

**In The  
SUPREME COURT OF OHIO**

**The East Ohio Gas Company dba  
Dominion East Ohio,**

Appellant,

v.

**The Public Utilities Commission of  
Ohio,**

Appellee.

: Case No. 12-2117  
:  
:  
: On appeal from the Public Utilities  
: Commission of Ohio, Case No. 11-  
: 5843-GA-RDR, *In the Matter of the*  
: *Application of the East Ohio Gas*  
: *Company d/b/a Dominion East Ohio*  
: *Gas Company to Adjust its Automated*  
: *Meter Reading Cost Recovery Charge to*  
: *Recover Costs Incurred in 2011.*  
:

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**MEMORANDUM CONTRA  
MOTION FOR STAY  
SUBMITTED ON BEHALF OF APPELLEE,  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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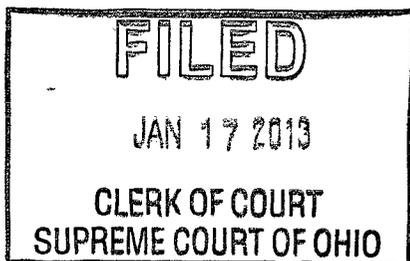
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Appellant,	:	On appeal from the Public Utilities Commission of Ohio, Case No. 11- 5843-GA-RDR, <i>In the Matter of the Application of the East Ohio Gas Company d/b/a Dominion East Ohio Gas Company to Adjust its Automated Meter Reading Cost Recovery Charge to Recover Costs Incurred in 2011.</i>
v.	:	
<b>The Public Utilities Commission of Ohio,</b>	:	
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Appellee.	:	

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**MEMORANDUM CONTRA  
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THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**INTRODUCTION**

Obtaining a stay requires more than just agreeing to post a bond. If granted, The East Ohio Gas Company dba Dominion East Ohio's ("Dominion") request will delay the crediting of over one million dollars to its customers' accounts. This is no small matter. Dominion should explain why such an extraordinary request is necessary as it challenges this Commission rate order. It has not. Instead, Dominion simply claims it is entitled to the stay because it has the financial resources to a post bond. This is not enough. Because Dominion chose not to address the merits, the Commission will.

The merits will show that Dominion made a deal with its customers and the Commission – Dominion would get expedited recovery of its costs to install automated

meter reading devices (“AMRs”) and, in exchange, customers would get substantial savings related to the program (the “AMR Program”). These savings are entirely dependent upon Dominion timely installing the AMRs. The AMRs replace traditional manual meter readers and allow meter reading to be accomplished less expensively, creating savings. The Commission told Dominion to complete the AMR Program by the end of December 2011 to maximize savings for customers. Dominion failed to do so and thus failed to uphold its end of the bargain. The work was not completed by December 2011 and the full savings did not appear. Therefore, the Commission ordered savings to be credited to ratepayers. To do less would essentially punish ratepayers for Dominion’s tardiness.

Dominion now asks this Court to further delay the savings customers are entitled to, even though it has demonstrated nothing save for the fact that it can post a bond. Its motion for stay should be denied.

### **STATEMENT OF THE FACTS AND CASE**

At its core, this case is about the Commission fulfilling its statutory duty to set just and reasonable rates and charges. At issue here is what Dominion should be allowed to change its customers under the automated meter reader rider (“AMR rider”). When Dominion initially proposed the AMR rider, it represented that it needed to install AMRs throughout its service territory in order to meet the Commission’s minimum gas service

standard rules. Dominion Attachment A, Opinion and Order at 9-11.<sup>1</sup> Dominion represented that it would complete the installation of the AMRs in five years. *Id.* at 10-11. Rather than recovering its costs through a traditional base rate case, Dominion requested approval of an accelerated rate-recovery mechanism, the AMR rider. Under this favorable cost-recovery mechanism that permits more timely utility recovery of its costs, Dominion has collected millions of dollars from its customers over the past few years. In exchange for paying the cost of the AMR Program, customers were supposed to realize reductions in meter reading operation and maintenance (“O&M”) costs. *Id.* at 13-14. Customers currently pay O&M costs related to manual meter readers in their base rates. These rates will not be reset until Dominion files its next base rate case, which may be many years away. *Id.* In essence, Dominion asks its customers to pay twice for meter reading services (once for AMRs through the rider and once for manual meter readers through base rates) until the appropriate level of O&M savings are realized. *Id.*

