

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, : **No. 08-0367**
: :
: :
Appellant, : :
: :
v. : :
: :
The Public Utilities Commission of Ohio, : :
: :
Appellee. : :
: :

MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION FOR A STAY OF EXECUTION SUBMITTED BY DUKE ENERGY OHIO, INC.

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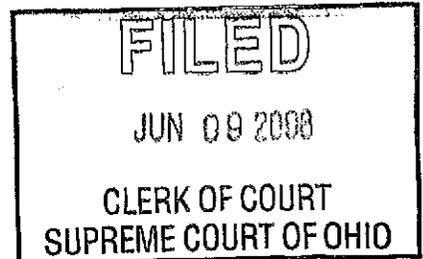
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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE FACTS AND THE CASE.....	3
ARGUMENT.....	6
Proposition of Law No. I.	6
OCC failed to comply with statutory mandates and its motion is procedurally flawed	6
OCC is not likely to prevail on the merits.....	7
There is no showing of irreparable harm and indeed, if the stay is issued, greater harm could result.....	12
The public interest is best served by denying OCC’s Motion for Stay of Execution.....	13
Proposition of Law No. II.	15
OCC’s Motion is barred by collateral estoppel and <i>res judicata</i> and is untimely.....	15
Proposition of Law No. III.	18
Prior precedent does not support OCC’s Motion for Stay of Execution	18
CONCLUSION.....	19
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Cincinnati Gas & Elec. Co. v. PUC</i> , (2004), 103 Ohio St. 3d 398	15
<i>Columbus & Southern Ohio Electric Co. v. Public Utilities Commission of Ohio</i> , (1984), 10 Ohio St. 3d 12.....	18
<i>Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.</i> , (1957), 166 Ohio St. 254	19
<i>MCI Telecommunications Corp. v. Pub. Util. Comm.</i> , (1987), 31 Ohio St. 3d 604	7
<i>Consumers' Counsel v. Pub. Util. Comm. et al.</i> , (1985), 16 Ohio St. 3d 9, 475 N.E.2d 782	17
<i>Ohio Consumers' Counsel v. Pub. Util. Comm.</i> , (1991), 61 Ohio St. 3d 396, 575 N.E.2d 157	6
<i>Ohio Consumers' Counsel v. Pub. Util. Comm.</i> , (2006), 111 Ohio St. 3d 300	5, 8, 9, 14
<i>Superior's Brand Meats v. Lindley</i> , (1980), 62 Ohio St. 2d, 403 NE 2d 996.....	17
<i>Trautwein v. Sorgenfrei</i> , (1979), 58 Ohio St. 2d 493	17
<i>Travis v. Public Utilities Commission</i> , (1931), 123 Ohio St. 355.....	15
<i>Virginia Petroleum Jobbers Assn. v. FPC</i> , (1958), 104 U.S. App. D.C. 106, 259 F.2d 921	7
<i>Verizon N. Inc. v. Pub.Util. Comm.</i> , (2004), 101 Ohio St. 3d 91	15

Entries and Orders of 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, Case Nos. 03-93-EL-ATA, et al., Application (January 10, 2003)</i>	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 Nos. 03-93-EL-ATA, et al.,
OCC Motion to Stay (February 15, 2008).....9

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 Nos. 03-93-EL-ATA, et al.,
Remand TR Volume II (March 20, 2007)..... 9

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 Nos. 03-93-EL-ATA, et al.,
Second Supplemental Testimony of John P. Steffen, Duke Ex.11 (February 28, 2007) 9

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 Nos. 03093-EL-ATA, et al.,
Opinion and Order (September 29, 2004) 15

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 Nos. 03-93-EL-ATA, et al.,
Entry (December 9, 2003)..... 3, 13

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 Nos. 03093-EL-ATA, et al.,
Response to the Request of the Commission to File A Rate Stabilization Plan (January 26, 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 Nos. 03093-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 Nos. 03093-EL-ATA, et al.,
Entry on Rehearing (November 23, 2004) 5, 16

