

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke )  
Energy Ohio, Inc., for an Increase in its ) Case No. 12-1685-GA-AIR  
Natural Gas Distribution 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 Change ) Case No. 12-1688-GA-AAM  
Accounting Methods. )

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**DUKE ENERGY OHIO, INC.'S  
MEMORANDUM CONTRA SECOND JOINT APPLICATION FOR REHEARING BY  
OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE KROGER COMPANY,  
THE OHIO MANUFACTURERS' ASSOCIATION, AND  
OHIO PARTNERS FOR AFFORDABLE ENERGY**

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**I. INTRODUCTION**

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) submits this Memorandum Contra the Second Application for Rehearing of The Office of the Ohio Consumers' Counsel (OCC), Ohio Partners for Affordable Energy, the Ohio Manufacturers' Association, and the Kroger Company (collectively, the Intervenors). The Intervenors again seek rehearing of the decision of the Public Utilities Commission of Ohio (Commission) and disagree that Duke Energy Ohio is legally permitted to recover costs incurred for the investigation and remediation of manufactured gas plants (MGPs). The Commission no longer has jurisdiction to consider this motion, as the proceedings have been appealed to the Ohio Supreme Court. Furthermore, the

Intervenors have not advanced any new arguments and the application for rehearing should fail once again.

## II. JURISDICTION

Each of the Intervenors has already filed a notice of appeal to the Ohio Supreme Court. OPAE filed a Notice of Appeal on March 5, 2014. OCC and OMA filed a Joint Notice of Appeal on March 10, 2014, and the Kroger Company submitted its Notice of Appeal on March 10, 2014. Each of the Intervenors argues that the Commission erred in authorizing Duke Energy Ohio to collect environmental investigation and remediation costs from customers, pursuant to R.C.4905.15(D).<sup>1</sup> R.C. 4903.13 provides that “a PUCO order shall be reversed, vacated, or modified by [the Ohio Supreme Court] only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable.”<sup>2</sup> The Court’s standard of review requires it to examine the Commission’s decision, to determine whether the record contains sufficient probative evidence to show that the decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.<sup>3</sup> The appellant bears the burden of demonstrating that the Commission’s decision is against the manifest weight of the evidence or is clearly unsupported

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<sup>1</sup> *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates, et al.*, Case No. 12-1685-GA-AIR, *et al.*, Notice of Appeal of Ohio Partners for Affordable Energy, March 5, 2014; *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates, et al.*, Case No. 12-1685-GA-AIR, *et al.*, Joint Second Notice of Appeal by The Office of the Ohio Consumers’ Counsel and the Ohio Manufacturers’ Association, March 10, 2014; *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates, et al.*, Case No. 12-1685-GA-AIR, *et al.*, Third Notice of Appeal by The Kroger Company, March 10, 2014.

<sup>2</sup> *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, 820 N.E.2d 885, at ¶ 50

<sup>3</sup> *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004-Ohio-6896, 820 N.E.2d 921, at ¶ 29.

by the record.<sup>4</sup> The Ohio Supreme Court also has "complete and independent power of review as to all questions of law" in appeals from the Commission.<sup>5</sup>

The General Assembly has created a broad and comprehensive statutory scheme for regulating the business activities of public utilities. R.C. Title 49 sets forth a detailed statutory framework for the regulation of utility service and the fixation of rates charged by public utilities to their customers. As part of that scheme, the legislature created the Public Utilities Commission and empowered it with broad authority to administer and enforce the provisions of Title 49. The Commission may fix, amend, alter or suspend rates charged by public utilities to their customers.<sup>6</sup> Every public utility in Ohio is required to file, for Commission review and approval, tariff schedules that detail rates, charges, and classifications for every service offered.<sup>7</sup> And a utility must charge rates that are in accordance with tariffs approved by, and on file with, the Commission.<sup>8</sup>

Accordingly, the Public Utilities Commission is akin to a trial court insofar as it hears and adjudicates all matters related to rates charged by public utilities. The general rule of law is that the trial court loses jurisdiction to take action in a cause after an appeal has been taken, unless and until the case is remanded to it by the appellate court.<sup>9</sup> Once the Intervenors filed their respective notices of appeal to the Supreme Court, the Public Utilities Commission was thus divested of its jurisdiction over the matter. Accordingly, the Commission is without jurisdiction to consider the most recent Application for Rehearing, filed subsequent to the Notices of Appeal.

