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# IN THE SUPREME COURT OF OHIO

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| The Office of the Ohio Consumers' Counsel, | ) | |
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| Appellant, | ) | Case No. 09-2022 |
| v. | ) | |
| | ) | Appeal From the Public Utilities Commission of Ohio |
| The Public Utilities Commission of Ohio, | ) | |
| | ) | Case Nos. 08-917-EL-SSO and 08-918-EL-SSO |
| Appellee. | ) | |
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# MEMORANDUM CONTRA APPELLANT'S MOTION TO SUSPEND COMMISSION ORDERS APPROVING RATES AND A MOTION TO REQUIRE PAST COLLECTIONS OF ALLEGED RETROACTIVE RATES TO BE ESCROWED ON BEHALF OF MOVANTS FOR INTERVENTION AS APPELLEES, COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY

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## I. Introduction

The Ohio Consumers' Counsel (OCC) filed what appears to be a unique request to suspend the Public Utilities Commission of Ohio (Commission) orders in the underlying case on November 30, 2009 with this Court. It is only unique because OCC repackaged its previous stay request before this Court (denied on Oct. 29, 2009 in Supreme Court Case No. 09-1620) and presented it to the Court as a *Motion to Suspend Commission Orders Approving Rates.* Perhaps this repackaging was done in an effort to avoid the statutory requirements of R.C 4903.16. However, regardless of whether an appellant seeks to label its request as an effort to "stay" or "suspend" a Commission order, the request must still adhere to the requirements of R.C. 4903.16. It is telling that OCC cannot even keep straight its attempt to distinguish a request for a "stay" from a request for "suspension." In its own filing OCC has several references to its "stay"

request including the notice to the Commission it cites as authority to file the motion with the Court. OCC fails to adhere to the requirement to post a bond in support of its R.C. 4903.16 request, and that reason is enough to declare the request is improper and should be denied.

Although the Court need not consider the arguments in support of OCC's suspension request absent the filing of a bond, OCC also fails to satisfy the standards typically used by the Court to determine the need for a stay or used by OCC to seek a suspension in this case. OCC claims that no single standard is necessary, but that there is a necessary balancing of the interests. In this case, OCC argues the substantial harm it asserts is so severe that it outweighs all other standards and lessens the hurdle to justify the stay request. However, the irreparable harm cited by OCC is nothing more than its disagreement with the Court's finding that the comprehensive statutory framework regulating public utilities must be honored. In OCC's attempts to overturn longstanding case law and statutory history, OCC ignores the substantial harm its request would cause Columbus Southern Power Company and Ohio Power Company (collectively "AEP Ohio") and the customer service and reliability programs not at issue in the appeal but that are funded by the very rates OCC wishes to suspend.

OCC also raises an unsubstantiated argument that the Court should put a portion of the rates already collected under the Commission-approved order in an escrow account pending appeal. As authority for its argument, OCC cites to statutes that do not apply to this situation and relies on the dissent in a decision by the Court. The majority holding in that case was that without a bond a municipality (in that case) could not secure a R.C. 4903.16 stay of a Commission decision. As discussed below, the bond requirement has also been held to apply to OCC.

OCC's arguments have fundamental flaws and would require the overturning of Court precedent and legislative interpretation, in order for the request sought to be awarded. Likewise, the granting of OCC's request would all but guarantee an increase in the number of cases appealed to the Court and in each of those cases there likely would be an appellant who also would seek suspension of the Commission's decision pending appeal, if to accomplish nothing more than to delay implementation of Commission decisions. The Court should recognize OCC's filing as a request under R.C. 4903.16 and again deny the request for lacking the statutorily required undertaking and failing to satisfy the requisite showing.

## II. OCC's Motion to Suspend Should Be Treated as a Request Under R.C. 4903.16

OCC improperly seeks to escape the requirements of filing a stay request under R.C. 4903.16 by styling its request as a motion to "suspend." Renaming a stay request as a motion to "suspend" does not erase the fact that OCC is seeking an action that must be requested under the method outlined by statute in R.C. 4903.16.

