

**In The
SUPREME COURT OF OHIO**

**The Office of the Ohio Consumers'
Counsel,**

Appellant,

v.

**The Public Utilities Commission of
Ohio,**

Appellee.

Case No. 08-0367

Appeal from the Public Utilities
Commission of Ohio, *In the Matter of
the Application of The Cincinnati Gas
& Electric Company to Modify its
Nonresidential Generation Rates to
Provide for Market-Based Standard
Service Offer Pricing and to Establish
an Alternative Competitive-Bid
Service Rate Option Subsequent to the
Market Development Period*, Case No.
03-93-EL-ATA, et al.

**MEMORANDUM CONTRA APPELLANT'S MOTION
FOR A STAY OF EXECUTION
SUBMITTED ON BEHALF OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Janine L. Migden-Ostrander

(Reg. No. 0002310)

Consumers' Counsel

Jeffrey L. Small

(Reg. No. 0061488)

Counsel of Record

Ann M. Hotz

(Reg. No. 0053070)

Assistant Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

614.466.8574 (telephone)

614.466.9475 (fax)

small@occ.state.oh.us

Counsel for Appellant,

The Office of the Ohio Consumers' Counsel

Nancy H. Rogers

(Reg. No. 0002375)

Attorney General of Ohio

Duane W. Luckey

(Reg. No. 0023557)

Section Chief

Thomas W. McNamee

(Reg. No. 0017352)

Counsel of Record

Sarah J. Parrot

(Reg. No. 0082197)

Assistant Attorneys General

Public Utilities Section

180 East Broad Street, 9th Floor

Columbus, Ohio 43215-3793

614.466.4397 (telephone)

614.644.8764 (fax)

duane.luckey@puc.state.oh.us

thomas.mcnamee@puc.state.oh.us

sarah.parrot@puc.state.oh.us

Counsel for Appellee,

The Public Utilities Commission of Ohio

FILED

JUN 06 2008

CLERK OF COURT
SUPREME COURT OF OHIO

Paul A. Colbert

(Reg. No. 0058582)

Counsel of Record

Associate General Counsel

Duke Energy Ohio, Inc.

155 East Broad Street, 21st Floor

Columbus, Ohio 43215

614.221.7551 (telephone)

614.221.7556 (fax)

paul.colbert@duke-energy.com

Rocco D'Ascenzo

(Reg. No. 0077651)

Counsel

Duke Energy Ohio, Inc.

139 East Fourth Street, 29 At. II

Cincinnati, Ohio 45201-0960

513.419.1852 (telephone)

513.419.1846 (fax)

**Counsel for Intervening Appellee,
Duke Energy Ohio, Inc.**

Michael Dortch

(Reg. No. 0043897)

Counsel of Record

Kravitz, Brown & Dortch, LLC

65 East State Street, Suite 200

Columbus, Ohio 43215

614.464.2000 (telephone)

614.464.2002 (fax)

mdortch@kravitzllc.com

**Counsel for Intervening Appellee,
Duke Energy Retail Sales, LLC**

TABLE OF CONTENTS

Page:

Table of Authorities	ii
Introduction	1
Statement of the Facts and Case	3
Argument	5
Proposition of Law No. I:	
OCC's failure to fulfill the statutory prerequisites of R.C. 4903.16 is fatal to its request for a stay order. <i>Ohio Consumers' Counsel v. Pub. Util. Comm'n</i> , 61 Ohio St. 3d 396, 403, 575 N.E.2d 157, 162 (1991).	5
Proposition of Law No. II:	
The OCC has not justified its request for stay and the Court should deny the request.	11
A. The OCC has not demonstrated a likelihood of success on the merits.	11
1. The components of the Duke Rate Stabilization Plan (RSP) are unique and not duplicative.	12
2. R.C. 4928.14 standard service offer is not traditional ratemaking.	16
3. The OCC cannot succeed on the merits.	18
B. The OCC will suffer no irreparable harm by virtue of the Commission's order.	18
C. A stay would cause harm to other parties and the public interest would not be served.	20
Conclusion	23
Proof of Service	24
Appendix	

TABLE OF AUTHORITIES

Page(s):

Cases

Ameritech Ohio v. Pub. Util. Comm'n, 79 Ohio St. 3d 1473, 682 N.E.2d 1002 (1997).....8

Cincinnati Bell Tel. Co. v. Pub. Util. Comm'n, 12 Ohio St. 3d 280, 466 N.E.2d 848
(1984)8

City of Columbus v. Pub. Util. Comm'n, 170 Ohio St. 105, 163 N.E.2d 167 (1959).....5, 7, 10

Cleavinger v. Hamilton Cty. Bd. of Comm'rs, 72 Ohio App. 3d 187, 594 N.E.2d 135
(1991).....7

Columbus & Southern Ohio Elec. Co. v. Pub. Util. Comm'n, 10 Ohio St. 3d 12, 460
N.E.2d 1108 (1984).....8

Keco Industries Inc., v. Cincinnati & Suburban Bell Tel. Co., 166 Ohio St. 254, 141
N.E.2d 465 (1957).....6, 10

MCI Telecommunications Corp. v. Pub. Util. Comm'n, 31 Ohio St. 3d 604, 510 N.E.2d
806 (1987).....11

Ohio Consumers' Counsel v. Pub. Util. Comm'n, 61 Ohio St. 3d 396, 575 N.E.2d 157
(1991).....5, 7, 10

Ohio Consumers' Counsel v. Pub. Util. Comm'n, 70 Ohio St. 3d 244, 638 N.E.2d 550
(1994).9

Ohio Consumers' Counsel v. Pub. Util. Comm'n, 107 Ohio St. 3d 1679, 839 N.E.2d 401
(2005).....6, 8

Ohio Consumers' Counsel v. Pub. Util. Comm'n, 109 Ohio St. 3d 1492, 848 N.E.2d 856
(2006)8

Ohio Consumers' Counsel v. Pub. Util. Comm'n, 111 Ohio St. 3d 300, 856 N.E.2d 213
(2006).....4, 19

Reading v. Pub. Util. Comm'n, 105 Ohio St. 3d 1496, 825 N.E.2d 621 (2005).....8

State ex rel. Geauga Bd. of Comm'rs v. Milligan, 100 Ohio St. 3d 366, 800 N.E.2d 361
(2003)7

State ex rel. Ocasek v. Riley, 54 Ohio St. 2d 488, 377 N.E.2d 792 (1978).7

Trademark Homes v. Avon Lake Bd. of Zoning Appeals, 92 Ohio App. 3d 214, 634
N.E.2d 685 (1993).....7