In 2010, the Commission issued an order expressing its expectations regarding Dominion’s completion of the AMR Program (*In the Matter of the Application of The East Ohio Gas Company d/b/a Dominion East Ohio to Adjust its Automated Meter Reading Cost-Recovery Charge and Related Matters*, Case No. 09-1875-GA-RDR

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<sup>1</sup> References to attachments to the appellant’s Motion for Stay filed in the instant case, No. 2012-2117, are denoted “Dominion Attachment \_\_\_\_;” references to appellee’s appendix attached hereto are “Appendix at \_\_\_\_.”

(Opinion and Order) (May 5, 2010) (hereinafter “2009 Order”).<sup>2</sup> To ensure that customers received maximum O&M savings, the Commission stated:

[T]he Commission finds that [Dominion] should be installing the AMR devices such that savings will be maximize and rerouting will be made possible in all communities at the earliest possible time. The Commission anticipates that, by the end of 2011, it will be possible to reroute nearly all of DEO’s communities. To that end, the Commission finds that, in its 2011 filing, DEO should demonstrate how it will achieve the installation of the devices on the remainder of its meters by the end of 2011, while deploying the devices in a manner that will maximize savings by allowing rerouting at the earliest possible time.

*Id.* at 7.

The 2009 Order put Dominion on notice that:

1. The Commission expected Dominion to install the AMR devices in such a manner that would maximize savings for customers. Dominion Attachment A, Opinion an Order at 8-9, 17-18; Dominion Attachment C, Entry on Rehearing at 5-6).
2. The Commission expected Dominion to reroute nearly all of its communities by the end of 2011. Dominion Attachment A, Opinion an Order at 8-9, 17-18; Dominion Attachment C, Entry on Rehearing at 5-6.
3. The Commission expected Dominion to install all the AMRs by the end of 2011, while also installing the AMRs in a manner that would maximize savings. Dominion Attachment A, Opinion an Order at 8-9, 17-18; Dominion Attachment C, Entry on Rehearing at 5-6.

On February 28, 2012, Dominion filed an application proposing a new monthly rider charge. Dominion Attachment A, Opinion and Order at 6. In its application, Dominion indicated that it had not completed its AMR Program. *Id.* Dominion also indi-

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<sup>2</sup> Although the order was issued in May of 2010, it is referred to as the “2009 Order” because the underlying case was filed in 2009 and relates to costs incurred during that calendar year.

cated that 27% of its communities still were not rerouted. *Id.* at 7-8. For the 12 months that culminated with the AMR program deadline ordered by the Commission (December 31, 2011), Dominion reported only \$3.5 million in annual savings, far short of the \$6,000,000 in annual cost savings that it projected to flow back to its customers for that time period (calendar year 2011). *Id.* at 7. Therefore, the Commission determined that Dominion did not comply with the 2009 Order and reduced the AMR rider amount proposed by Dominion. *Id.* at 17-18. The Commission adjusted the AMR rider to ensure that customers, who have been subsidizing Dominion's AMR Program for years, pay a just and reasonable charge.

## ARGUMENT

### Proposition of Law No. I:

**An order of the Public Utilities Commission of Ohio should not be stayed by the Court absent a strong showing that the party seeking the stay will likely prevail on the merits; that without a stay irreparable harm would be suffered; that if a stay is issued substantial harm to other parties would not result; and, most importantly, that such a stay is in the public interest. *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d 604, 605 (1987) (Douglas, J. dissenting).**

**A. Simply because Dominion agrees to post bond does not automatically mean it is entitled to stay.**

Stay of an agency order is considered an extraordinary remedy. *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). In 1987, then Justice Andrew Douglas, in dissent, offered the following standards to guide the Court's analysis of any application seeking a stay:

Orders of the Public Utilities Commission have effect on everyone in this state – individuals, business and industry. 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. These standards should include consideration of [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, above all in these types of cases, [4] where lies the interests of the public.

*MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St.3d at 606 (1987).

The *Douglas* test is well reasoned, and comports with the standards applied by federal courts in similar cases. See, e.g., *Virginia Petroleum Jobbers Assn. v. Federal Power Comm.*, 259 F.2d 921 (D.C. Cir. 1958). The *Douglas* test is also consistent with one Ohio appellate court's approach to stays of administrative agency decisions. *Bob Krihwan Pontiac-GMC Truck, Inc. v. GMC*, 141 Ohio App. 3d 777, 783 (Franklin Cty. 2001). In *GMC*, the Franklin County Court of Appeals applied the same four factors discussed by Justice Douglas. Although the *GMC* case involved an appeal arising from R.C. 119.12 and did not involve the Commission, the *GMC* court's reasoning is sound and instructive here.

Dominion has failed to make even a colorable showing that a stay is warranted in this case. Staying a Commission order is extraordinary judicial action and not simply a mechanical, ministerial act as Dominion chooses to portray it. Unlike staying a judgment between private individuals, staying a Commission order here frustrates the end result of

a long and complex process at the Commission. It also affects the pocketbooks of over a million customers. The Commission is the agency charged by the General Assembly with establishing reasonable rates and charges for these customers. Although this Court always has jurisdiction to determine the legality of Commission orders, it should not disrupt Commission orders merely because an appellant has the financial ability to post a bond. The Court should require movants to show why the extraordinary remedy it seeks is appropriate. Over the years, movants have applied the “*Douglas* test” to support their stay requests. Dominion, in stark contrast and perhaps not surprisingly, totally avoids the merits of the rate order that it attacks and, instead, seeks to foist higher costs upon its customers by delaying credits to their bills that are due now.

The Court has previously denied stay requests even where appellants have agreed to post a bond. In fact, the Court has done so where substantially more money was at stake. *Columbus S. Power Co. v. Pub. Util. Comm.*, 95 Ohio St.3d 8, 2002-Ohio-1487; *The Cincinnati Gas & Electric Company v. Pub. Util. Comm.*, Case No. 03-1207. In *Columbus Southern Power*, the appellants, AEP Companies, claimed that they would potentially lose “revenues approaching \$100 million” if the stay was not granted. *Columbus Southern Power Company and Ohio Power Company v. Pub. Util. Comm.*, Case No. 2260 (Application at for Stay at 4) (March 8, 2001), Appendix at 5. AEP Companies indicated that they would lose approximately \$8 million a month if the stay was denied. *Id.* at 12, Appendix at 13. The AEP Companies stated they were willing “to secure a surety bond to the satisfaction of the Clerk of the Court.” *Id.* at 10, Appendix at 11. The Court, however, denied the AEP Companies’ application for stay. *Columbus S.*

*Power Co. v. Pub. Util. Comm.*, 91 Ohio St.3d 1496, 2001-Ohio-5 (*Columbus Southern Power Company and Ohio Power Company v. Pub. Util. Comm.*, Case No. 2260 (Entry) (April 13, 2001)), Appendix at 18.

CG&E is another example. CG&E represented that it was at immediate risk of losing up to \$5,000,000 and could have potentially lost in excess of \$100,000,000 if the stay was not granted. *Cincinnati Gas & Electric Co. v. Pub. Util. Comm.*, Case No. 03-1207 (Motion at for Stay at 8) (July 11, 2003), Appendix at 28. CG&E represented that it was prepared to post a bond in any amount set by the Court in order to obtain a stay of the Commission's order. *Id.* at 2, Appendix at 22. The Court denied CG&E's request also. *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.*, 99 Ohio St.3d 1539, 2003-Ohio-4671 (*Cincinnati Gas & Electric Co. v. Pub. Util. Comm.*, Case No. 03-1207 (Entry) (September 10, 2003)), Appendix at 32.<sup>3</sup>

Because Dominion has failed to explain substantively why the Court should grant a stay, its petition should be denied.