The only authority OCC provides for its motion to "suspend" is the fact that the word suspend appears in R.C. 4903.12, 4903.17, and 4903.18. OCC points out that these statutes are silent as to the factors to determine a suspension, but that the word is included in the statutes and therefore OCC concludes that it is an alternative form of injunctive relief available for Court approval that is different than a stay. OCC's interpretation of the statutes is inappropriate.

The Court has previously held that matters involving appeals of Commission decisions are subject to a comprehensive regulatory system and that the only manner to suspend a Commission decision is under that statutory process.

> From the above consideration it is our conclusion that the rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection; that any rates set by the Public Utilities Commission are the lawful rates until such time as they are set

> aside as being unreasonable and unlawful by the Supreme Court; and that *the General Assembly, by providing a method whereby such rates may be suspended* until final determination as to their reasonableness or lawfulness by the Supreme Court, has completely abrogated the common-law remedy of restitution in such cases.

(emphasis added). *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co. (1957), 166 Ohio St. 254, 259, 141 N.E.2d 465, 469.* The Court's discussion in that case provided that the method to obtain the suspension is a stay request under R.C. 4903.16. Specifically the Court stated, "[f]rom this section [R.C. 4903.16] it is clear that the General Assembly intended that a public utility shall collect the rates set by the commission's order, giving, however, to any person who feels aggrieved by such order a right to secure a stay of the collection of the new rates after posting a bond. [*Id.* at 257, 468.] OCC's motion, if granted, would improperly circumvent the requirements of R.C. 4903.16 and should not be entertained by the Court.

A grammatical analysis supports the Court's previous treatment of these terms. Suspension is the action or verb used to get to the result which is a stay. The Court should not treat a request for a suspension different than a request for a stay. "Stay" is defined by Black's Law Dictionary as:

> **stay,** *n.* **1.** The postponement or halting of a proceeding, judgment, or the like. **2.** An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding. — Also termed *stay of execution*; *suspension of judgment*.— **stay,** *vb.* — **stayable,** *adj.*

Black's Law Dictionary (8th ed. 2004). Suspend is defined by Black's Law Dictionary as:

> **suspend,** *vb.* **1.** To interrupt; postpone; defer <the fire alarm suspended the prosecutor's opening statement>. **2.** To temporarily keep (a person) from performing a function, occupying an office, holding a job, or exercising a right or privilege <the attorney's law license was suspended for violating the Model Rules of Professional Conduct>.

Black's Law Dictionary (8th ed. 2004). Black's Law Dictionary uses "suspend" as a term to define a stay and could use the words interchangeably. If any practical difference exists, "suspend" is a broader term that when applied as a verb can result in a "stay." In other words, a motion to suspend an order of the Commission is in effect a motion seeking a "stay" which is governed by R.C. 4903.16.

The Court need look no further than OCC's own motion to see that even OCC considers the word "stay" is interchangeable with "suspend." The motion includes at least four references to OCC's request for a stay in this case. On page 8 of its motion OCC asks the Court in considering a particular argument to weigh it heavily in the balancing factors *considered for a stay*. On page 10 OCC refers to its motion as a stay request in describing its filing by stating the "questions of law presented in the underlying appeal and *addressed in this stay*...." On page 17 in section heading "D" organizing the filing, OCC states that "[t]he Companies Will Suffer No Substantial Harm As a Result of *This Court's Stay of the Orders*." Most notable is the fact that the OCC filed a letter with the PUCO on November 6, 2009, indicating its intention to file a motion for stay at the Court. OCC references this letter in its motion seeking the suspension as authority or a prerequisite to filing the motion seeking the stay with the Court. [OCC's Motion FN 1 citing OCC Exhibit B.] OCC itself has noticed, labeled, and characterized its filing as a stay. It is inappropriate to ask this Court to ignore the well established statutory practice to seek a stay of a Commission decision by creating a new suspension standard when OCC itself sees a "stay" and a "suspension" as the same act.

## III. OCC's Failure to Execute an Undertaking *(i.e.,* Post Bond) Violates R.C. 4903.16. This Factor Alone Dictates a Denial of the Request for a Stay.