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 Nos. 03093-EL-ATA, et al.,
Second Entry on Rehearing (December 19, 2007) 12

Statutes

Ohio Rev. Code Ann. §4928.14 (Baldwin 2008)..... 3,9
Ohio Rev. Code Ann. § 2505.03 (Baldwin 2008)..... 17
Ohio Rev. Code Ann. § 2505.04 (Baldwin 2008)..... 17
Ohio Rev. Code Ann. § 4903.16 (Anderson 2008)6, 17
Ohio Rev. Code Ann. § 4903.17 (Anderson 2008) 6

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel	:	No. 08-0367
	:	
Appellant,	:	Appeal from the Public
	:	Utilities Commission of
v.	:	Ohio Case Nos. 03-93-EL-ATA
	:	03-2079-EL-AAM
The Public Utilities Commission of Ohio	:	03-2081-EL-AAM
	:	03-2080-EL-ATA
Appellee.	:	

**MEMORANDUM CONTRA THE OFFICE OF THE OHIO CONSUMERS' COUNSEL'S MOTION FOR A STAY OF EXECUTION
SUBMITTED BY DUKE ENERGY OHIO, INC.**

INTRODUCTION

The Public Utilities Commission of Ohio (Commission) has maintained stability and reliability in electric service for Ohio consumers for the past nine years. Subsequent to the mandate by the General Assembly to open Ohio electric utility service to competition, the Commission presided over complex and competing interests and market conditions to keep the lights on for Ohio consumers at reasonable expense and keep the Ohio utilities financially viable. In so doing, it struck a balance where there might otherwise be chaos. The balance insulated consumers from extreme market conditions while allowing the state's electric utilities the financial stability necessary to continue providing reliable competitive retail electric generation services. Despite the obvious advantage provided, the Office of the Ohio Consumers' Counsel (OCC)

now seeks to deprive customers of the benefits of the balance struck by the Commission.

OCC asks this Court to improperly stay one element of an order of the Commission; the Infrastructure Maintenance Fund (IMF). It seeks its stay based upon an Order rendered by the Commission on October 24, 2007. But, the IMF was actually ordered by the Commission in its Entry on Rehearing on November 23, 2004. OCC's motion seeking to stay only the IMF, not only upsets the delicate pricing balance approved by the Commission, but is also procedurally defective. OCC's request comes nearly four years after the IMF was first approved by this Commission. OCC's Motion should fail for many reasons; practical, procedural and substantive.

OCC is unlikely to succeed on appeal and its Motion is not in the public interest and untimely. The Commission's Order on Remand dated October 24, 2007 (Order on Remand) fully supported Duke Energy Ohio, Inc (DE-Ohio or the Company) DE-Ohio's Rate Stabilization Plan (RSP) Market-Based Standard Service Offer (MBSSO) including the IMF with record evidence.

The Court should deny OCC's Motion and not upset the delicate balance achieved by the Commission. To do otherwise compromises DE-Ohio's ability to meet its statutorily mandated obligation to customers and exposes customers to greater market volatility.

STATEMENT OF THE FACTS AND THE CASE

On January 10, 2003, pursuant to R.C. 4928.14, DE-Ohio filed its application before the Commission to establish its market-based standard service offer.¹ This initial application was never acted upon by the Commission. The Commission was concerned about a lack of development of the competitive wholesale electric market and the ability of the wholesale market to support the competitive retail electric market.² Instead, the Commission instructed DE-Ohio to file the RSp0MBSSO which would include stabilized rates and be market-based at the same time.³

As requested, DE-Ohio filed such a plan on January 26, 2004.⁴ The initial RSP-MBSSO formula was made up of two basic components: a by-passable price-to-compare and a non-by-passable rate that all customers must pay, which is known as the provider-of-last-resort or POLR. Over the course of the proceedings, the pricing formula evolved such that the price-to-compare and POLR became calculated through a series of components. The evidentiary

¹ *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-EI-ATA, *et al*, (Post-MDP Service Case) (Application) (January 10, 2003) Rec. at ICN 1; Ohio Rev. Code Ann. §4928.14 (Baldwin 2007).

