

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company to )  
Modify its Non-Residential Generation )  
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 )

Case No. 03-93-EL-ATA

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In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Certain Costs Associated )  
With The Midwest Independent )  
Transmission System Operator )

Case No. 03-2079-EL-AAM

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting )  
Procedures for Capital Investment in its )  
Electric Transmission And Distribution )  
System And to Establish a Capital )  
Investment Reliability Rider to be )  
Effective After the Market Development )  
Period )

Case No. 03-2081-EL-AAM

Case No. 03-2080-EL-ATA

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**DUKE ENERGY OHIO'S MEMORANDUM CONTRA TO THE MOTION  
TO STAY THE COMMISSION'S ORDER BY THE OHIO CONSUMERS'  
COUNSEL**

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**INTRODUCTION:**

The Ohio Consumers' Counsel (OCC), on February 15, 2008, filed its Motion to Stay (Motion) the Public Utilities Commission of Ohio's

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(Commission) Remand Order.<sup>1</sup> OCC's Motion concerns the Infrastructure Maintenance Fund (IMF) component of Duke Energy Ohio's (DE-Ohio) Market-Based Standard Service Offer (MBSSO) affirmed by the Commission on October 24, 2007.<sup>2</sup> After OCC's subsequent Application for Rehearing, the Commission again affirmed DE-Ohio's MBSSO, including the IMF, in its December 19, 2007, Entry on Rehearing.<sup>3</sup>

OCC's Motion is defective for three reasons: (1) It does not meet the proper legal standard for obtaining a Stay set forth by the Commission in *In re Modification of Intrastate Access Charges*;<sup>4</sup> (2) Its request for a stay is untimely; and (3) It misstates the evidence and the Court's Remand Opinion regarding the IMF. For these reasons, the Commission should deny OCC's Motion.

**ARGUMENT:**

**I. OCC failed to state, and does not comply with, the standard necessary to sustain its Motion to Stay.**

OCC's Motion relies entirely upon the Commission's Entry in *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to its Compliance with Certain Provisions of the Minimum Telephone*

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<sup>1</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (OCC Motion to Stay) (February 15, 2008).

<sup>2</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Order on Remand) (October 24, 2007).

<sup>3</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Entry on Rehearing) (December 19, 2008).

<sup>4</sup> *In re Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI (Entry on Rehearing at 5) (February 20, 2003) (*see MCI v. Pub. Util. Comm'n*, 31 Ohio St. 3d 604, 606, 510 N.E.2d 806, 807 (1987)).

*Service Standards Set Forth in 4901:1-5, Ohio Administrative Code (In re Ameritech)* granting a stay to Ameritech on July, 18, 2002.<sup>5</sup> OCC misstates the reasoning behind *In re Ameritech*, alleging that the Commission granted the stay “until the company’s concerns were addressed through judicial review.”<sup>6</sup> Although the Commission did not articulate a particular standard for assessing a motion to stay in *In re Ameritech*, the company sought the stay to avoid “the complicated process of changing current practices” so that it did not have to reverse course if its appeal were sustained.<sup>7</sup> That standard is inapplicable to these proceedings because the Commission is not seeking to impose new practices upon DE-Ohio. The IMF component has been a component of DE-Ohio’s MBSSO and assessed to non-residential customers since 2005, and residential customers since 2006.

The Commission adopted the following four part test to assess applications for stay in *In re Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI (Entry on Rehearing) (February 20, 2003):

- (a) Whether there has been a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has

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<sup>5</sup> *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI (Entry at 3-5) (July 18, 2002).

<sup>6</sup> *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et al*, (OCC Motion to Stay at 7) (February 15, 2008).

<sup>7</sup> *In the Matter of the Commission-Ordered Investigation of Ameritech Ohio Relative to its Compliance with Certain Provisions of the Minimum Telephone Service Standards Set Forth in 4901:1-5, Ohio Administrative Code*, Case No. 99-938-TP-COI (Entry at 3) (July 18, 2002).

shown that it would suffer irreparable harm absent the stay;

(c) Whether the stay would cause substantial harm to other parties; and

(d) Where the public interest lies.<sup>8</sup>

OCC's Motion does not address the first part of the test at all; whether it is likely to prevail on the merits. Rather, OCC merely restates the arguments it has already made and lost before the Commission. OCC provides no assessment regarding the likelihood of its success on appeal to the Court. Clearly, OCC has little likelihood of success on appeal.

In the Court's Order on Remand, regarding the IMF, the Court required only that the Commission provide evidence on its reasoning in support of its decision.<sup>9</sup> The Commission clearly set forth the record evidence supporting the IMF in its Order on Remand.<sup>10</sup> It also set forth its reasoning that the IMF represents "a legally mandated generation function."<sup>11</sup> Because the Commission has properly cited record evidence and stated its reasoning supporting its Order on Remand, the Commission's Order on Remand is likely to be upheld on appeal. This view is supported by the fact that the Court did not require the Commission to discontinue the IMF on remand, but only required the

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<sup>8</sup> *Id.*

<sup>9</sup> *Ohio Consumers' Counsel v. Pub. Util Comm'n* 111 Ohio St.3d 300, 323, 856 N.E.2d 213, 236 (2006).