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<sup>3</sup> It is worth noting that both the AEP Companies and CG&E, unlike Dominion, took the effort to address the four factors of the *Douglas* test in their respective motions for stay.

**B. Dominion failed to show that it is likely to prevail on the merits.**

**i. Dominion is unlikely to prevail on the merits because the Commission's interpretation of its own order is reasonable and supported by the record.**

This is Dominion's appeal in a nutshell: Dominion wants the Court to reject the Commission's interpretation of its own order. This alone shows that Dominion is unlikely to prevail. The Court has previously held that the Commission is given considerable discretion in setting just and reasonable rates and charges. *AT&T Communications of Ohio, Inc. v. Public Utilities Com.*, 51 Ohio St.3d 150, 154-155 (1990); *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788 ¶ 68. The Court has also recognized the difficulties inherent in making rate determinations and the need to apply expert judgment to such a task. *AT&T Communications*, 51 Ohio St.3d. at 154. Thus, when the Commission fixes rates or charges of a public utility, it is presumed that such rates or charges are fair and reasonable. *Id.* Dominion has the heavy burden of overcoming this presumption.

To set the appropriate AMR rider charge, the Commission interpreted its 2009 Order. Dominion invites the Court to replace the Commission's interpretation with its own. Dominion is highly unlikely to succeed in this because it would require the Court to ignore well-established precedent. This Court has previously stated that review of Commission orders is within the expertise of the Commission. *DiFranco v. FirstEnergy Corp.*, Slip Opinion No 2012 Ohio 5445, ¶34 (“[T]he commission is the fact-finder best suited to review and analyze various charged rates, rate designs, tariff schedules, and

*commission orders.*” (Emphasis added.) This deference regarding Commission orders comports with other decision of the Court. *Payphone Ass’n v. Pub. Util. Comm.*, 109 Ohio St.3d 453, 2006-Ohio-2988, ¶ 25 (“As the agency with the expertise and statutory mandate to implement the statute, the PUCO is entitled to deference”) citing *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004-Ohio-6767, ¶51; and *State ex rel. Saunders v. Indus. Comm.*, 101 Ohio St.3d 125, 2004-Ohio-339, ¶ 41 (“courts must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise in the particular subject area and to which the General Assembly has delegated the responsibility of implementing the legislative command”).

The Commission’s interpretation of its 2009 Order is reasonable based upon the history of the AMR Program. The Commission determined that Dominion was supposed to complete the AMR Program by the end of 2011 in order to maximize savings for its customers. The Commission’s interpretation of its own order is grounded in the history of the AMR Program, prior AMR rider cases, and the evidence in the record below. The basis for the Commission’s interpretation is thoroughly discussed in the Opinion and Order and Entry on Rehearing issued below. Dominion’s disagreement with this interpretation does not render the Commission’s action unreasonable or unlawful, nor does it change the fact that the Commissions’ rate order is supported by record evidence. To prevail on the merits, Dominion must convince the Court to (i) reject the Commission’s interpretation of its own order and (ii) have the Court reweigh all the evidence that the Commission relied upon to come to its conclusion. The Court, of course, routinely

rejects such invitations and should do so here. *DiFranco*, 2012-Ohio-5445, at ¶ 34; *Consumers' Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007-Ohio-4276, ¶ 29 (holding that the Court would not “second-guess the commission on questions of fact” unless the Commission’s findings are against the manifest weight of the evidence).

Because Dominion is not likely to succeed on the merits, the Court should not disrupt the Commission’s reasonable exercise of its statutory obligation to set reasonable rates and charges. Dominion’s motion should be denied.