² *Post-MDP Service Case*, (Entry at 3, 5) (December 9, 2003) Rec. at ICN 61.

³ *Id.*

⁴ *Post-MDP Service Case*, (Response to the Request of the Commission to File an RSP) (January 26, 2004) Rec. at ICN 64.

support for the components, however, including the various costs, risks, and prices to provide the two necessary services remained constant.

The hearing to review DE-Ohio's RSP-MBSSO application was scheduled to begin on May 17, 2004, but was postponed to allow the conclusion of settlement discussions among all Parties. On May 19, 2004, after a full day of negotiation with all Parties, including OCC, a Stipulation was reached with most, but not all of the Parties. Thereafter, the initial evidentiary hearing began.⁵ On September 29, 2004, the Commission issued its Opinion and Order, which substantially changed the terms of the Stipulation, including the total RSP-MBSSO price.⁶

DE-Ohio, as well as other Parties, filed Applications for Rehearing.⁷ In its Application for Rehearing, DE-Ohio included an alternative proposal to the Commission's Opinion and Order based upon the existing record evidence. The alternative proposal established and incorporated some of the changes made by the Commission in its Opinion and Order.⁸ DE-Ohio renamed and repositioned certain components proposed in the modified Stipulation.⁹ The alternative proposal included new component names but not new concepts.

⁵ *Post MDP Remand Case*, (Order on Remand at 5) (October 24, 2007) Rec. at ICN 473. The proceedings on remand will be referred to as "Post-MDP Remand Case" for clarity and consistency with other parties although all references are to the proceedings before the Commission in Case No. 03-93-EL-ATA *et. al.*

⁶ *Id.*

⁷ *Order on Remand* at 6.

⁸ *Id.*

⁹ *Order on Remand* at 31-38.

The Commission issued its 2004 Entry on Rehearing in late November.¹⁰ The Commission did not adopt DE-Ohio's alternative proposal as filed, but made significant changes regarding which components customer must pay and which were optional for customers who opted to go with competitors, and the total market price charged to customers returning to DE-Ohio from competitive service.¹¹ DE-Ohio did not oppose the 2004 Entry on Rehearing. OCC did not seek to stay the IMF before the Commission, but instead appealed the 2004 Entry on Rehearing to the Court on several grounds.¹² Ultimately, the Court rejected nearly all of OCC's claims and remanded the matter to the Commission on two procedural issues.¹³

On remand, the Commission went beyond what was required by the Court. The Commission conducted a second full evidentiary hearing of the existing record, permitted additional and expansive discovery, allowed the Parties, including OCC, to submit new evidence, and afforded all Parties the opportunity to recommend changes to DE-Ohio's MBSSO. Ultimately, the Commission's Order on Remand upheld DE-Ohio's RSP-MBSSO with certain modifications and supported each component with record evidence. On February 15, 2008, OCC filed a Motion for Stay before the Commission. OCC,

¹⁰ *Post-MDP Service Case* (Entry on Rehearing) (November 23, 2004) Rec. at ICN 229

¹¹ *Id.*

¹² *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300, 856 N.E.2d 213, (2006).

¹³ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 111 Ohio St. 3d 300 at 323, 856 N.E.2d 213, (2006). Specifically, the Court remanded to the Commission ordering it to: (1) state its reasoning and cite record evidence in support of changes the Commission made in its November 23, 2004, Entry on Rehearing; and (2) grant OCC previously denied discovery.

however, never permitted the Commission an opportunity to rule on its Motion for Stay because it filed its appeal of the Commission's Order on Remand to the Court before the next Commission meeting on February 19, 2008. Upon filing such an appeal, only the Court may grant a stay of a Commission order.¹⁴ OCC's Motion is currently pending before the Court.

ARGUMENT

Proposition of Law No. I.

OCC failed to comply with statutory mandates and its motion is procedurally flawed.