The Court's previous recognition of R.C. 4903.16 as the part of the comprehensive statutory scheme governing requests to suspend a Commission decision results in OCC's request

being statutorily deficient and subject to denial. R.C. 4903.16 requires, among other requirements, the posting of an undertaking or bond. OCC even admits a bond is required in its motion when attempting to differentiate between a suspension and a stay. [OCC's Motion at 3.]

The statute requires an undertaking conditioned for the prompt payment of all damages caused by the delay in enforcement of the order complained of by the appellant on appeal. R.C. 4903.16 reads:

> 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.

(emphasis added).

The statutory prerequisite of an undertaking is not an option or suggestion. Unless the Court is willing to abandon the very statutory framework providing for the direct appeal to this Court, an appellant such as OCC must file an undertaking in order for the Court to stay execution of or "suspend" an order. The Court has repeatedly reiterated the requirement to post a bond to secure a stay under R.C. 4903.16. *Office of Consumers' Counsel v. Public Util. Comm.* (1991), 61 Ohio St. 3d 396, 403, 575 N.E.2d 157, *162; City of Columbus v. Pub. Util. Comm.* (1959), 170 Ohio St. 105, 112, 163 N.E.2d 167, 172; *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 258, 141 N.E.2d 465, 468. In the *Office of Consumer's Counsel* decision the Court applied this requirement directly to a stay request filed by OCC. Specifically, the Court stated that "R.C. 4903.16 provides for the procedure that must be

followed when seeking a stay of a final order of the Commission." *Id.* at 403,162. The Court recognized the filing of the bond to be a part of the procedure that must be followed to seek a stay. Even if OCC's stay request were otherwise warranted, OCC's request to bypass the statutory requirement for an undertaking/bond is improper and compels the denial of the stay request.

## IV. Standard of Review for a Stay of Execution of Commission Orders

OCC uses the same test frequently offered for consideration of stay requests before the Court as the standard of review for its motion to "suspend." OCC asserts that the test found in Justice Douglas' dissent in *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604, 606 was urged by the Commission to apply to stays, another form of injunctive relief. [OCC's Motion at 4.] OCC's reliance on Justice Douglas' standard is interesting because he did not state that this test should apply to other types of relief as suggested by OCC. In fact, Justice Douglas indicates why the statutory process is so important when he stresses the importance of Commission cases and the effect they have on everyone in this state -- individuals, business and industry. Justice Douglas wrote that 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. *MCI Telecommunications Corp. v. Pub. Util. Comm.* (1987), 31 Ohio St.3d 604, 606.

It seems curious that OCC would apply Justice Douglas' standards for the issuance of a stay without recognizing the importance of the Commission's decisions and requiring the same type protection and security afforded Commission orders for a stay under R.C. 4903.16. Justice Douglas warned against issuing stays of Commission orders and presented his criteria as a means to determine the limited circumstances of when to award a stay. If granted, the undefined

injunctive relief created by OCC in this motion would contradict Justice Douglas' purpose in creating standards and discussing the importance of R.C. 4903.16.

A rate order does not rise to the level of an extreme exception and routinely issuing stay orders would violate the deference due to the Commission's expertise in setting rates. *Weiss v. Pub. Util. Comm., 90* Ohio St. 3d 15, 17-18 (2000) (due deference should be given to statutory interpretations by an agency that has accumulated substantial expertise and to which the General Assembly has delegated enforcement responsibility).

## V. OCC's Request Fails to Qualify for Approval by the Court Under Justice Douglas' Test for a Stay

Even if OCC had properly posted a bond and fulfilled the procedural requirements of R.C. 4903.16, OCC still fails to satisfy the elements to be granted a stay/"suspension." OCC attempts to show it satisfies Justice Douglas' test by reweighing the standards to take the focus off of the fact that this is just another OCC appeal after its arguments at hearing and rehearing were denied. OCC starts its effort of proving it satisfies the standard for a stay by focusing its filing on its assertion of an irreparable harm. The motion then includes a one-sided view of the public interest. OCC also asserts that the raising of serious questions going to the merits is enough to satisfy its burden to show a likelihood of success on the merits. Finally, OCC incorrectly claims that AEP Ohio will suffer no substantial harm as a result of the Court's stay of the orders.