**C. Dominion has not shown that, without a stay, it will suffer irreparable harm.**

Dominion’s claim of “harm” springs from the faulty premise that the Commission is somehow precluded from making any adjustments to Dominion’s proposed rider recovery request. That the Commission must simply accept rate proposals advocated by a utility is not supported by the law and is contrary to basic ratemaking regulatory principles. The case below required the Commission to establish the appropriate AMR rate for Dominion to charge its customers. Dominion filed data with the Commission for review and evaluation. The data addressed Dominion’s cost of the AMR Program and the level of savings customers are entitled to. While the Commission, in the main, did not take issue with Dominion’s level of costs expended during the recovery period,<sup>4</sup> it did find that Dominion delayed savings that would have reduced its customers’ bills because

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<sup>4</sup> The Commission did determine that Dominion was not allowed to recover cost for 9,530 uninstalled AMRs in the 2011 recovery year. It stated, however, that Dominion could potentially recover for the cost of these AMRs in future recovery years. Dominion Attachment A, Opinion and Order at 10-11.

Dominion failed to timely meet its AMR Program obligations. The longer Dominion delayed the AMR Program, the longer its customers pay twice for meter reading services. This is unfair and unjust to its over one million ratepayers. Accordingly, the Commission applied its rate-setting judgment and applied a credit (to the amount Dominion sought to recover) reflective of the savings that should have been achieved had Dominion timely completed its AMR installations. This is entirely consistent with the Commission's statutory obligation to set just and reasonable rates.

Dominion, however, presumes it was entitled to a specific level of revenue recovery. Such entitlement or guarantee is nowhere found in Ohio ratemaking law. Where a rate applicant fails to support the level of rates and charges that it proposes, the law allows, indeed requires, the Commission to reduce same. Thus, Dominion must explain how the Commission's adjustment of its proposed AMR rider amount irreparably harms the utility. It has not done so. It failed to show how reducing its proposed revenue requirement will damage its credit. It has not claimed the reduced AMR rider amount will hinder its ability to raise capital or reduce its ability to operate as a safe and reliable utility. Rather, in conclusory fashion, Dominion simply claims the "1.6 million dollar reduction" will cause it harm. But this alleged "harm" pales in comparison to the millions of dollars Dominion has recovered from its customers under the AMR Program since its inception. Dominion has done so while avoiding the costs, time, and resources required to litigate traditional base rate cases. It has also benefitted by avoiding the inherent lag in cost recovery associated with those rate cases.

All that happened below was that Dominion was not permitted to collect twice for performing the same function, meter reading. Being denied a double recovery cannot constitute “harm.”

In sum, Dominion requested approval to implement an accelerated cost recovery mechanism and the Commission granted this request, in no small part based upon Dominion’s representations of the level of customer savings the program would generate. Dominion has been allowed to recover its costs every year under the AMR Program. For its part, Dominion was ordered to complete the AMR installations by a specific date to maximize savings for customers. It failed to do both. Thus, the Commission ordered a rate adjustment to reflect the level of savings that Dominion would have achieved had it complied with the Commission’s 2009 Order. Allowing Dominion to recover less than what it requested is simply rate-making and is neither surprising or unlawful, nor does it constitute “irreparable harm.”

**D. Dominion failed to show that, if the stay is granted, other parties would not suffer substantial harm.**

As already pointed out, over 1.3 million ratepayers are entitled to greater savings from Dominion, and a stay of the Commission’s order will only serve to punish customers for Dominion’s missteps. Dominion used customers’ money to pay for its AMR Program. It has recovered millions of dollars from customers on an accelerated basis under the program. For customers, the primary benefit of the AMR Program is O&M savings. It is less expensive to read meters automatically, remotely, than it is to use manual readings and this reduces O&M expenses. When Dominion proposed the AMR Program, it

represented that customers would potentially see millions of dollars in savings. Because Dominion's failure to timely complete the AMR Program unreasonably delayed these savings, the Commission adjusted the AMR rider amount to pass on more savings to customers.