In its Motion, OCC cites to the applicable Ohio statutes for a stay of execution for a Commission Order.¹⁵ Indeed, R.C. 4903.16 vests the Court with the authority to issue a stay of a final Order rendered by the Commission under certain circumstances.¹⁶ The Court also has authority to establish trustee accounts pursuant to R.C. 4903.17.¹⁷ Contrary to OCC's declarations, however, a stay of execution is neither appropriate nor supportable in this instance.¹⁸

Revised Code Sections 4903.16 and 4903.17 offer little guidance on what factors the Court should consider in evaluating whether to grant a request for Stay of execution of a Commission Order. The lack of statutory guidance does not mean that such requested relief should be granted freely. As Justice

¹⁴ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, (1991) 61 Ohio St. 3d 396, 403-404, 575 N.E.2d 157; 162.

¹⁵ OCC Memorandum in Support of Motion for Stay at 5.

¹⁶ Ohio Rev. Code Ann. § 4903.16 (Anderson 2008).

¹⁷ Ohio Rev. Code Ann. § 4903.17 (Anderson 2008).

¹⁸ If the Court should grant OCC's Motion, the establishment of a trustee account pursuant to R.C. 4903.17 is appropriate.

Douglas succinctly stated in his dissenting opinion in *MCI Telecommunications Corp. v. Pub. Util. Comm.*, “when the commission issues an order, after the thorough review generally given by the commission and its experts, a stay of that order should only be given after substantial thought and consideration -- *if at all*, and then only where certain standards are met.”¹⁹ Justice Douglas then proposed four criteria to consider in granting the extraordinary relief afforded by a Stay of a Commission Order:²⁰

- 1) Whether the seeker of the stay has made a strong showing of the likelihood of prevailing on the merits;
- 2) Whether the party seeking the stay has shown that without a stay irreparable harm will be suffered;
- 3) Whether or not, if the stay is issued, substantial harm to other parties would result; and,
- 4) Above all in these types of cases, where lies the interest of the public.²¹

As discussed below, OCC does not satisfy the Douglas criteria or any other standard relevant to the Court’s consideration of ordering a Stay of Execution.

1. OCC is Not Likely to prevail on the Merits

OCC’s Motion ignores the plethora of evidence contained in the record supporting DE-Ohio’s RSP-MBSSO, including the IMF. Each component of DE-Ohio’s RSP-MBSSO is supported in the record and in the Order on Remand. The Commission ensured the various RSP-MBSSO components were

¹⁹ *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604. *Emphasis added.*

²⁰ *Id.*

²¹ *Id.*; Douglas’ four criteria are similar to those used by courts in evaluating motions for preliminary injunctions. *See e.g. Virginia Petroleum Jobbers Assn. v. FPC* (1958), 104 U.S. App. D.C. 106, 259 F.2d 921.

not duplicative.²² DE-Ohio respectfully disagrees with OCC's attempts at divination regarding the Court's prior discussion regarding the IMF in remanding the case to the Commission.²³ Regarding the IMF, the Court's Order required only that the Commission cite the record evidence to support its decision to approve DE-Ohio RSP-MBSSO.²⁴ OCC relies upon 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 had made such a finding.²⁵ 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 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

²² *Post-MDP Remand Case*, (Order on Remand at 31-38) (October 24, 2007) Rec. at ICN 473.

²³ OCC's Memorandum in Support of Motion for Stay at 11.

²⁴ *Ohio Consumers' Counsel v. Pub. Util Comm'n* (2006) 111 Ohio St.3d 300, 323, 856 N.E.2d 213, 236.

²⁵ OCC's Memorandum in Support of Motion for Stay at 12.