TABLE OF AUTHORITIES

Page(s):

Virginia Petroleum Jobbers Ass'n v. FPC, 259 F. 2d 921 (D.C. Cir. 1985)8

Statutes

Ohio Rev. Code Ann. § 2503.40 (Anderson 2008)..... 6

Ohio Rev. Code Ann. § 2505.06 (Anderson 2008)..... 7

Ohio Rev. Code Ann. § 2505.12 (Anderson 2008)..... 7

Ohio Rev. Code Ann. § 4903.10 (Anderson 2008)..... 9

Ohio Rev. Code Ann. § 4903.15 (Anderson 2008)..... 6, 9

Ohio Rev. Code Ann. § 4903.16 (Anderson 2008)..... 5, 6, 7, 20

Ohio Rev. Code Ann. § 4903.17 (Anderson 2008)..... 9

Ohio Rev. Code Ann. § 4903.18 (Anderson 2008).....9

Ohio Rev. Code Ann. § 4903.19 (Anderson 2008)..... 9

Ohio Rev. Code Ann. § 4928.14 (Anderson 2008).....17

Am.Sub.S.B. No. 221.....19

Other Authorities

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, Case No. 03-93-EL-ATA et al. (Entry) (December 9, 2003).....3

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, Case No. 03-93-EL-ATA et al. (Opinion and Order) (September 29, 2004)3

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, Case No. 03-93-EL-ATA et al. (Entry on Rehearing) (November 23, 2004)3

TABLE OF AUTHORITIES

Page(s):

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, Case No. 03-93-EL-ATA et al. (Order on Remand) (October 24, 2007)..... passim

In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period, Case No. 03-93-EL-ATA et al. (Entry on Rehearing) (December 19, 2007).....5

**In The
SUPREME COURT OF OHIO**

The Office of the Ohio Consumers’ Counsel,	:	Case No. 08-0367
	:	
Appellant,	:	Appeal from the Public Utilities Commission of Ohio, <i>In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period</i> , Case No.
v.	:	03-93-EL-ATA, <i>et al.</i>
The Public Utilities Commission of Ohio,	:	
Appellee.	:	

**MEMORANDUM CONTRA APPELLANT’S MOTION
FOR A STAY OF EXECUTION
SUBMITTED ON BEHALF OF APPELLEE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

Maintaining balance, ultimately, is the Public Utilities Commission of Ohio’s (“Commission”) charge in establishing the market-based standard service offer, just as it is with implementing the other aspects of electric restructuring. The Commission has been given a complex set of requirements, many of which conflict, but all of which must be implemented simultaneously. The Commission must assure that customers have the options they want available to them, in this case stabilizing prices over several years, but simultaneously support the development of the market in which prices vary hour-by-hour. It must assure customers reasonable, but yet also market-based, prices in a market where prices vary by orders of magnitude. It must provide customers with encouragement to

shop, but also provide them with a safe haven to return to if shopping does not work out. All of this must be done without creating subsidies either from the competitive side to the non-competitive side or vice-versa.

The Commission has accomplished its mission (after much examination, another hearing reconsidering, and then rejecting a stipulation, reweighing old evidence and taking new) and balanced all of these competing requirements. As might be expected given the complexity of the requirements and their internal conflicts, the mechanism to accomplish this is detailed and its many facets are inter-related. It is a fine balance of many parts.

The Office of the Ohio Consumers' Counsel ("OCC") asks this Court to upset the delicate balance. It asks this Court, quite improperly, to reach inside this structure and remove one part, the Infrastructure Maintenance Fund ("IMF"). Just as one could not remove one gear from a watch and expect it to run, staying the order below would defeat the statutory goals. It would create unpredictability where there is certainty today. It would move away from market-based pricing when the statute requires a market base. It would upset other cases not on appeal. It would create a risk of revealing information that is factually a trade secret. It would hamper shopping by making more charges unavoidable. Good sense requires the OCC's request be rejected.

Even if the OCC's motion did not create all of these harms, it is neither procedurally proper nor timely. The OCC does not offer the statutorily required bond. Further, this charge has been in place for two and a half years without the OCC asking for a stay before this Court. To claim that the charge now creates irreparable harm when the

OCC itself took no steps to stay the charge strains credulity. The motion should be denied.

STATEMENT OF THE FACTS AND CASE

The case below began on January 10, 2003, when Duke Energy Ohio, Inc. (“Duke”) filed an application for authority to modify its nonresidential generation rates to provide for a competitive market option for rates subsequent to its market development period (“MDP”). On December 9, 2003, the Commission consolidated the case with additional, related proceedings and requested that Duke file a rate stabilization plan (“RSP”) to stabilize prices following the termination of the MDP. *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA *et al.* (hereinafter “*Post-MDP Service Case*”) (Entry) (December 9, 2003), OCC’s Stay Appendix at 5.

On September 29, 2004, following a hearing, the Commission issued its opinion and order, approving a stipulated RSP with certain modifications. *Post-MDP Service Case* (Opinion and Order) (September 29, 2004). In response to Duke’s application for rehearing, which proposed various modifications to the stipulated RSP, the Commission issued, on November 23, 2004, an entry on rehearing in which it found that Duke’s proposed modifications were reasonable, ordered the collection of the same IMF

component at issue in this motion and, making certain further revisions, granted rehearing in part. *Post-MDP Service Case* (Entry on Rehearing) (November 23, 2004).

On March 18, 2005 and May 23, 2005, OCC appealed the Commission's opinion and order and entry on rehearing to the Court. OCC sought no stay of these orders before this Court although they included an IMF component at the same level that OCC now seeks to have this Court stay. On November 22, 2006, the Court upheld the Commission's resolution of most issues, but held that the Commission "failed to comply with R.C. 4903.09 by not providing record evidence and sufficient reasoning when it modified its order on rehearing" and "abused its discretion when it denied discovery regarding alleged side agreements." *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 323, 856 N.E.2d 213, 236 (2006). Pursuant to the Court's remand, the previously denied discovery was mandated and a hearing was held, beginning on March 19, 2007, to obtain the record evidence required by the Court. Following the hearing, which included the presentation of testimony and introduction of evidence, briefs were submitted. The Commission considered the record and pleadings before it and issued an order on remand on October 24, 2007. *Post-MDP Service Case* (Order on Remand) (October 24, 2007), OCC's Exhibit A.