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<sup>4</sup> *Id.*

<sup>5</sup> *Ohio Edison Co. v. Pub. Util. Comm.*, 78 Ohio St.3d 466, 469, 1997 Ohio 196, 678 N.E.2d 922 (1997).

<sup>6</sup> R.C. 4909.15, 4909.16.

<sup>7</sup> R.C. 4905.30.

<sup>8</sup> R.C. 4905.22.

<sup>9</sup> *In re Mahoning Valley Sanitary District*, 161 Ohio St. 259 (1954); *Majnaric v. Majnaric*, 46 Ohio App. 2d 157 (1975); *Vavrina v. Greczanik*, 40 Ohio App. 2d 129 (1974); *Sullivan v. Cloud*, 62 Ohio App. 462 (1939).

### III. ARGUMENT

#### A. **The Commission Appropriately Approved Duke Energy Ohio's Tariffs, Consistent with its Opinion and Order Holding that MGP-Related Environmental Investigation and Remediation Expenses May Be Recovered.**

The Intervenors assert that the Commission should not have approved the tariffs that were proposed by the Company to effectuate the Commission's Opinion and Order. They base this assertion on two grounds. First, they quote from the dissenting opinion in these proceedings to support their belief that there is no basis for collecting the MGP-related costs. But the dissenting opinion is just that: a dissent. It is of no legal weight. It is undeniable that a majority of the Public Utilities Commissioners constitutes a quorum for the transaction of any business or performance of any duty or the exercise of any power. The act of the majority is the act of the Commission.<sup>10</sup> A majority of the Commissioners reached a conclusion, allowing recovery of prudently incurred costs for environmental investigation and remediation. The existence of a minority position is irrelevant to the legality and sustainability of the Commission's decision.

The Intervenors' second basis for this claimed error is that Duke Energy Ohio failed to prove that the expenses in question were prudently incurred. They cite to their respective briefs and applications for rehearing, but otherwise present no argument. The Commission has considered this issue repeatedly, and has, each time, rejected the Intervenors' contentions in this regard.

The Commission should summarily deny this ground for rehearing.

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<sup>10</sup> R.C. 4901.08.

**B. The Commission's Order Denying the Intervenors' Motion to Stay Provides Ample Support for the Decision and Does Not Violate R.C. 4903.09.**

Relying on R.C. 4903.09, the Intervenors argue that the Commission's Entry denying the motion to stay the implementation of rates is legally insufficient. The argument fails, both because the cited statute is inapplicable and because ample justification for the decision was provided.

With regard to R.C. 4903.09, its import is critical in nature, but limited in scope. Its purpose, according to the Ohio Supreme Court, to enable the Court to review the Commission's decision with a complete understanding of how the Commission reached its conclusions.<sup>11</sup> But a close reading of the statute reveals that it is applicable to the Commission's substantive decision on the merits, not to other entries. Indeed, the Commission issued its Opinion and Order in these proceedings, in compliance with this law. The issuance of such an Opinion and Order is what is mandated, and the Commission has performed that obligation.

On the other hand, the decision on the motion for a stay was a procedural one, not covered by the cited statute. The Commission has previously found that R.C. 4903.09 does not apply to an entry on rehearing.<sup>12</sup> The same rationale must apply here.

Beyond the question of whether the statute is relevant, the Commission's entry, denying the motion, clearly set forth the reasons for the outcome. The Commission explicitly stated that it had thoroughly reviewed and considered all arguments raised by the parties and that its analysis and application of the statute and precedent was clearly delineated.<sup>13</sup> Moreover, the Commission noted that the Intervenors had failed to demonstrate a strong showing that they are likely to prevail on the

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<sup>11</sup> *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451 at 455 (2004).

<sup>12</sup> *In the Matter of the Complaint of Elyria Foundry Company*, Case No. 05-796-EL-CSS, Second Entry on Rehearing, (May 2, 2007) at p.6, citing *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999).

<sup>13</sup> Entry on Rehearing at p.6

merits or indeed to meet any of the four-factor test that Intervenors had argued in supporting the motion to stay.