<sup>10</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (Order on Remand at 35-38) (October 24, 2007).

<sup>11</sup> *Id.* at 37.

Commission to properly support its order. Because the Commission has properly responded to the Court, OCC's appeal has little chance of success.

OCC does address the second prong of the Commission's test, whether residential customers will suffer irreparable harm.<sup>12</sup> OCC argues that residential customers suffer irreparable harm because if it prevails on appeal no refund may be available to residential customers and OCC speculates regarding the effect of legislation pending but not passed by the legislature. Neither argument holds merit.

Residential customers may indeed suffer irreparable harm if DE-Ohio is unable to fulfill its statutory provider of last resort (POLR) obligations. That is the very purpose of the IMF, as acknowledged by the Commission in its Order on Remand.<sup>13</sup> DE-Ohio's provision of reliable service is paramount, and therefore, the Commission should deny OCC's request for stay. Speculative legislation does not represent reasonable grounds to sustain an allegation of irreparable harm or a motion to stay.

OCC also fails to address whether a stay would harm DE-Ohio or other parties. If the Commission were to discontinue the IMF, DE-Ohio may not be in a position to meet its POLR obligations. For example, DE-Ohio may not be able to meet financial commitments it has made to perform its POLR obligations. More importantly, DE-Ohio does not have

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<sup>12</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (OCC Motion to Stay at 8-10) (February 15, 2008).

<sup>13</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (Order on Remand at 37-38) (October 24, 2007).

the ability to target specific customers if it incurs reliability issues. If reliability suffers due to capacity market constraints because the Commission grants OCC's Motion for Stay, non-residential customers will suffer harm along with residential customers. It is no secret that DE-Ohio is currently in a short capacity position. If DE-Ohio is unable to secure sufficient capacity to maintain system reliability all customers may suffer harm.

Additionally, OCC does not address the fourth prong of the test, public interest. DE-Ohio filed these cases on January 10, 2003. There have been two evidentiary hearings regarding DE-Ohio's MBSSO price. OCC, and all other parties, have had the opportunity to present evidence and argue their position before the Commission. There has been an appeal to the Ohio Supreme Court resulting in the second evidentiary hearing before the Commission. Throughout this process, the Commission and the Court have sustained DE-Ohio's MBSSO price, including the component parts, with only minor changes to the ability of certain customers to avoid specific price components. Two of the Commission's goals in this process remain price stability for customers and revenue certainty for DE-Ohio. Continued modifications of the DE-Ohio's price, absent new evidence, do not serve the Commission's goals or the public interest. The Commission should deny OCC's Motion to Stay.

## **II. OCC request for a stay is untimely.**

OCC “moves to stay the implementation of the October 24, 2007 Order on Remand... regarding the Infrastructure Maintenance Fund charge....”<sup>14</sup> DE-Ohio, however, implemented the IMF effective January 1, 2005 for non-residential customers, and January 1, 2006, for residential customers. The Commission’s October 24, 2007, Order on Remand did not amend or alter the application of the IMF in any way except for the ability of certain non-residential customer to avoid the IMF. Thus, if OCC seeks a stay of the Commission’s October 24, 2007 Order on Remand the only result is that those non-residential customers could not avoid the IMF.

From OCC’s pleading, however, it appears that OCC wants the Commission to discontinue application of the IMF to residential customers. If that is what OCC is attempting to accomplish it should have sought a stay of the Commission’s November 23, 2004, Entry on Rehearing that established, and permitted DE-Ohio to implement, the IMF.<sup>15</sup> OCC should have sought a stay from the Court pursuant to R.C. 4903.16, and the Appellate Rules of Procedure pursuant to R.C. 2505.03 and R.C. 2505.04 if the Commission had denied a request for a stay in 2004.<sup>16</sup> It is too late for OCC to now seek a stay of the Commission’s November 23, 2004, Entry on Rehearing. It is also too late for OCC to

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<sup>14</sup> *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et al*, (OCC Motion to Stay at unmarked page 2) (February 15, 2008).

<sup>15</sup> *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et al*, (Entry on Rehearing) (November 23, 2004).

<sup>16</sup> Ohio Rev. Code Ann. §§ 4903.16, 2505.03, 2505.04 (Baldwin 2008).

seek a stay from the Court regarding implementation of the IMF. The OCC already had that opportunity and the Court did not stay the IMF on its own.

The well established doctrines of *res judicata* and collateral estoppel also bar OCC from seeking a stay of the IMF in these proceedings because it could have sought a stay from the Commission in earlier proceedings in this docket but did not.