The Commission found that the stipulated RSP should be rejected due to insufficient evidence to support a finding that the parties engaged in serious bargaining. *Id.* at 27. Instead, the Commission thoroughly reviewed Duke's RSP, as originally proposed in its application and subsequently modified by Duke prior to the initial hearing. *Id.* at 28. The Commission approved Duke's RSP with modifications and

allowed an IMF as a reasonable market-based charge to compensate for the pricing risk incurred by Duke in its provision of statutory provider of last resort (“POLR”) service. *Id.* at 37, 41.

On November 23, 2007, OCC filed an application for rehearing. The Commission issued an entry denying rehearing on December 19, 2007. *Post-MDP Service Case* (Entry on Rehearing) (December 19, 2007), OCC’s Exhibit B. On February 19, 2008, OCC appealed the Commission’s order on remand to the Court. On May 30, 2008, OCC filed a motion for a stay of execution of the enforcement of the Commission’s order on remand. Specifically, OCC seeks to stay implementation of the IMF.

ARGUMENT

Proposition of Law No. I:

OCC’s failure to fulfill the statutory prerequisites of R.C. 4903.16 is fatal to its request for a stay order. *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 61 Ohio St. 3d 396, 403, 575 N.E.2d 157, 162 (1991).

OCC has failed to commit to the financial undertaking that is required by R.C. 4903.16. Ohio Rev. Code Ann. § 4903.16 (Anderson 2008), App. at 3. By this omission, OCC has failed to satisfy the statutory procedural requirements necessary for issuance of a stay.

This Court has determined “that there is no automatic stay of any [PUCO] order, but that it is necessary for any person aggrieved thereby to take affirmative action, and if he does so he is required to post bond.” *City of Columbus v. Pub. Util. Comm’n*, 170 Ohio St. 105, 109-110, 163 N.E.2d 167, 171 (1959); *Keco Industries, Inc., v. Cincinnati*

& *Suburban Bell Tel. Co.*, 166 Ohio St. 254, 258, 141 N.E.2d 465, 468 (1957). Unless otherwise specified, an order of the Commission is effective immediately upon journalization. Ohio Rev. Code Ann. § 4903.15 (Anderson 2008), App. at 3. To obtain a stay of a Commission order, a party must follow the procedure described in R.C. 4903.16:

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the *appellant shall execute an undertaking, payable to the state* in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

Ohio Rev. Code Ann. § 4903.16 (Anderson 2008) (emphasis added), App. at 3.

OCC argues that R.C. 2505.12 operates to exempt it from R.C. 4903.16's requirement of posting a bond. Recently, OCC presented this same argument to this Court in seeking a stay. The Court, quite properly, denied OCC's request.¹ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 107 Ohio St. 3d 1679, 839 N.E.2d 401 (2005). OCC's argument is untenable regardless. The Court is empowered to issue a writ of supersedeas. Ohio Rev. Code Ann. § 2503.40 (Anderson 2008), App. at 1. Such

¹ Although the OCC presented this same argument to the Court in this case in support of its motion for a stay, and the Court denied that motion, the Court did so without a written decision. It is thus not possible to know all the reasons that influenced the Court in rejecting the OCC's motion for a stay. It is logical to conclude the Court did not find the argument persuasive.

writs are conditioned on the provision of a bond. Ohio Rev. Code Ann. § 2505.06 (Anderson 2008), App. at 1. Government agencies can be exempt from this supersedeas bond requirement. Ohio Rev. Code Ann. § 2505.12 (Anderson 2008), App. at 1. All this is true but irrelevant. A supersedeas bond is not required here.² A writ of supersedeas is not sought. Rather, OCC seeks a stay pursuant to R.C. 4903.16 and its requirements apply. There is no need to apply rules of statutory construction. These are simply two different matters.

R.C. 4903.16 provides *without exception* that an appellant seeking to stay the execution of a Commission order must execute an undertaking for the potential payment of damages if the Commission order is sustained. Ohio Rev. Code Ann. § 4903.16 (Anderson 2008), App. at 3. Indeed, the Court has directly concluded that the bond requirement applies to governmental appellants. In a case involving the OCC, the Court concluded that the OCC “did not follow the statutory procedure of asking the Supreme Court to stay an order of the Commission, *including posting a bond.*” *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 61 Ohio St. 3d 396, 403, 575 N.E.2d 157, 162 (1991) (emphasis added). Similarly, the Court has also imposed the bond requirement on a municipal appellant. *See City of Columbus v. Pub. Util. Comm’n*, 170 Ohio St. 105, 109,

² The undertaking described in R.C. 4903.16 is not a supersedeas bond, which is a bond required to take an appeal. A supersedeas bond only applies where a judgment was rendered for money damages. *Trademark Homes v. Avon Lake Bd. of Zoning Appeals*, 92 Ohio App. 3d 214, 634 N.E.2d 685 (1993); *Cleavinger v. Hamilton Cty. Bd. of Comm’rs*, 72 Ohio App. 3d 187, 594 N.E.2d 135 (1991). A supersedeas bond temporarily supersedes the trial court’s damages judgment while the appeal is pending, and is granted *as a matter of right* where the bond is adequate and proper. OCC does not claim it is entitled to a stay as of right, which is provided in both Civ. R. 62 and R.C. 2505.09. *State ex rel. Geauga Bd. of Comm’rs v. Milligan*, 100 Ohio St. 3d 366, 800 N.E.2d 361 (2003); *State ex rel. Ocasek v. Riley*, 54 Ohio St. 2d 488, 377 N.E.2d 792 (1978).

163 N.E.2d 167, 171 (1959) (finding that the statutory procedures control the process for appealing final Commission orders and “any stay of an order of the commission is dependent on the execution of an undertaking by the appellant”).

R.C. 4903.16 obviously does not contemplate granting a stay as a routine matter, and is far from a matter of right for appellants. It is, after all, an extraordinary remedy that OCC seeks. *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1985). Indeed, notwithstanding frequent requests, this Court has rarely³ seen fit to grant a stay over a Commission order pending appeal. See *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 109 Ohio St. 3d 1492, 848 N.E.2d 856 (2006) (stay denied); *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 107 Ohio St. 3d 1679, 839 N.E.2d 401 (2005) (stay denied); *Reading v. Pub. Util. Comm’n*, 105 Ohio St. 3d 1496, 825 N.E.2d 621 (2005) (stay denied); *Ameritech Ohio v. Pub. Util. Comm’n*, 79 Ohio St. 3d 1473, 682 N.E.2d 1002 (1997) (stay denied). On the contrary, the Court’s standard for granting a stay (discussed further in Proposition of Law No. II, *infra*) is a difficult standard for appellants to satisfy.