### A. OCC Fails to Show Irreparable Harm

OCC equates irreparable harm to the general concern that "increases to customer bills that are being imposed while the underlying appeal is being heard by the Court may be unrecoverable by customers once paid...." [OCC's Motion at 8.] This argument is not an argument aimed at the Commission's decision or even AEP Ohio. The root of OCC's alleged

irreparable harm is an argument with the statutory structure for appeals and with Supreme Court of Ohio precedent.

OCC addresses the appropriate Supreme Court precedent in establishing its fundamental disagreement with the General Assembly, but fails to present the entire discussion that led to the Court's acceptance of the comprehensive statutory structure regulating public utilities. [See OCC's Motion at 8 discussing *Keco Indus. v. Cincinnati & Suburban Bell Tel. Co. (1957), 166 Ohio St. 254, 141 N.E.2d 465.*] OCC discusses the existence of R.C. 4905.32, expressing the Court's application of the statute that a utility has no option but to collect the rates set by the Commission and is forbidden to refund any part of the rate collected. [OCC's Motion at 8.] But OCC ignores the rationale for the Court's holding of this doctrine. The Court held that the rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection and any rate set by the Commission is lawful and that the provision of a method to suspend rates abrogates the common-law remedy of restitution. [*Keco* at 259, 469.] The Court went on to provide its "common sense and wholehearted" endorsement of this practice giving deference to the comprehensive scheme of public utility regulation and the greater overall good. Specifically, the Court quoted Judge How of the Hamilton County Court of Common Pleas and stated:

> 'It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953, order of the commission and the rates finally fixed by the commission on June 4, 1954, but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the

> equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation.
>
> 'In any event, a consideration of the applicable statutes and the authorities cited by counsel leads me to conclude that a rate fixing order of the Public Utilities Commission of Ohio stands on a different footing than the judgment or order of a court of law and that the common-law right of restitution is not available to the plaintiffs under the circumstances of this case.'

[*Id.*]

The Court has previously considered the potential inequity of permitting retention of rates collected during an appeal, even when the appeal resulted in reversal of the original order. While the Court recognized that it is impossible to do absolute justice under all circumstances, the Court upheld the statutory balancing of interests achieved by the General Assembly recognizing the broad objectives considered. A finding of substantial harm as requested by OCC in this case requires overturning *Keco* and its progeny and reinterpreting the Ohio Revised Code. The Court need not reweigh this issue. Precedent dictates that the basis of OCC's substantial harm argument should be denied and therefore that the request for suspension be denied.

It also bears pointing out that OCC's delay in filing for relief contradicts its claim of irreparable harm. As noted in the first footnote of the motion, OCC filed a notice of appeal on November 5, 2009 and a notice of intent "**to file a *motion for a stay* at the Court**" under R.C. 4903.16 on November 6, 2009.[1] Yet OCC did not file a motion at the Court seeking to suspend the Commission orders until November 30, 2009. That is a delay of 24 days after the filing its notice of appeal and 23 days after filing its notice of intent to file for a stay. OCC points out throughout its filing that it has been pressing these arguments since March and it would seem

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[1] The letter was filed on November 6 2009, but OCC's Motion at footnote 1 indicates the letter was filed at the Commission on November 7, 2009. [See OCC's Motion at footnote 1; OCC Exhibit B.]

waiting over three weeks to file a request for any type of relief from the Court would indicate the lack of any irreparable harm. The need for urgency of relief from irreparable harm is belied by the fact that OCC had the ability to file its request earlier but did not.

OCC argues that in another proceeding the Commission has already granted a stay acknowledging the irreparable harm that would likely be suffered due to the holding in *Keco*. [OCC's Motion at 7.] OCC's reliance on the Commission's decision in the NOPEC case[2] is overly broad and misplaced. A review of the entire Commission decision reveals specific findings that NOPEC satisfied each and every prong of the standard for granting a stay. If anything the *NOPEC* example should be viewed as an example for the Court that the Commission does review requests for stays brought before it for consideration. The *NOPEC* example reveals that the Commission will issue a stay of its orders where the situation is warranted.