Asking the Commission to stay an order that it has rendered, while perhaps procedurally necessary, is somewhat akin to a Sisyphean task. The Commission, in an eighty-page Opinion and Order offered, in exemplary detail, its findings of fact, rationale and conclusion in this proceeding. It is unrealistic to believe that the Commission would then simply change its mind on the basis of arguments that have already been argued, and stay its own order. This is what the Commission stated when it said: “Therefore, we believe it would be antithetical to our decision in these cases and inappropriate for us to entertain Movant’s motion to stay at this time.” And there is certainly no reason for the Commission to reiterate the entire eighty pages of reasoning.

While the Intervenors have argued that they can satisfy a four-prong test, there is no controlling precedent with regard to this test and Intervenors acknowledged this fact in the motion seeking a stay.<sup>14</sup> Nonetheless, the Commission laid out its understanding of all of the arguments in support of the Intervenors’ motion, and then stated that they were not persuaded. The Commission’s decision is abundantly clear. The Intervenors simply refuse to accept that decision.

The balance of the Intervenors’ arguments are the same as those raised in the original motion to stay. Since they are duplicative, Duke Energy Ohio, to spare paper and the Commission’s administrative resources, will not reply again but simply refers the Commission to its arguments in the Memorandum Contra Motion to Stay that was submitted on December 23, 2013.<sup>15</sup>

The second ground for rehearing must be denied.

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<sup>14</sup> Motion for Stay, (December 2, 2013) at p. 4.

<sup>15</sup> Duke Energy Ohio, Inc.’s Memorandum Contra Motion for Stay, (December 13, 2013) incorporated here by reference.

**C. The Commission Must Require Intervenors to Post a Bond under R.C. 4903.16, Regardless of Claims of Unconstitutionality.**

Joint Intervenors sought a stay of the Commission's Opinion and Order. In order to succeed in that effort, the Intervenors, pursuant to R.C.4903.16, are required to post a bond. Even the Intervenors make no claim to the contrary. Rather, the Intervenors propose that the Commission should simply ignore the provisions of that statute, based upon their argument that the law is unconstitutional.

Duke Energy Ohio has previously argued the substance of the constitutionality argument and will not repeat that discussion here.<sup>16</sup> But the important issue is the limited nature of the Commission's jurisdiction. "[T]he [Commission] cannot resolve constitutional issues . . ."<sup>17</sup> Although the Intervenors pay lip service to this concept, nevertheless they believe that the stay should not have been denied on the basis that no bond was posted. The Commission is not the place for the Intervenors to make this argument; the Commission has no choice but to follow the law, as written.

It is also important to recognize that the utility regulatory process, including the right to appeal from rate orders, is entirely statutory.<sup>18</sup> Indeed, the Commission may exercise only that authority that is granted to it by statute.<sup>19</sup> The Intervenors argue based upon an assumption to the contrary. The Intervenors argue that the right to appeal Commission order is judicially created and may not be infringed upon by the General Assembly. Joint Intervenors misunderstand that, instead, the right to appeal is entirely statutory. The Commission itself is a

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<sup>16</sup> See, Duke Energy Ohio, Inc.'s Memorandum Contra Application for Rehearing by the Office of the Ohio Consumers' Counsel, et al., (December 23, 2013) incorporated here by reference.

<sup>17</sup> Second Joint Application for Rehearing by the Office of the Ohio Consumers' Counsel, et al., (March 21, 2104), at p.10.

<sup>18</sup> See R.C. 4903.11 to 4903.13.

<sup>19</sup> *Canton Storage & Transfer Co. v. Pub. Util. Comm.*, 72 Ohio St.3d 1, at 5, 647 N.E. 2d 136 at 141, (1995).

creature of statute.<sup>20</sup> Therefore, the Commission may only act in a manner consistent with its statutory authority. In this instance, the Commission may not grant a stay absent statutory authority to do so. The General Assembly may dictate the manner in which appeals may be taken, and in this case, the General Assembly has seen fit to require a bond. Thus, Appellant's and specifically OCC's effort to evade this requirement based upon a Constitutional argument are misguided.

Finally, the Intervenors make a passing reference to their prior assertion that the entry denying the stay failed to comply with R.C. 4903.09. They specifically complain that the entry "fails to address specifically the findings of fact that are relied upon in denying the Stay . . ."<sup>21</sup> But, as discussed above, that statute only applies to the opinion and order in a case, not to a procedural entry. The Commission need not make findings of fact in order to issue a procedural entry.