R.C. 4903.16 does not stand alone but is part of an integrated set of provisions within R.C. Chapter 4903 designed by the General Assembly to address the effect of

³ OCC cites four instances where stays were granted. Of these, three (*Cincinnati Bell Tel. Co. v. Pub. Util. Comm’n*, 12 Ohio St. 3d 280, 466 N.E.2d 848 (1984) (also cited by Supreme Court number 83-392 as though it were a different case); *Columbus & Southern Ohio Elec. Co. v. Pub. Util. Comm’n*, 10 Ohio St. 3d 12, 460 N.E.2d 1108 (1984) (also cited by Supreme Court case number 83-461 as though it too were a different case); and Supreme Court case number 85-390 in which a stay was granted but the case ultimately dismissed by OCC) were decided under the leadership of former Chief Justice Celebrezze. That Court had a significantly more expansive view of the applicability of stays of Commission orders than Courts before or since. The more restrictive, modern view is correct.

Commission orders and to create a comprehensive appellate process for exclusive judicial review by this Court. For example, in R.C. Chapter 4903, the General Assembly has expressly provided that Commission orders are effective immediately. Ohio Rev. Code Ann. § 4903.15 (Anderson 2008), App. at 3. In certain cases, the General Assembly has provided that an application for rehearing can delay the effective date of a Commission order while the application remains pending.⁴ Ohio Rev. Code Ann. § 4903.10 (Anderson 2008), App. at 1. Moreover, the General Assembly has provided for a detailed process for a stay of execution by this Court. Those integrated provisions include a specific provision for stay orders affecting rates and the possible remedy of directing a trustee to hold funds associated with a rate order pending appeal, R.C. 4903.17; accounting requirements associated with stay orders affecting rates including provision for penalties, R.C. 4903.18; and specified obligations for disposition by utility companies of funds relating to any Court-ordered stay of execution and a defined process for unclaimed funds associated with such a Court-ordered stay, R.C. 4903.19. *See* Ohio Rev. Code Ann. §§ 4903.17- 4903.19 (Anderson 2008), App. at 3-4.

In an effort to sidestep the requirements of R.C. 4903.16, OCC argues that the Court should utilize the escrow option found in R.C. 4903.17. That statute is found immediately following R.C. 4903.16 and, in that context, enables the Court to establish such an escrow in cases where the Court stays or suspends the order or decision of the Commission. Ohio Rev. Code Ann. § 4903.17 (Anderson 2008), App. at 3. As is evident

⁴ Of course the rehearing process is a jurisdictional prerequisite to filing an appeal before this Court. *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 70 Ohio St. 3d 244, 247, 638 N.E.2d 550, 553 (1994).

from the text of that provision, R.C. 4903.17's escrow option is merely a particular form of stay relief available when the Court decides, pursuant to R.C. 4903.16, to stay execution of a Commission order involving customer rates. Consequently, asking for a rate escrow does not obviate or sidestep the requirements of R.C. 4903.16 (as argued by OCC) but that option becomes available where R.C. 4903.16 is met and the Court decides to issue a stay order based on satisfaction of R.C. 4903.16. Because OCC fails to satisfy the statutory requirement, the Court should deny OCC's motion.

If the General Assembly had intended to create an exception in R.C. 4903.16 for governmental appellants, it could have easily done so. It did not. The Commission recognizes this Court's power to stay the Commission's order in connection with appeals, upon satisfaction of the applicable statutory process found in R.C. 4903.16. And this Court has consistently held that any party seeking a stay of a Commission order must strictly comply with the statutory standards of R.C. 4903.16 and persuade the Supreme Court of Ohio to grant a stay. *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 61 Ohio St. 3d 396, 575 N.E.2d 157 (1991); *City of Columbus v. Pub. Util. Comm'n*, 170 Ohio St. 105, 163 N.E.2d 167 (1959); *Keco Industries Inc., v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957). The Court should honor its prior decisions and uphold the plain requirements of R.C. 4903.16.

Proposition of Law No. II:

The OCC has not justified its request for stay and the Court should deny the request.

In addition to failing to meet the above jurisdictional requirements, OCC has failed to justify a stay of execution under the four substantive criteria⁵ frequently suggested for granting a stay.

These standards should include consideration of whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits; whether the party seeking the stay has shown that without a stay irreparable harm will be suffered; whether or not, if the stay is issued, substantial harm to other parties would result; and, above all in these types of cases, where lies the interest of the public.

MCI Telecommunications Corp. v. Pub. Util. Comm'n, 31 Ohio St. 3d 604, 606, 510 N.E.2d 806, 807 (1987) (Douglas, J., dissenting). OCC's request fails under this standard.

A. The OCC has not demonstrated a likelihood of success on the merits.

The OCC argument is simple, easy to understand, and wrong. In simplest terms, the OCC reasons that the IMF component of the Duke standard offer rate is either duplicative or not based on cost. The record reveals that the charge is not duplicative and does represent cost.⁶ OCC is wrong on the law and the facts and has no chance of success on the merits.

⁵ These criteria arise from the reasoning in a dissent and are not controlling on the Court in any respect. They have been used by parties many times subsequently as they provide a clear exposition, but their use is only for clarity. The Court is not bound to this analytic structure and we do not mean to suggest otherwise.

⁶ Albeit economic, not accounting, cost.

1. The components of the Duke Rate Stabilization Plan (RSP) are unique and not duplicative.

The rate aspects of the Duke RSP consist of five components. Each component is unique and intended to capture a part of what is necessary to “maintain essential electric service to consumers” as is the Commission’s duty under R.C. 4928.14(A). These parts are: “little g”; fuel and purchased power (“FPP”); annually adjusted component (“AAC”); system reliability tracker (“SRT”); and IMF. There is, by design, no overlap between them. Indeed, avoiding the overlap about which the OCC is concerned is the point of having the components at all. The components are a means to understand what is being paid for and how much is being paid for it. An examination of the components *seriatim* reveals this.

The “little g”⁷ component is the generation charge that came out of the original unbundling of Duke rates as a result of the restructuring mandated by SB3 in 1999. *Post-MDP Service Case* (Order on Remand at 29) (October 24, 2007), OCC’s Exhibit A. It reflects all the generation-related payments in the rates before restructuring. This would be fuel, purchased power, maintenance and operation of the plants as they were in the pre-2000 rates. Under the plan, little g is quite sensibly paid by those who buy electricity from Duke and not by those who do not. It is *avoidable* by those who shop for electricity from another source.

⁷ The term “little g” implies that there was once a “big g” and indeed there was. Big g consisted of little g plus the statutorily mandated transition charges associated with generation (sometimes called “stranded costs”). These transition charges were billed separately.