The doctrines of *res judicata* and collateral estoppel prevent a party that had an opportunity, or did, litigate the same issues against the same parties in a prior proceeding, from re-litigating such issues in a later proceeding.<sup>17</sup> Enforcement of the doctrines of *res judicata* and collateral estoppel are necessary to bring finality to the decisions of administrative agencies such as the Commission.<sup>18</sup>

OCC had ample opportunity to litigate the issuance of a stay from the Commission subsequent to the Commission's November 23, 2004, Entry on Rehearing and did not do so. Therefore, the doctrines of *res judicata* and collateral estoppel bar OCC's Motion in this case.

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<sup>17</sup> *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained within the Rate Schedules of Columbia Gas of Ohio and Related Matters*, Case Nos. 04-221-GA-GCR, 05-221-GA-GCR, (Entry at 2)(December 29, 2006).

<sup>18</sup> *Superior's Brand Meats v. Lindley*, 62 Ohio St. 2d 133, 135, 403 N.E.2d 996, 999 (1980).



**III. The Court remanded to the Commission with specific instructions to “thoroughly explain its conclusion that the modifications on rehearing are reasonable and identify the evidence it considered to support its findings.”<sup>19</sup>**

OCC provides an out of context partial quote from the Court’s decision to infer that the Commission should have determined whether the IMF was a surcharge and that there might be something wrong with a surcharge if the Commission made such a determination. OCC alleges that “the Court was concerned that the infrastructure maintenance fund may be some type of surcharge and not a cost component.<sup>20</sup> This characterization of the Court’s opinion is incorrect. The Court did no such thing and it is improper for OCC to suggest otherwise.

The full paragraph of the Court’s holding is as follows:

CG&E claims that the infrastructure-maintenance fund, together with the system reliability tracker, represented the reserve capacity charge previously set forth in the stipulation as part of the annually adjusted component. Although this may be true, *we have found nothing in the commission's first rehearing entry to support that assertion.* Under the commission's rehearing entry, CG&E's costs for maintaining adequate reserve capacity are now covered by the system-reliability tracker. *The commission did not mention the infrastructure-maintenance fund -- which is intended to compensate CG & E for committing its generation capacity to serve consumers who choose the market-based standard service offer*

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<sup>19</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 309, 323 856 N.E.2d 213, 225, 236 (2006).

<sup>20</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al*, (OCC Motion to Stay at unmarked page 2) (February 15, 2008).

through 2008 -- in the context of maintaining adequate reserve capacity requirements. In that respect, the infrastructure-maintenance fund may be some type of surcharge and not a cost component. *Without explanation from the commission, however, we cannot know for certain.* In any event, even if we accepted CG&E's claim as true, *that would not excuse the commission from its statutory obligation to justify its orders.*<sup>21</sup>

It is clear from a review of the entire paragraph that the Court considered DE-Ohio's (at that time CG&E) argument on brief but decided that regardless of the merits of DE-Ohio's arguments that the Commission must support its decision.<sup>22</sup> As required by statute, DE-Ohio's POLR charge, including the IMF, is set at a market price. Even if the IMF were considered a surcharge, which De-Ohio does not concede, traditional regulated cost based pricing does not apply to a market price for a competitive retail electric service under Ohio law, and there is no prohibition against a surcharge.<sup>23</sup> The Court did not expressly or impliedly, state otherwise.

OCC relies upon the opinions of its witness, Mr. Neil Talbot, in its Motion. Mr. Talbot's opinions, however, were discredited on cross-examination during the hearing.<sup>24</sup> OCC ignores all of the other testimony, including the testimony of DE-Ohio's witness, Mr. John

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<sup>21</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 307-308 856 N.E.2d 213, 223-224 (2006) (emphasis added).

<sup>22</sup> *Id.*

<sup>23</sup> Ohio Rev. Code Ann. §4928.05 (Baldwin 2008).

<sup>24</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et al.*, (OCC Motion to Stay at 6) (February 15, 2008).

Steffen. Mr. Steffen testified that the IMF compensates DE-Ohio for “the risks and costs associated with maintaining adequate capacity reserves.”<sup>25</sup> The record evidence also demonstrates that the IMF is a derivative of the original AAC, not a duplicative charge as incorrectly alleged by OCC’s witness Mr. Talbot.<sup>26</sup> The Commission has already rejected OCC’s arguments. It should reject them again and deny the Motion to Stay.

**CONCLUSION:**

OCC’s Motion fails to meet the Commission’s standard for a stay. It also is untimely and based on erroneous allegations previously rejected by the Commission. For the reasons more fully explained above DE-Ohio respectfully requests that the Commission deny OCC’s Motion to Stay.

Respectfully submitted,



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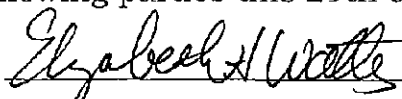
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<sup>25</sup> *In re DE-Ohio’s MBSSO*, Case No. 03-93-EL-ATA *et al*, (Duke Ex. 11 at 20) (February 28, 2007).

<sup>26</sup> *Id.* at JPS-7.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 29th day of February, 2008.



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