The Intervenors' third ground for rehearing must be denied.

**D. The Commission Must Require OCC to Post a Bond under R.C. 4903.16, Regardless of the Claim that OCC is Exempt as a Public Officer.**

OCC argues, separate from the other three Intervenors, that it is exempt from the need to post a bond, under the provisions of a statute that is entirely outside of Title 49 and therefore entirely inapplicable to the Commission. R.C. 2505.09 authorizes Ohio appellate courts to issue stays upon the execution of a supersedeas bond, but a subsequent section exempts certain entities from this requirement, including "[a]ny 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."<sup>22</sup>

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<sup>20</sup> Id.

<sup>21</sup> Page 10

<sup>22</sup> R.C. 2505.12.



OCC proposes that it is a “public officer,” for purposes of this exemption, due to language in R.C. 4911.06. But its status as a “state officer” under R.C. 4911.06 is entirely unrelated to the term “public officer” as used in R.C. 2505.12. R.C. 4911.06, although quoted only in part by OCC, states that the consumers’ counsel shall be considered a state officer **for purposes of** section 24 of Article II, Ohio Constitution. That constitutional provision merely explains that certain state officers are liable to be impeached. The intent of R.C. 4911.06 is, thus, to make clear that the consumers’ counsel may be removed from office. R.C. 2505.12 has a distinctly different purpose, specifying when a supersedeas bond is not required. There is nothing to indicate that R.C. 2505.12 is meant to encompass officers who can be impeached; nothing ties it to R.C. 4911.06. Therefore, the exemption from the appellate court bonding requirement is not applicable to OCC.

Furthermore, an exemption under R.C. 2505.12 would not, in any case, apply to the appeal of a Commission order, as the undertaking required by R.C. 4903.16 is not a supersedeas bond. A supersedeas bond is specifically designed to ensure that the appellee receives the benefit of the judgment, if the appeal is unsuccessful.<sup>23</sup> The undertaking required with regard to Commission orders, on the other hand, is meant to protect the utility against the damages caused by the delay in enforcement of a legal Commission order. The two are not comparable. The exemption from the supersedeas requirement is inapplicable.

The Intervenor’s fourth ground for rehearing must be denied.

**E. The Commission’s Entry Amply Explains the Rationale for Denying the Motion to Collect the Rate Increase Subject to Refund.**

The Intervenor’s once again argue that the Commission’s entry fails to comply with R.C. 4903.09, this time with regard to the denial of their motion that collections be subject to refund. As

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<sup>23</sup> See R.C. 2505.09.

explained above in the discussion of the second ground for rehearing, the Commission has no obligation under R.C. 4903.09 to set forth findings of fact and opinions of law in a procedural entry.

Furthermore, the Commission is not legally permitted to order a refund of rates. In *In re Application of Columbus Southern Power Co. et al.*, where the OCC similarly argued that the Commission should have made a rate increase subject to refund, the Court stated:

As OCC recognizes, under *Keco*, we have consistently held that the law does not allow refunds in appeals from Commission orders. As we have stated only two years ago, “any refund order would be contrary to our precedent declining to engage in retroactive ratemaking.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009 Ohio 604, 904 N.E.2d 853 at para. 21.<sup>24</sup>

The Court made clear in the *Columbus Southern* case that its decisions in *Keco* and other cases hold that the statutes protect against unlawfully high rates by providing for stays, under R.C. 4903.16. The General Assembly, in R.C. 4903.16, has made clear its intent that a public utility shall collect the rates set by Commission order and that an aggrieved party has the right to seek a stay *and post bond* once it appeals an order to the Court.<sup>25</sup> The Intervenors made this argument previously, and failed previously. It must fail again.

The Intervenors’ fifth ground for rehearing must also be denied.

#### IV. CONCLUSION

The Commission has already rejected the arguments advanced by Intervenors. To the extent the Commission believes it may continue to have jurisdiction over this matter, it should reject the arguments again and deny the Application for Rehearing. These same arguments were rejected in the original Opinion and Order and in the Entry denying Rehearing. For the reasons

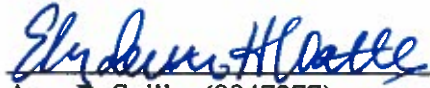
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<sup>24</sup> *In re Application of Columbus Southern Power Company, et al.; Office of the Ohio Consumers Counsel, et al. v. Pub. Util. Comm.*, 128 Ohio St.3d 512, 516, 2011-Ohio-1788, 947 N.E.2d 655, at ¶ 16. *See, also, Green Cove Resort I Owners’ Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, at ¶ 27 (“Neither the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in *Keco*...”).