Time marches on and the generation amounts captured by little g are no longer adequate to “maintain essential electric service to consumers” as necessitated by the words of the statute. The next two components are designed to capture aspects of how generation requirements have changed since the rates unbundled in 2000 were established. Both use the payment levels already included in little g as a base for measurement. Thus the FPP would include the increase in fuel, purchased power, and emission allowances (these are needed to produce electricity from any unit that emits sulfur dioxide) above that seen in 2000. *Post-MDP Service Case* (Order on Remand at 30, 34) (October 24, 2007), OCC’s Exhibit A. Similarly, expenditures for homeland security, environmental compliance (this does not include emission allowances), and taxes have changed markedly. Increases to these costs of production of generation from the company’s existing plant fleet, over and above those already captured through the little g, are encompassed in the AAC. *Post-MDP Service Case* (Order on Remand at 33) (October 24, 2007), OCC’s Exhibit A. While there are certainly other increases in the company’s cost of production that have occurred since 2000, these are reflected, if at all, through the IMF, which will be discussed *infra*. Taken together, the FPP and the AAC reflect many of the increases in production cost the company has experienced since 2000. Thus, little g, the FPP, and the AAC reflect some of the cost for providing power to customers currently. As costs of providing power to customers today, they are paid by customers who receive power today and are not paid by those who obtain their power elsewhere. They are *avoidable* by shoppers.

There is another cost component associated with providing power. It is not sufficient to have access to merely enough energy to meet today's need. It is necessary, to maintain reliability, that the company have access to sufficient reserves, that is to say, that the company be able to control a sufficient quantity of productive plant to provide a reserve (for Duke, this is about 15%) above historic peak demand to be able to supply increases in demand when they appear. This does not reflect the price of the power that would be available, but just the availability of productive plant to produce power at all. Having reserves places the company's customers, both those who buy from the company today and those who could return to the company at any time, a certain, and favored, place in line to buy power at times of high demand. This reserve requirement relates to both the customers who are being served and those who could return to utility service without warning. The purpose of the SRT component is to do exactly this. *Post-MDP Service Case* (Order on Remand at 32) (October 24, 2007), OCC's Exhibit A. It is the payment that allows the company to maintain these vital reserves. Controlling the availability of these reserves does not also control the price of power produced by those reserves. That is a different matter. Controlling the reserves assures that the company, during times of tight supply, *will be able to obtain power at all*. Those who have no reserves will be unable to obtain power, at any price, during a supply crunch. Thus, having these reserves is a benefit to both those who currently shop for power (but could return to the company's standard offer service when the market becomes tight) and those who stay with the company. Being a benefit to all customers, whether shoppers or not, the SRT is payable by all. The SRT is unavoidable.

One slight proviso should be added here. The order on appeal does allow industrial and commercial customers who waive the statutory right⁸ to return to the standard service offer to agree with the company that they will not return to the standard service offer no matter what. Such customers bear a significant risk. Should the supplier for such a customer fail when the market is stressed and supplies are extremely tight, the customer would either have to pay what would certainly be extremely high market prices for power or perhaps face a situation where no power is available at any price. Because the utility buys no reserves for these customers, it incurs no cost, and, thus there is no cost for such customers to pay. For such a customer, the SRT is *avoidable*. *Post-MDP Service Case* (Order on Remand at 32) (October 24, 2007), OCC's Exhibit A.

This brings us to the last component, the IMF. To understand the IMF it is necessary to understand what is really being proposed by the company and what might have been. The company has agreed to provide power at a constrained price over a period of years. While the company could have simply moved to a straight market price for its power, it offered to sell its power within the constraints of this plan instead. To the extent that there is a gulf between the stabilized price available under this plan and the day-to-day, hour-by-hour fluctuations in the market price for power, the company is exposed to a large price risk. *Post-MDP Service Case* (Order on Remand at 36-38) (October 24, 2007), OCC's Exhibit A. Its stabilized price might be very much lower than the price the company might have gotten by simply participating in the market. Indeed, the record shows that the stabilized price, including the IMF, has resulted in a cost of

⁸ See Ohio Rev. Code Ann. § 4928.14(C) (Anderson 2008), App. at 5.

electricity that has been very reasonable compared to the fluctuating market. *Post-MDP Service Case* (Order on Remand at 37 n.12) (October 24, 2007), OCC's Exhibit A. The record shows just how large a risk the company absorbed. Over the term of the plan, the rates paid by customers have been twenty-eight percent below average market prices. *Post-MDP Service Case* (Order on Remand at 40) (October 24, 2007) (discussing testimony of Rose), OCC's Exhibit A. The IMF is the price paid for stability and predictability, in the words of the Commission "to compensate for the pricing risk incurred by Duke in its provision of statutory POLR service." *Post-MDP Service Case* (Order on Remand at 37) (October 24, 2007), OCC's Exhibit A. It has been a truly excellent bargain for customers.

In sum, each component of the Duke plan is individual. There is no overlap whatsoever between any of them. OCC's criticism to the contrary does not match the facts.

2. R.C. 4928.14 standard service offer is not traditional ratemaking.

The OCC argues that the IMF does not represent a cost and therefore cannot be included in the standard service offer. The argument reflects confusion about the controlling law.

Under traditional ratemaking, that is before SB3, generation ratemaking was largely a matter of accounting. The company books were examined to determine an investment amount. This accounting determination was termed "rate base." A rate of

return, based mostly⁹ on the interest rates of the debt carried on the company's books, was applied to that rate base. To this product, the company's costs, as reflected in its books, were added to give a "revenue requirement" which was then used to set specific rates. The company was entitled to cost of production plus a return on investment.

None of this traditional system has anything to do with the standard service offer under R.C. 4928.14(A) and (B). *Post-MDP Service Case* (Order on Remand at 37) (October 24, 2007), OCC's Exhibit A. A review of those sections reveals that neither of them even includes the word "cost." Instead of accounting cost, the polestar for the standard service offer is market, either market-based in R.C. 4928.14(A) or competitively bid in R.C. 4928.14(B). The concept of totaling a list of accounts to set a rate is *gone*. OCC has yet to adjust to the new regime.

It is obvious that the Commission has continued to use components that have a basis in accounting in the plan. This is driven by a desire for clarity not because of any legal requirement. Under current law, the company is entitled, not to a return of its accounting cost, but rather to a market-based payment, regardless of the accounting cost of production. Ohio Rev. Code Ann. § 4928.14(A) (Anderson 2008), App. at 4. Concomitantly, ratepayers no longer have a right to buy power at cost plus a return on investment; rather, they have a right to buy power at market-based rates. *Id.* The OCC may view this as a poor decision, but it was the General Assembly's decision and cannot be changed in this venue.