CG&E's claim as true, *that would not excuse the commission from its statutory obligation to justify its orders.*²⁶

It is clear from a review of the entire paragraph that the Court considered DE-Ohio's argument on brief but decided that regardless of the merits of DE-Ohio's arguments, the Commission must support its decision.²⁷ Revised Code Section 4928.14 does not require components of a market price to be cost-based.²⁸ The Court did not expressly or impliedly state otherwise.²⁹ DE-Ohio's RSP-MBSSO, which includes the POLR charge, and which further includes the component IMF, is market-based.³⁰ The Commission agrees.³¹

Similarly, OCC's Motion relies almost entirely on the opinions of its witness, Mr. Neil Talbot, who was largely discredited on cross-examination during the hearing on Remand.³² On cross, Mr. Talbot conceded that utilities face unique risks related to the POLR requirement that competitors do not.³³ Mr. Talbot also conceded that over 96% of DE-Ohio's total RSP-MBSSO price was avoidable for the first 25% of the Company's total load that switches to a

²⁶ *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*).

²⁷ *Id.*

²⁸ Ohio Rev. Code Ann. § 4928.14 (Anderson 2008)

²⁹ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, (2006)111 Ohio St. 3d 300, 307-308 856 N.E.2d 213, 223-224.

³⁰ *Id.* at 311; "We hold that the commission's finding that CG & E's standard service offer was market based is supported by sufficient probative evidence. As already noted, CG & E's standard service offer was made up of two components: the price-to-compare and the POLR." *See also* Post-MDP Remand Case, (Order on Remand at 31-38) (October 24, 2007) Rec. at ICN 473.

³¹ *Post-MDP Remand Case*, (Order on Remand at 35-38) (October 24, 2007) Rec. at ICN 473.

³² *Post-MDP Remand Case*, (OCC Motion to Stay at 6) (February 15, 2008).

³³ *Post-MDP Remand Case*, Remand TR Vol. II at 90 (March 20, 2007).

competitive supplier.³⁴ Further, OCC ignores all of the other evidence, including the testimony of DE-Ohio's witness, Mr. John Steffen, who explained that the IMF compensates DE-Ohio for "the risks and costs associated with maintaining adequate capacity reserves."³⁵

The Commission's Order on Remand dissects each RSP-MBSSO component and thoroughly discusses the evidence it relied upon in reaching its conclusion.³⁶ The Commission explained the evolution of the IMF as one of two components that made up the fixed price included in DE-Ohio's initial MBSSO application as the POLR reserve margin.³⁷ The initial reserve margin POLR charge in the Stipulation was not a pure cost recovery mechanism, but was a fixed price equal to the projected cost of a peaking unit. The fixed price was to compensate DE-Ohio for its out-of-pocket costs to maintain a 17% reserve throughout the duration of the RSP-MBSSO, as well as compensate the Company for various market risks such as credit quality, existing capacity, market concentration, and other regulatory risks.³⁸

The Commission's 2004 Entry on Rehearing approved a division of the reserve margin POLR charge into two components, a fixed charge phased in over time, and a variable pure cost recovery mechanism.³⁹ This cost pass

³⁴ *Id.* at 88.

³⁵ *Post-MDP Remand Case*, (Second Supplemental Testimony of John P. Steffen, Duke Ex. 11 at 20) (February 28, 2007).

³⁶ *Id.*

³⁷ *Post-MDP Remand Case*, (Order on Remand at 35-38) (October 24, 2007) Rec. at ICN 473.

³⁸ *Id.* at 31.

³⁹ *Id.* at 32.

through to customers became known as the System Reliability Tracker (SRT).⁴⁰ The fixed compensation for the market risks associated with providing POLR service became the IMF.⁴¹

The Commission has clearly set forth the record evidence supporting the IMF in its Order on Remand.⁴² The Commission also set forth its reasoning that the IMF represents “a legally mandated generation function.”⁴³ Moreover, the Commission has considered DE-Ohio’s total RSP-MBSSO in relation to market prices and found that the inclusion of the IMF for recovery of pricing risk results in a reasonable price.⁴⁴ Moreover, the Commission’s Order on Remand, further tipped the scales in favor of consumers and market competitors, by increasing residential customers’ ability to bypass certain of DE-Ohio’s riders and eliminating the 25% cap on avoidability for certain riders for residential load.⁴⁵

The Commission properly cited record evidence and stated its reasoning supporting its Order on Remand. Accordingly, the Court is likely to uphold the Commission’s Order on Remand and to deny OCC’s Motion. 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 Commission to properly support its Order. The record evidence demonstrates that the IMF is a

⁴⁰ *Id.* at 32.