<sup>25</sup> *Id.*

stated herein, Duke Energy Ohio respectfully requests that the Intervenor's Second Application for Rehearing be denied.

Respectfully submitted,  
DUKE ENERGY OHIO, INC.



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Amy B. Spiller (0047277)  
Deputy General Counsel  
Associate General Counsel  
Elizabeth H. Watts (0031092)  
Associate General Counsel  
Duke Energy Business Services LLC  
139 East Fourth Street  
Cincinnati, Ohio 45202  
513-287-4359 (telephone)  
513-287-4385 (facsimile)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 2<sup>nd</sup> day of April, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.

  
Elizabeth H. Watts

Thomas J. O'Brien  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
tobrien@bricker.com

**Counsel for the City of Cincinnati**

A. Brian McIntosh  
McIntosh & McIntosh  
1136 Saint Gregory Street  
Suite 100  
Cincinnati, Ohio 45202  
brian@mcintoshlaw.com

**Counsel for Stand Energy Corporation**

Joseph P. Serio, Counsel of Record  
Larry S. Sauer  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
serio@occ.state.oh.us  
sauer@occ.state.oh.us

**Attorneys for the Ohio Consumers'  
Counsel**

Vincent Parisi  
Matthew White  
Interstate Gas Supply, Inc.  
6100 Emerald Parkway  
Dublin, Ohio 43016  
vparisi@igsenergy.com  
mswhite@igsenergy.com

**Attorneys for Interstate Gas Supply, Inc.**

Colleen L. Mooney  
Ohio Partners for Affordable Energy  
231 West Lima St.  
Findlay, OH 45839-1793  
Cmooney2@columbus.rr.com

**Counsel for OP&E**

Douglas E. Hart  
441 Vine Street, Suite 4192  
Cincinnati, OH 45202  
dhart@douglasshart.com

**Attorney for The Greater  
Cincinnati Health Council and the  
Cincinnati Bell Telephone Company**

Thomas McNamee  
Devin Parram  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad St., 6<sup>th</sup> Floor  
Columbus, Ohio 43215  
Thomas.mcnamee@puc.state.oh.us  
Devin.parram@puc.state.oh.us

**Counsel for Staff of the Commission**

Edmund J. Berger  
6035 Red Winesap Way  
Dublin, OH 43016  
berger@occ.state.oh.us

**Attorney for the Ohio Consumers'  
Counsel**

Joseph M. Clark  
21 East State Street, Suite 1900  
Columbus, OH 43215  
joseph.clark@directenergy.com

**Attorney for Direct Energy Services,  
LLC, and Direct Energy Business, LLC**

Andrew J. Sonderman  
Kegler, Brown, Hill & Ritter LPA  
Capitol Square, Suite 1800  
65 East State Street  
Columbus, Ohio 43215  
asonderman@keglerbrown.com

**Attorney for People Working  
Cooperatively, Inc.**

Kimberly W. Bojko  
Mallory M. Mohler  
Carpenter Lipps & Leland LLP  
280 North High Street #1300  
Columbus, OH 43215  
Bojko@carpenterlipps.com  
Mohler@carpenterlipps.com

**Attorneys for The Kroger Co.**

Robert A. Brundrett  
33 N. High Street  
Columbus, Ohio 43215

**Attorneys for Ohio Manufacturers'  
Association**

M. Howard Petricoff, Trial Counsel  
Stephen M. Howard  
52 East Gay Street  
P. O. Box 1008  
Columbus, Ohio 43216-1008  
mhpetricoff@vorys.com  
smhoward@vorys.com

**Attorneys for Interstate Gas Supply, Inc.**

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

Summary: Memorandum Duke Energy Ohio Inc's Memorandum Contra Second Joint Application for Rehearing by OCC, The Kroger Company, OMA, and OP&E electronically filed by Carys Cochern on behalf of Watts, Elizabeth H. Ms.