Dominion characterizes the loss to other parties as only pennies for individual customers. This misses the point. Many cases before this Court involving utility rates or charges impact millions of customers. The rate increase/decrease at issue often represents only dollars per month (or even less) for many customers while the increase/decrease involves thousands or millions of dollars per month for the utility. Focusing upon individual customer rate impacts, as Dominion does, ignores the fact that the Commission's task below was to set rates for *all* of the company's gas customers and that all of those customers were entitled to the benefits of greater costs savings that Dominion should have achieved. Granting Dominion's motion for stay will reward its failure to comply with a Commission order and will further deny ratepayers the savings they are entitled to.

**E. The public interest requires that the stay be denied.**

The public's interest in this case is clear. First, the public is entitled to pay just and reasonable rates and charges. It is the Commission's job to make this happen. After a full hearing on the matter, the Commission determined that ratepayers would not be paying a reasonable AMR rider amount unless Dominion's proposed O&M savings level is adjusted. Dominion should not be able to upset the Commission's decision, and upset the

public's reliance upon the Commission's decisions, without a clear showing that stay is appropriate. Second, Dominion's customers paid the costs of the program but are not receiving its full benefits. That is inequitable in any sense of the word. The Commission's order is the only thing that fixes this. Staying the Commission's order would hurt the public's interest by further delaying the savings Dominion promised.

### **CONCLUSION**

Dominion's customers have waited long enough to obtain the benefits of the program they paid for. Simply because Dominion has the financial wherewithal to post a bond should not be determinative of a stay that, if granted, rewards the utility's failures and punishes its customers. Dominion's stay petition prominently fails to apply and support its request under any of the well-reasoned criteria developed by former Ohio Supreme Court Justice Andrew Douglas. Dominion should be required to "earn" a stay and not be permitted to merely buy it.

Respectfully submitted,

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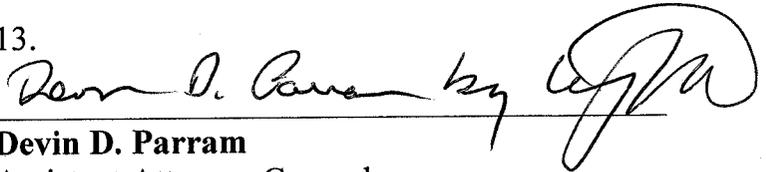
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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Contra Motion for Stay, submitted on behalf of appellee, the Public Utilities Commission of Ohio, was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 17<sup>th</sup> day of January, 2013.

  
\_\_\_\_\_  
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# **APPENDIX**

# APPENDIX

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IN THE SUPREME COURT OF OHIO

ATTORNEY GENERAL'S OFFICE  
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Columbus Southern Power Company  
and Ohio Power Company,

Appeal from the Public Utilities  
Commission of Ohio

Appellants,

Case No. 00-2260

v.

The Public Utilities  
Commission of Ohio,

Public Utilities Commission of Ohio  
Case Nos. 99-1729-EL-ETP and  
99-1730-EL-ETP

Appellee.

---

APPELLANTS COLUMBUS SOUTHERN POWER COMPANY'S  
AND OHIO POWER COMPANY'S APPLICATION FOR STAY

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IN THE SUPREME COURT OF OHIO

Columbus Southern Power Company  
and Ohio Power Company,

Appellants,

v.

The Public Utilities  
Commission of Ohio,

Appellee.

Appeal from the Public Utilities  
Commission of Ohio

Case No. 00-2260

Public Utilities Commission of Ohio  
Case Nos. 99-1729-EL-ETP and  
99-1730-EL-ETP

---

APPELLANTS COLUMBUS SOUTHERN POWER COMPANY'S  
AND OHIO POWER COMPANY'S APPLICATION FOR STAY

---

Appellants Columbus Southern Power Company and Ohio Power Company (the AEP Companies) respectfully move the Court for an order staying execution and enforcement of the portion of the Opinion and Order and Entry on Rehearing of the Public Utilities Commission of Ohio (Commission) which is the subject of the appeal in this proceeding, pending a decision by this Court on the merits of the AEP Companies' appeal from those orders. This application seeks to stay the May 1, 2001 effective date of the portion of the Commission's orders complained of in this appeal. The grounds for this application are set forth in the accompanying memorandum in support.