⁴¹ *Id.* at 35-36.

⁴² *Post-MDP Remand Case*, (Order on Remand at 35-38) (October 24, 2007) Rec. at ICN 473.

⁴³ *Id.* at 37.

⁴⁴ *Id.* at 36, fn 12.

⁴⁵ *Id.* at 35-38.

derivative of the original POLR charge, not a duplicative charge as incorrectly alleged by OCC's witness Mr. Talbot.⁴⁶ OCC's arguments have already been considered and rejected by the Commission. The Commission has properly responded to the Court directive on Remand. In short, OCC's appeal has little chance of success.

2. There is no showing of irreparable harm and indeed, if the stay is issued, greater harm could result.

OCC argues that absent the Stay of Execution, residential customers will suffer irreparable harm because if it prevails on appeal, no refund may be available.⁴⁷ DE-Ohio asserts that residential customers may suffer irreparable harm if DE-Ohio is unable to fulfill its statutory provider of last resort obligations due to a stay in the implementation of the IMF. That is the very purpose of the IMF, as acknowledged by the Commission in its Order on Remand.⁴⁸ DE-Ohio believes that the provision of reliable service is paramount, and therefore, the Court should deny OCC's request for stay.

OCC ignores the likely harm to DE-Ohio or other customers if a stay is granted. If the Court were to stay the IMF, DE-Ohio may not be in a position to meet its POLR obligations or meet the financial commitments made to perform its POLR obligations. If reliability suffers because the Court grants OCC's Motion for Stay and DE-Ohio is unable to secure sufficient capacity to

⁴⁶ *Post-MDP Remand Case*, (Entry on Rehearing at 7) (December 19, 2007) Rec. at ICN 490.

⁴⁷ OCC Memorandum in Support of Motion to Stay at 13.

⁴⁸ *Post-MDP Remand Case*, (Order on Remand at 37-38) (October 24, 2007) Rec. at ICN 473.

maintain system reliability, all customers may suffer harm. Thus, the potential harm from granting the stay is greater than the harm from denying the stay.

3. The public interest is best served by denying OCC's Motion for Stay of Execution

OCC narrowly construes the definition of the public interest to mean obtaining the lowest possible cost for residential customers no matter what the expense. DE-Ohio respectfully submits that the public interest is actually much broader and is deeply rooted in the Commission's actions and approval of DE-Ohio's RSP-MBSSO. In requesting the state's electric distribution utilities to file rate stabilization plans in late 2003, the Commission had the public interest at heart. The Commission set forth three goals to be accomplished through the stabilized pricing plan: 1) provide rate certainty for consumers; 2) provide revenue stability for utilities; and 3) further the competitive market.⁴⁹ The Commission's Opinion on Remand strikes an appropriate balance to those conflicting goals and is directly in the public interest. The public interest is best served in upholding the Commission's decision.

DE-Ohio filed these cases January 10, 2003. To date, there have been two complete evidentiary hearings before the Commission 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 twice. Similarly, this Court has already heard one appeal of DE-Ohio's RSP-MBSSO, prompting the second comprehensive evidentiary hearing before the Commission.

⁴⁹ *Post-MDP Service Case*, (Entry at 5) (December 9, 2003). Rec. at ICN 61.

Throughout this process, the Commission has sustained DE-Ohio's RSP-MBSSO price with only minor changes to the ability of certain customers to avoid specific price components. The Court already found DE-Ohio's price to be market based as required under Ohio Law.⁵⁰ OCC's crusade to further modify and reduce DE-Ohio's price furthers neither the Commission's goals in establishing rate stabilized pricing nor the broader public interest.