⁹ There was also a return on equity component, which was the only non-accounting factor used in the rate-making formula.

This discussion points to the variation between the concept of “cost” used by accountants versus that used by economists. An economist would include opportunity costs, bearing risk and such as “costs,” while an accountant would not. The General Assembly essentially moved from the accounting use of the term to the economic use of the term. The IMF would reflect a cost in the economic sense, but does not appear as a tally in a book of account and thus would not represent a “cost” to an accountant.

3. The OCC cannot succeed on the merits.

Thus, neither of the OCC arguments has merit. The first is factually incorrect and the second misunderstands the current law. Having no argument that can succeed, the Court should reject the requested stay.

B. The OCC will suffer no irreparable harm by virtue of the Commission’s order.

Because the OCC has failed to show any likelihood of success in overturning the Commission’s order, it cannot claim any harm in awaiting the outcome of this appeal. Further, it is difficult to understand why there would be harm now at this late date. The same IMF rate has been in force for the entire post-market development period, that is to say, since the beginning of 2006. When the IMF was established initially, although OCC appealed that decision, *it did not seek a stay from this Court at that time*. To argue irreparable harm from a charge that has existed for years, *when the OCC had this very means available to it to stay that charge during the entire period*, strains credulity.

The OCC may suggest that the passage of the new electric regulation bill (SB 221) changes the situation. A portion of that bill provides, in pertinent part:

Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code.

Am.Sub.S.B. No. 221 (R.C. 4928.141 becomes effective on July 1, 2008), App. at 5. The OCC may be concerned that the IMF will stay in force for a period after the underlying plan would otherwise have ended at year's end (assuming that the Commission has not approved a new plan at that time). While one might argue that this legislative action is a tacit endorsement of the existing plans, one need not go so far to recognize the futility of the OCC's request. Even if the Commission's order is stayed, then its prior order¹⁰ must be effective. That is, after all, what a stay means. The prior order also required customers to pay exactly the same IMF amount.¹¹ Thus, any plan that would continue to apply to Duke under the new section 4928.141(A) after December 31, 2008, because the Commission has not approved a new standard service offer, will include the IMF whether or not a stay is ordered. A stay is therefore a vain act in this regard and the Court should not grant it.

¹⁰ This is to say the Commission's orders approving the stipulated RSP already appealed to this Court in *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213 (2006).

¹¹ Although the balance of the order was different and inferior in several respects as will be discussed *infra*.

C. A stay would cause harm to other parties and the public interest would not be served.

The OCC's request is framed in terms of stopping the IMF from continuing. This is not an option in isolation. The statute speaks of staying the order, not parts of the order. Specifically, it states:

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay *execution of such order* unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the *enforcement of the order* complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by *the order* complained of, in the event *such order* is sustained.

Ohio Rev. Code Ann. § 4903.16 (Anderson 2008) (emphasis added), App. at 3. A simple reading of this section shows that it speaks entirely in terms of staying “the order.” The logic of this reading is compelling. A small example shows this. Take a very simple situation where the Commission issues an order doing one thing, raising a rate fifty percent. If the Court were to stay a part of that order, say half again so that only twenty-five percent of the increase went into effect, the Court would have, effectively, set a rate and that the Court cannot do. Logic supports the plain reading of the statute. The authorization is, therefore, to stay all of it or none of it.

Staying the entirety of the order would have very negative consequences. Putting the old order back into effect would hamper shopping because fewer

charges would be avoidable. *Post-MDP Service Case* (Order on Remand at 34-35, 37-38) (October 24, 2007), OCC's Exhibit A. Under the prior order, a portion of "little g" would have been unavoidable by most customers, even some who obtained power elsewhere. *Post-MDP Service Case* (Order on Remand at 29) (October 24, 2007), OCC's Exhibit A. Reinstating this would be harmful to efforts to support shopping. The prior order included an only partially avoidable rate stabilization charge. *Post-MDP Service Case* (Order on Remand at 30) (October 24, 2007), OCC's Exhibit A. Again, unavoidable charges hamper shopping and should only be used where necessary. The order readopts a process for customers who return to Duke's service after having shopped elsewhere. *Post-MDP Service Case* (Order on Remand at 38-39) (October 24, 2007), OCC's Exhibit A. Staying this aspect of the order places that process in limbo. The Commission made a factual determination, after much review and examination, that certain information constituted trade secrets and should be maintained confidentially. *Post-MDP Service Case* (Order on Remand at 17) (October 24, 2007), OCC's Exhibit A. Staying that aspect of the order would perhaps reverse that involved factual determination and render that information available to the public. Once revealed, the damage is irreversible. The levels of two components have been set in other proceedings by agreement and without appeal. *Post-MDP Service Case* (Order on Remand at 30 (FPP), 32 (SRT)) (October 24, 2007), OCC's Exhibit A. It is unclear what the effect of a stay of the order adopting these resolutions would be. Thus,

granting OCC's request for relief would result in confusion, harm to shopping, and irrevocable injury.

All of these harms would flow from a stay of the order but the primary reason to reject the OCC's request is more basic. The OCC is simply wrong. The IMF should be charged. It is the primary mechanism¹² that moves the rates from being historic, accounting-based rates to the market-based rates that R.C. 4928.14(A) requires. It is the payment made to the company to recompense it for the very real risk that it takes on by agreeing to provide power at relatively constrained rates over a period of years rather than trying its fortunes in the market.

The public has benefitted, is benefitting, and should continue to benefit from the relative stability provided by this plan. Staying the Commission order would create confusion and chaos. The public interest is clear and OCC's motion should be rejected.

¹² Some of the cost adjustments do this to an extent as well. *Post-MDP Service Case* (Order on Remand at 36-37) (October 24, 2007), OCC's Exhibit A. For example, changes in fuel cost tend to be correlated with market prices for energy. Adjustments of this sort act as a partial proxy for market prices to the extent of this correlation.

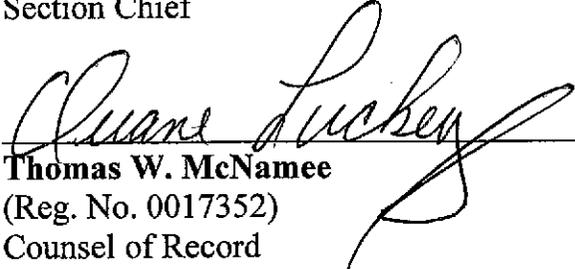
CONCLUSION

The OCC has failed to offer the statutorily required bond. Further, the OCC has failed to justify its request for a stay. The OCC's motion for a stay of execution is harmful, procedurally improper, and untimely. The OCC's motion should be denied.

