energymarketers.com
sbloomfield@bricker.com
TOBrien@Bricker.com
dane.stinson@baileycavalieri.com
korkosza@firstenergycorp.com

Scott.Farkas@puc.state.oh.us
Jeanne.Kingery@puc.state.oh.us