It is interesting that OCC cites the Commission's judgment in the *NOPEC* decision as support for its request when OCC also sought a stay from the Commission in the case below and the same Commission determined that a stay was not warranted in this case. NOPEC was able to meet the burden of being awarded a stay in its request. OCC was not able to do the same and the Court should not assume the Commission finding on irreparable harm in the *NOPEC* case compels the same finding in the underlying case when the Commission had the chance to make the finding and declined to grant the request.

Finally, it bears pointing out that OCC's definition of irreparable harm is so broad that if accepted it would likely increase the number of appeals to this Court and number of cases sought

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[2] *In the Matter of the Complaint of Northeast Ohio Public Energy Council v. Ohio Edison Company and the Cleveland Electric Illuminating Company*, (July 8, 2009) Commission Case No. 09-423-EL-SS [OCC Appendix at 000116]

to be "suspended" (i.e. stayed). Every case that involves a rate change impacts some party. If the only standard for a stay or suspension is that upon appeal a party may not be able to recover rates paid while the case is on appeal and if a bond is not required, then many more cases dealing with rates likely will be appealed to the Court as a tool to avoid the rate change until the appellate process is complete. The system is set up by the General Assembly to work in the opposite manner. Commission orders are valid upon approval and then only subject to change once reviewed by the Court. The statutory stay provision is available for special circumstances and incorporates an undertaking/bond requirement if a stay is warranted by some set of extreme circumstances. But OCC's effort to characterize the inability to recover rates paid during an appeal if the decision is overturned as "irreparable harm," ignores the statutory structure and opens the door for that argument to be made in every appeal affecting rates at the Commission.

**B. OCC's Interpretation of Public Interest Improperly Ignores the Impact on the Utility, the Regulatory Scheme and the Other Factors in the Orders Not in Contention But Jeopardized by the Request.**

OCC limits the view of public interest by narrowing it to assert that the public interest is served by suspending the Commission-approved rates because it keeps customers from paying allegedly unreasonable rates while the Court reviews the appeal. OCC's narrow interpretation of the public interest ignores the statutory design of the General Assembly, the financial impact on the utilities, and the over breadth of the request seeking to suspend the entirety of the order even beyond rates.

OCC's observation that Title 49 and the newly enacted S.B. 221 focus on the need to set reasonable rates contradicts its argument that a suspension of the rates in this case is in the public interest. Reasonable rates are not solely viewed from the point of view of the consumer. The General Assembly has charged the Commission with overseeing the welfare of the entire industry, consumers and utilities alike, by balancing all interests. OCC's argument focuses only

on the consumer. What OCC ignores is the need to ensure reasonable rates also includes consideration of the utilities' interest.

The General Assembly updated the regulation of the electric industry in 2008 leading to the filing of the applications in the underlying appeal. The Commission applied those legislative updates codified by the General Assembly. Assuredly OCC would not argue that when the General Assembly changes a law the result is not presumed to be in the public interest. Yet, OCC asks this Court to erase the General Assembly's latest updates to the regulation of electric utilities, as applied by the Commission in the underlying orders, and return to a system without all of the features of the legislative updates.

Suspension of the Commission's orders involves other aspects of the public interest beyond the rates discussed in the notice of appeal. Specifically, a suspension or stay of the orders would also jeopardize safety and customer oriented programs approved by the Commission. For example, the Commission's orders that are the target of OCC's motion contain funding provisions relating to enhancements in AEP Ohio's tree trimming program which results in more reliable and safe service to customers. The Commission's orders also provide funding for AEP Ohio to begin a smart grid project to benefit customers. The Commission ordered AEP Ohio to seek federal stimulus dollars to cover a portion of the costs of the smart grid upgrades and awarded authority to begin implementation of a smart grid system to assist customers in demand side management and energy conservation efforts. Both of these efforts will be jeopardized if the Court grants OCC's request to suspend the order below. Justice Douglas noted in his dissent setting up the standards being applied in this case that where a blanket stay of the Commission orders containing far more in substance than that which is at issue between the parties, a stay is "*incomprehensible*." *MCI Telecommunications Corp. v. Pub. Util. Comm.*

(1987), 31 Ohio St.3d 604, 606. That is exactly what is being asked by OCC in this case, a blanket suspension of the Commission orders. The public interest is not served by decreasing reliability, safety, and customer empowerment.