Respectfully submitted,

Nancy H. Rogers
(Reg. No. 0002375)
Attorney General of Ohio

Duane W. Luckey
(Reg. No. 0023557)
Section Chief

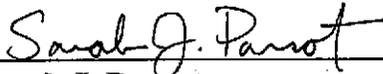


Thomas W. McNamee

(Reg. No. 0017352)
Counsel of Record
Sarah J. Parrot
(Reg. No. 0082197)
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, Ohio 43215-3793
614.466.4397 (telephone)
614.644.8764 (fax)
duane.luckey@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us
sarah.parrot@puc.state.oh.us

PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Memorandum Contra Appellant's Motion for a Stay of Execution** submitted on behalf of Appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, on the following parties of record, this 6th day of June 2008.



Sarah J. Parrot
Assistant Attorney General

PARTIES OF RECORD:

Janine L. Migden-Ostrander
Jeffrey L. Small
Ann M. Hotz
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
small@occ.state.oh.us

Michael Dortch
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, Ohio 43215
mdortch@kravitzllc.com

Paul A. Colbert
Duke Energy Ohio, Inc.
155 East Broad Street, 21st Floor
Columbus, Ohio 43215
paul.colbert@duke-energy.com

Rocco D'Ascenzo
Duke Energy Ohio, Inc.
139 East Fourth Street, 29 At. II
Cincinnati, Ohio 45201-0960

APPENDIX

Table of Contents
Appendix

Ohio Rev. Code Ann. § 2503.40 (Anderson 2008)..... 1

Ohio Rev. Code Ann. § 2505.06 (Anderson 2008)..... 1

Ohio Rev. Code Ann. § 2505.12 (Anderson 2008)..... 1

Ohio Rev. Code Ann. § 4903.10 (Anderson 2008)..... 2

Ohio Rev. Code Ann. § 4903.15 (Anderson 2008)..... 3

Ohio Rev. Code Ann. § 4903.16 (Anderson 2008)..... 3

Ohio Rev. Code Ann. § 4903.17 (Anderson 2008)..... 3

Ohio Rev. Code Ann. § 4903.18 (Anderson 2008).....4

Ohio Rev. Code Ann. § 4903.19 (Anderson 2008)..... 4

Ohio Rev. Code Ann. § 4928.14 (Anderson 2008).....4

Excerpt from Amended Substitute Senate Bill 2215

O.R.C. 2503.40 Issuance of Writs.

In addition to the original jurisdiction conferred by Section 2 of Article IV, Ohio Constitution, the supreme court when in session, and on good cause shown, may issue writs of supersedeas in any case, and other writs not specially provided for and not prohibited by law, when necessary to enforce the administration of justice.

O.R.C. 2505.06 Bond on administrative-related appeal.

Except as provided in section 2505.12 of the Revised Code, no administrative-related appeal shall be effective as an appeal upon questions of law and fact until the final order appealed is superseded by a bond in the amount and with the conditions provided in sections 2505.09 and 2505.14 of the Revised Code, and unless such bond is filed at the time the notice of appeal is required to be filed.

O.R.C. 2505.12 No supersedeas bond required for certain appeals.

If a supersedeas bond has been executed and filed and the surety is one other than a surety company, the clerk of the court with which the bond has been filed, upon request, shall issue a certificate that sets forth the fact that the bond has been filed and that states the style and number of the appeal, the amount of the bond, and the sureties on it. Such a certificate may be filed in the office of the county recorder of any county in which the sureties may own land, and, when filed, the bond shall be a lien upon the land of the sureties in such county. The lien shall be extinguished upon the satisfaction, reversal, or vacation of the final order, judgment, or decree involved, or by an order of the court that entered the final order, judgment, or decree, that releases the lien or releases certain land from the operation of the lien.

The clerk, upon request, shall issue a notice of discharge of such a lien, which may be filed in the office of any recorder in whose office the certificate of lien was filed. Such notice shall state that the final order, judgment, or decree involved is satisfied, reversed, or vacated, or that an order has been entered that releases the lien or certain land from the operation of the lien. Such recorder shall properly keep and file such certificates and notices as are filed with the recorder and shall index them in the book or record provided for in section 2937.27 of the Revised Code.

The fee for issuing such a certificate or notice shall be as provided by law, and shall be taxed as part of the costs of the appeal. A county recorder shall receive a base fee of fifty cents for filing and indexing such a certificate, which fee shall cover the filing and the entering on the index of the notice and a housing trust fund fee of fifty cents pursuant to section 317.36 of the Revised Code.

O.R.C. 4903.10 Application for Rehearing:

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.

Notwithstanding the preceding paragraph, in any uncontested proceeding or, by leave of the commission first had in any other proceeding, any affected person, firm, or corporation may make an application for a rehearing within thirty days after the entry of any final order upon the journal of the commission. Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; and,

(B) The interests of the applicant were not adequately considered in the proceeding.

Every applicant for rehearing or for leave to file an application for rehearing shall give due notice of the filing of such application to all parties who have entered an appearance in the proceeding in the manner and form prescribed by the commission.

Such application shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

Where such application for rehearing has been filed before the effective date of the order as to which a rehearing is sought, the effective date of such order, unless otherwise ordered by the commission, shall be postponed or stayed pending disposition of the matter by the commission or by operation of law. In all other cases the making of such an application shall not excuse any person from complying with the order, or operate to stay or postpone the enforcement thereof, without a special order of the commission.

Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefor is made to appear. Notice of such rehearing shall be given by regular mail to all parties who have entered an appearance in the proceeding.

If the commission does not grant or deny such application for rehearing within thirty days from the date of filing thereof, it is denied by operation of law.

If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take

any evidence that, with reasonable diligence, could have been offered upon the original hearing.

If, after such rehearing, the commission is of the opinion 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; otherwise such order shall be affirmed. An order made after such rehearing, abrogating or modifying the original order, shall have the same effect as an original order, but shall not affect any right or the enforcement of any right arising from or by virtue of the original order prior to the receipt of notice by the affected party of the filing of the application for rehearing.

No cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for a rehearing.

O.R.C. 4903.15 Orders effective immediately - Notice:

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

O.R.C. 4903.16 Stay of Execution:

A proceeding to reverse, vacate, or modify a final order rendered by the public utilities commission does not stay execution of such order unless the supreme court or a judge thereof in vacation, on application and three days' notice to the commission, allows such stay, in which event the appellant shall execute an undertaking, payable to the state in such a sum as the supreme court prescribes, with surety to the satisfaction of the clerk of the supreme court, conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid by any person, firm, or corporation for transportation, transmission, produce, commodity, or service in excess of the charges fixed by the order complained of, in the event such order is sustained.