Additionally, even if OCC is correct that price is the most important consideration, customers could not purchase DE-Ohio's capacity today at the price approved by the Commission. Since DE-Ohio's last rate case under regulation in 1991, capacity prices have risen dramatically. With respect to the IMF market price, DE-Ohio charges approximately \$45 million per year through the IMF for committing its capacity to load in its certified territory. If DE-Ohio sold the same capacity in the market today, it could receive approximately \$160 million per year.⁵¹ Yet, OCC's theory is that customers should pay the same price they paid in 1991, which is even less than the amount approved by the Commission in the RSP-MBSSO. The Court should deny OCC's Motion to Stay.

⁵⁰ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, (2006)111 Ohio St. 3d 300, at 310, 856 N.E.2d 213, 223-224.

⁵¹ See, PJM Auction User Information, (Base Residual Market Results at 2009/2010 for RTO at \$102.04 per MW-day, posting date Oct. 17, 2007), available at <http://www.pjm.com/markets/rpm/downloads/2009-2010-base-residual-auction-results.xls> (last visited November 20, 2007).

Proposition of Law No. II.

OCC's Motion is barred by collateral estoppel and *res judicata* and is untimely.

OCC cites to the Court's decision in *Travis v. Public Utilities Commission*⁵² for the proposition that the Court will sustain a Motion for Stay where the party complaining timely files a request and shows irreparable harm.⁵³ Although the standard OCC proposes is included in the *Travis syllabus*, in practice, the Court has referenced the *Travis* holding as standing for the position that when a "commission order had been carried out, no stay had been granted, and there was nothing left upon which the court's decision could operate, the appeal was moot and should be dismissed."⁵⁴ Regardless of the applicability of *Travis*, OCC declares that its Motion was timely filed and necessary to prevent irreparable harm to residential customers.⁵⁵ OCC is wrong.

OCC's characterization of its request is misleading. OCC moves this Court to stay what OCC refers to as the "reinstatement of the unsupported" IMF in the Commission's October 24, 2007 Order on Remand.⁵⁶ OCC's characterization of the Commission's Order on Remand as a "reinstatement" of the IMF is incorrect. OCC would have this Court believe that the IMF was

⁵² *Travis v. Public Utilities Commission*, (1931) 123 Ohio St. 355.

⁵³ OCC Memorandum in Support of Motion for Stay at 9.

⁵⁴ *Cincinnati Gas & Elec. Co. v. Pub. Util. Commn.*, 103 Ohio St. 3d 398 (2004); *Verizon N. Inc. v. Pub.Util. Commn.*, 101 Ohio St. 3d 91 (2004).

⁵⁵ OCC Memorandum in Support of Motion for Stay at 9.

⁵⁶ OCC Memorandum in Support of Motion for Stay at 1.

previously discontinued or held invalid. This is not the case. The IMF has been effective and appropriately charged to non-residential consumers since January 1, 2005, and residential consumers since January 1, 2006.⁵⁷ The Commission's Order on Remand thoroughly explains the record and policy support for the IMF.⁵⁸ The Commission did not amend or alter the application of the IMF in any way for residential consumers.⁵⁹ The Order on Remand did, however, afford certain non-residential customers, who switch to a competitive supplier, the opportunity to avoid the IMF if those switched customers agreed to remain off DE-Ohio's RSP-MBSSO price through December 31, 2008, but at the risk of returning at a market price higher than DE-Ohio's RSP-MBSSO.⁶⁰ 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.

Instead, OCC seeks discontinuance of the IMF to residential customers entirely. OCC's Motion comes more than two years after the IMF became effective for residential consumers and more than three years after OCC filed its first appeal. OCC had the opportunity to seek a Stay of the Commission's 2004 Entry on Rehearing but did not do so.⁶¹ Subsequently, OCC had the

⁵⁷ *Post-MDP Service Case*, (Opinion and Order at 7) (September 29, 2004) Rec. at ICN 206.

⁵⁸ *Post-MDP Remand Case*, (Order on Remand at 31-38) (October 24, 2007) Rec. at ICN 473.

⁵⁹ *Id.*

⁶⁰ *Id.* at 38.