### C. OCC Fails to Even Assert That it Will Likely Prevail on the Merits.

OCC does not attempt to assert that it is likely to prevail on the merits. Instead, OCC asserts that it need not show that it is likely to prevail on the merits, or that there is a strong probability of success, because other factors considered in the balancing test, specifically the irreparable harm standard, weigh in its favor. [OCC's Motion at 9-10.] OCC claims that it provided substantial and appropriate evidentiary support for its positions before the Commission and the errors presented to the Court raise serious questions going to the merits. Thus, OCC admits that it can only raise questions concerning the merits of the case and it is reliant upon the presence of irreparable harm to satisfy this portion of the test for a stay. As shown above OCC fails to meet the irreparable harm standard, and by its own analysis therefore fails to satisfy the "likelihood of success on the merits" standard.

AEP Ohio will leave the arguments on the underlying issues for the Court's consideration in the underlying appeal. There is, however, one matter that AEP Ohio finds appropriate to discuss concerning this section of OCC's motion. OCC is incorrect that three of the four underlying issues in the appeal are legal issues. The issues in the underlying appeal present factual issues.

Assignment of Error 1 deals with the accusation that the Commission approved an improper rate structure.[3] [OCC's Motion at 11.] This matter deals in main part with the

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[3] The Court should also note that this argument alleging retroactive ratemaking will be moot by January 1, 2010. The Commission approved a rate structure for each of the three years

Commission's discretion delegated by the General Assembly in the S.B. 221 legislative changes. OCC asserts that the Commission's actions violated statutory provisions, but it is the Commission's application of facts to those statutes and the discretion vested in the Commission under those statutes that OCC is appealing. These are not legal issues--they are factual issues on application of the statute.

Assignments of Error 2, 3, and 4 also deal with factual matters related to the Commission's discretion under S.B. 221. [OCC's Motion at 14, 15, 16 respectively.] Whether it is OCC's argument that certain charges were not eligible to be included in rates under S.B. 221, that the Commission failed to recognize off-system sales in its opinion, or that the level of Provider of Last Resort charges was too high, they all deal with factual determinations by the Commission. It is not a question of law but the application of the facts and how the Commission categorized the charges, under its discretion, that are at issue. OCC's disagreement with how the facts are applied to statutes does not make the issues legal issues. In the underlying appeal, the Court will be reviewing the Commission's factual determinations and discretion in applying the statutes.

### D. OCC's Own Motion Demonstrates at Least $207 Million of Substantial Harm to AEP Ohio.

OCC makes the bold statement that there is no substantial harm to AEP Ohio if they are prohibited from collecting supplemental rates because the action approving the increased rates was an *ultra vires* act prohibited by law. This is false. Acceptance of OCC's statement requires a number of assumptions to be made. The Court must assume that OCC is likely to prevail on the merits. OCC did not even attempt to assert that it was likely to prevail on the merits

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of the plan. The 2009 portion will be complete at the end of the month and OCC's argument related to that portion of its appeal will be a moot point under the statutes and *Keco*.

choosing instead to seek to establish that it was raising serious questions. The Court must allow OCC to rewrite the Ohio Revised Code and this Court's precedent to remove any right of a utility to collect rates and implement duly approved orders of the Commission. The fact is that the Commission did approve the orders in this case and pursuant to the Ohio Revised Code and the opinions of this Court, AEP Ohio is entitled and required to implement those orders and collect the approved rates absent a stay by this Court.

OCC's argument that R.C. 4928.143(C)(2)(b) will mitigate AEP Ohio's harm confuses the applicability of the statute. OCC is correct that the statute is the path the General Assembly recognized in the event that an Electric Security Plan was first authorized by the Commission, but subsequently rejected by the utility. However, that is not the circumstance in this case. OCC seeks to go back to previous existing rates with some amount of fuel cost added because it was unable to convince the Commission of its arguments in the hearing and rehearing process.[4] That is not the purpose of R.C. 4928.143(C)(2)(b). OCC is not the utility and has no right to relief under this statute. OCC's argument that R.C. 4928.143(C)(2)(b) would mitigate AEP Ohio's substantial harm and could be used by the Court lacks any merit and should be rejected.