O.R.C. 4903.17 Order in Case of Stay:

The supreme court, in case it stays or suspends the order or decision of the public utilities commission in any matter affecting rates, joint rates, fares, tolls, rentals, charges, or classifications, may also by order direct the public utility or railroad affected to pay into the hands of a trustee to be appointed by the court, to be held until the final determination of the proceeding, under such conditions as the court prescribes, all sums of money

collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended.

O.R.C. 4903.18 Order to keep excess accounts pending review.

In case the supreme court stays or suspends any order or decision of the public utilities commission lowering any rate, joint rate, fare, toll, rental, charge, or classification, the commission, upon the execution and approval of the suspending bond required by section 4903.16 of the Revised Code, may require the public utility or railroad affected, under penalty of the immediate enforcement of the order or decision of the commission, pending review, to keep such accounts, verified by oath, as are, in the judgment of the commission, sufficient to show the amounts being charged or received by such public utility or railroad in excess of the charges allowed by the order or decision of the commission, together with the names and addresses of the corporations or persons to whom overcharges will be refundable in case the charges made by the public utility or railroad pending review are not sustained by the supreme court.

O.R.C. 4903.19 Disposition of monies charged in excess:

Upon the final decision by the supreme court upon an appeal from an order or decision of the public utilities commission, all moneys which the public utility or railroad has collected pending the appeal, in excess of those authorized by such final decision, shall be promptly paid to the corporations or persons entitled to them, in such manner and through such methods of distribution as are prescribed by the court. If any such moneys are not claimed by the corporations or persons entitled to them within one year from the final decision of the supreme court, the trustees appointed by the court shall give notice to such corporations or persons by publication, once a week for two consecutive weeks, in a newspaper of general circulation published in Columbus, and in such other newspapers as are designated by such trustee, said notice to state the names of the corporations or persons entitled to such moneys and the amount due each corporation or person. All moneys not claimed within three months after the publication of said notice shall be paid by the public utility or railroad, under the direction of such trustee, into the state treasury for the benefit of the general fund. The court may make such order with respect to the compensation of the trustee as it deems proper.

O.R.C. 4928.14 Market-based standard service offer.

(A) After its market development period, an electric distribution utility in this state shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a market-based standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. Such offer shall be filed with the public utilities commission under section 4909.18 of the Revised Code.

(B) After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric

service the price of which is determined through a competitive bidding process. Prior to January 1, 2004, the commission shall adopt rules concerning the conduct of the competitive bidding process, including the information requirements necessary for customers to choose this option and the requirements to evaluate qualified bidders. The commission may require that the competitive bidding process be reviewed by an independent third party. No generation supplier shall be prohibited from participating in the bidding process, provided that any winning bidder shall be considered a certified supplier for purposes of obligations to customers. At the election of the electric distribution utility, and approval of the commission, the competitive bidding option under this division may be used as the market-based standard offer required by division (A) of this section. The commission may determine at any time that a competitive bidding process is not required, if other means to accomplish generally the same option for customers is readily available in the market and a reasonable means for customer participation is developed.

(C) After the market development period, the failure of a supplier to provide retail electric generation service to customers within the certified territory of the electric distribution utility shall result in the supplier's customers, after reasonable notice, defaulting to the utility's standard service offer filed under division (A) of this section until the customer chooses an alternative supplier. A supplier is deemed under this division to have failed to provide such service if the commission finds, after reasonable notice and opportunity for hearing, that any of the following conditions are met:

- (1) The supplier has defaulted on its contracts with customers, is in receivership, or has filed for bankruptcy.
- (2) The supplier is no longer capable of providing the service.
- (3) The supplier is unable to provide delivery to transmission or distribution facilities for such period of time as may be reasonably specified by commission rule adopted under division (A) of section 4928.06 of the Revised Code.
- (4) The supplier's certification has been suspended, conditionally rescinded, or rescinded under division (D) of section 4928.08 of the Revised Code.

**Excerpt from:
(127th General Assembly) (Amended Substitute Senate Bill Number 221)**

AN ACT

To amend sections 4905.31, 4928.01, 4928.02, 4928.05, 4928.09, 4928.14, 4928.17, 4928.20, 4928.31, 4928.34, 4928.35, 4928.61, 4928.67, 4929.01, and 4929.02; to enact sections 9.835, 3318.112, **4928.141**, 4928.142, 4928.143, 4928.144, 4928.145, 4928.146, 4928.151, 4928.24, 4928.621, 4928.64, 4928.65, 4928.66, 4928.68, 4928.69, and 4929.051; and to repeal sections 4928.41, 4928.42, 4928.431, and 4928.44 of the Revised Code to revise state energy policy to address electric service price regulation, establish

alternative energy benchmarks for electric distribution utilities and electric services companies, provide for the use of renewable energy credits, establish energy efficiency standards for electric distribution utilities, require greenhouse gas emission reporting and carbon dioxide control planning for utility-owned generating facilities, authorize energy price risk management contracts, and authorize for natural gas utilities revenue decoupling related to energy conservation and efficiency.

Sec. 4928.141. (A) Beginning January 1, 2009, an electric distribution utility shall provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service. To that end, the electric distribution utility shall apply to the public utilities commission to establish the standard service offer in accordance with section 4928.142 or 4928.143 of the Revised Code and, at its discretion, may apply simultaneously under both sections, except that the utility's first standard service offer application at minimum shall include a filing under section 4928.143 of the Revised Code. Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code. Notwithstanding the foregoing provision, the rate plan of an electric distribution utility shall continue for the purpose of the utility's compliance with this division until a standard service offer is first authorized under section 4928.142 or 4928.143 of the Revised Code, and, as applicable, pursuant to division (D) of section 4928.143 of the Revised Code, any rate plan that extends beyond December 31, 2008, shall continue to be in effect for the subject electric distribution utility for the duration of the plan's term. A standard service offer under section 4928.142 or 4928.143 of the Revised Code shall exclude any previously authorized allowances for transition costs, with such exclusion being effective on and after the date that the allowance is scheduled to end under the utility's rate plan.

(B) The commission shall set the time for hearing of a filing under section 4928.142 or 4928.143 of the Revised Code, send written notice of the hearing to the electric distribution utility, and publish notice in a newspaper of general circulation in each county in the utility's certified territory. The commission shall adopt rules regarding filings under those sections.