⁶¹ *Post-MDP Service Case*, (Entry on Rehearing) (November 23, 2004) Rec. at ICN 229.

opportunity to seek 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. 2505.04.⁶² Again, OCC did not do so. OCC's Motion for Stay of Execution is untimely.

The doctrines of *res judicata* and collateral estoppel support the position that OCC is out of time to seek a stay of the IMF. 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.⁶³ 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.⁶⁴

As applied to OCC's Motion before the Court, OCC had a full 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. OCC could have requested a stay from this Court in 2005 when it filed the first appeal. OCC did not. Therefore, the doctrines of *res judicata* and collateral estoppel bar OCC's present attempts at undermining the Commission's balance of the public interest.

⁶² Ohio Rev. Code Ann. §§ 4903.16, 2505.03, 2505.04 (Baldwin 2008).

⁶³ See *Office of Consumers' Counsel v. Pub. Util. Comm. et al.*, (1985) 16 Ohio St. 3d 9; 475 N.E.2d 782; citing *Trautwein v. Sorgenfrei* (1979), 58 Ohio St. 2d 493, 12 O.O.3d 403, *syllabus*.

⁶⁴ *Superior's Brand Meats v. Lindley*, (1980) 62 Ohio St. 2d 133, 135, 403 N.E.2d 996, 999.

Proposition of Law No. III

Prior precedent does not support OCC's Motion for Stay of Execution.

In support of its Motion, OCC cites to the Court's opinion in *Columbus & Southern Ohio Electric Co. v. Public Utilities Commission of Ohio* as authority to grant the Stay of execution.⁶⁵ OCC's reliance is misplaced as the facts in the case sub judice are incongruent to those in *Columbus Southern*.

In *Columbus Southern*, the utility appealed a Commission Order that prevented it from collecting charges related to construction work in progress (CWIP) on a nuclear generating station that the Commission had previously allowed it to charge.⁶⁶ In a subsequent Order, the Commission reversed course and determined the charges were no longer recoverable.⁶⁷ The utility sought relief from the Court through a Stay pursuant to R.C. 4903.16 to permit it to continue collecting the charges authorized by the Commission's first order during the appeal of the Commission's subsequent decision to disallow the CWIP recovery.⁶⁸ The Court permitted the utility to deposit the funds into an interest bearing account under R.C. §4903.17.⁶⁹

In the present case, however, the Commission has twice ruled that the RSP-MBSSO, including the IMF, is reasonable and appropriately charged to

⁶⁵ *Columbus & Southern Ohio Electric Co. v. Public Utilities Commission of Ohio*, (1984)10 Ohio St.3d 12.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

customers. OCC had the opportunity to pursue a stay of the IMF when the Commission first approved the charge but failed to do so. DE-Ohio's RSP-MBSSO, including the IMF, is the lawful rate in effect, is in accordance with the Commission's Order, and DE-Ohio has no option but to collect the rates set by the Commission.⁷⁰ The Commission has not changed the IMF's applicability to residential consumers or DE-Ohio's ability to recover the charge from residential consumers. Rather, the Commission has rightfully determined, twice, that the IMF is appropriate and recoverable from DE-Ohio's consumers. The Court should not circumvent the Commission's judgment in determining an appropriate market based price.

CONCLUSION

The motion for a stay of the IMF portion of the rate stabilized price for DE-Ohio's electric customers is ill conceived and legally unsupportable. OCC has failed to act on this motion for years and now asserts that irreparable harm is occurring. OCC's motion is procedurally defective and OCC's argument fails factually and substantively. Finally, granting OCC's motion to stay would not provide the remedy OCC seeks as it would merely reinstate the Commission's earlier order. For these reasons, OCC's motion should be denied.

⁷⁰ See *Keco Industries, Inc. v. Cincinnati and Suburban Bell Tel. Co.*, (1957), 166 Ohio St. 254.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was served on the following either electronically or by first class U.S. mail, postage prepaid, upon the following, this 9th day of June, 2008.



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