Beyond the faulty assumptions relied upon by OCC's argument is the real substantial harm facing AEP Ohio. The Court does not even need to look into the record for a preview of the scale of substantial harm facing AEP Ohio. OCC's motion includes numbers in two of its four assignments of error that illustrate the substantial harm faced by AEP Ohio. For example, should the orders be suspended and the case takes one year to make it through the appeal process, AEP Ohio would be facing the loss of at least $207.9 million dollars of Commission-

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[4] Again the Commission approved funding for other matters in the underlying applications, such as safety, reliability, and smart grid upgrades, that will also be effected by a suspension.

authorized rates.[5] That does not include the impact of the other errors raised or the harm resulting from suspending the funding of the safety and reliability tree trimming efforts and smart grid improvements also included in the Commission Orders. A suspension of rates that would result in a decrease of more than $207.9 million of revenues in a year's time in a case where OCC cannot even argue it is likely to prevail on the merits, must be viewed as substantial harm to AEP Ohio. When the effect of the blanket suspension of the funding for programs related to safety, reliability, and energy conservation efforts is added to the question, then, as Justice Douglas wrote, such a request is incomprehensible.[6]

## VI. OCC's Request That a Portion of Previously Collected Rates be Placed in an Escrow Account is Without Merit.

OCC provides no authority for its request to place rates already collected in this case into an escrow account pending appeal. OCC improperly relies upon R.C. 4903.17 and 4903.18 as support for the placement of a portion of the rates already collected in this case into escrow pending appeal. OCC recognizes that these provisions are directed toward the situation where utilities, not customers obtain a stay or suspension of Commission orders. [OCC's Motion at 18.] OCC creates the impression that Justice Herbert provided guidance in *Columbus v. Pub. Util. Comm.* (1959), 170 Ohio St. 105, 163, N.E.2d 167 that "the General Assembly never intended to handicap a municipality [or statutory representative] from seeking to protect its citizens" through denial of the usage of the escrow process in R.C. 4903.17 and R.C. 4903.18. However, although not pointed out by OCC, Justice Herbert's consideration of the matter was as the author of the dissenting opinion in that case. The majority opinion determined that R.C. 4903.17 and R.C. 4903.18 only applied to utilities seeking to stay a rate decrease and that a

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5 Assignment of Error 2: 1 year = $110 million.
Assignment of Error 4: 1 year = $97.9 million.

6 See discussion of Justice Douglas' dissent in the public interest section.

municipality seeking a stay would need to post a bond under R.C. 4903.16 to secure a stay. The majority holding in the case does not support OCC's assertion. This Court has consistently held the requirement that an entity seeking a stay, even OCC, must file an undertaking pursuant to R.C. 4903.16.[7] OCC's insinuation that there is precedent otherwise is inappropriate.

In the absence of any authority on which to base OCC's request for an escrow of past paid rates, the Court should deny OCC's request.

## VI. Conclusion

The Court should deny OCC's *Motion to Suspend Commission Orders Approving Rates and a Motion to Require Past Collections of Retroactive Rates to be Escrowed* based on the arguments as outlined in the foregoing Memorandum Contra filed by AEP Ohio.

Respectfully submitted,

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[7] See also the discussion in the irreparable harm section concerning the Court's holding in *Keco* and the requirement to charge the rates approved by the Commission and not refund rates.

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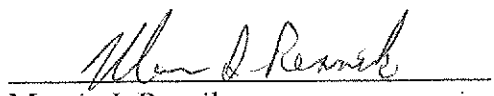
## PROOF OF SERVICE

I certify that Columbus Southern Power Company's and Ohio Power Company's **MEMORANDUM CONTRA APPELLANT'S MOTION TO SUSPEND COMMISSION ORDERS APPROVING RATES AND A MOTION TO REQUIRE PAST COLLECTIONS OF ALLEGED RETROACTIVE RATES TO BE ESCROWED ON BEHALF OF MOVANTS FOR INTERVENTION AS APPELLEES, COLUMBUS SOUTHERN POWER COMPANY AND OHIO POWER COMPANY** was served by First-Class U.S. Mail upon counsel identified below for all parties of record this 10th day of December, 2009.



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