**MEMORANDUM IN SUPPORT  
OF APPLICATION FOR STAY**

**Background**

This Application for Stay is submitted to the Court in conjunction with an appeal from the Public Utilities Commission of Ohio's (Commission) September 28, 2000 Opinion and Order and November 21, 2000, Entry on Rehearing in Case Nos. 99-1729-EL-ETP and 99-1730-EL-ETP. The AEP Companies' appeal focuses on only one aspect of the Commission's orders -- the effective date of the AEP Companies' proposed credit to rates to reflect their future exemption from the Public Utility Excise Tax (Excise Tax). The AEP Companies' Merit Brief was filed with the Court on February 23, 2001.

As more fully described in the AEP Companies' Merit Brief, Am. Sub. S.B. No. 3 (S.B. 3) required electric utility companies, such as the AEP Companies, to unbundle the electric service they had been providing into the three basic service components -- generation, transmission and distribution. The purpose of the unbundling was to release the generation component from cost-of-service/certified territory regulation and let that component be provided competitively at market-based prices.

A necessary step toward this restructuring of the electric industry was to unbundle current rates so that customers would know what each component of service was costing and so that the price for the "wires" services, i.e., the transmission and distribution services, which remain subject to cost-of-service regulation, would reflect only those expenses properly attributable to them. R. C. 4928.34(A)(6) requires that the sum of the unbundled components "shall equal" the bundled rate that was in effect on the day before that section became effective. One of the limited exceptions to the "shall

equal" requirement was that the rates must be adjusted to reflect certain tax changes made by S.B. 3.

One such change is at the heart of this appeal. S.B. 3 amended R. C. 5727.30 to exempt electric utilities from the Excise Tax. This is a tax to which electric utilities have been subject since 1896. The Excise Tax is imposed on the privilege of doing business in Ohio and owning property in Ohio. The Excise Tax is calculated on taxable gross receipts over a twelve-month "measurement year" ending on April 30<sup>th</sup> and is imposed on the next twelve-month period which is referred to as the "privilege year."

There is no dispute between the Commission and the AEP Companies regarding certain basic understandings. S.B. 3's amendment to R. C. 5727.30 provides that the last privilege year for Excise Tax purposes is the twelve-month period May 1, 2001 through April 30, 2002. The measurement year for that last Excise Tax is the twelve-month period May 1, 2000 through April 30, 2001. It also is agreed that the AEP Companies' unbundled rate components must be reduced to reflect the AEP Companies' future exemption from the Excise Tax. Finally, there also is agreement concerning the amount of the reduction and the manner of reducing rates, i.e., a credit rider to rate schedules which reduces rates. The disagreement is when that reduction must occur.

The Commission's orders require the reduction to be effective May 1, 2001, at the conclusion of the last measurement year. The AEP Companies contend that the law requires the reduction to be effective May 1, 2002, at the conclusion of the last privilege year. At stake in this disagreement is approximately \$100 million of revenues

for the AEP Companies attributable to the one-year period for which the AEP Companies contend that the Commission prematurely reduced rates.

**Request for Stay**

The AEP Companies request a stay of the portion of the Commission's orders which requires that their rates be reduced one year earlier than they believe is permitted by law. The AEP Companies can only speculate concerning when this appeal might be orally argued to and decided by the Court. Even if this case were completed by as early as the end of August, 2001, four months of the credit, equal to about \$30 - \$35 million worth of unrecovered revenues, will have been implemented. If this case is not set for oral argument until the Fall of this year most of the credit will have been implemented by the time a decision is announced and the Commission acts on remand, resulting in lost revenues approaching \$100 million.<sup>1</sup> Without a stay of the Commission's orders, even if the AEP Companies prevail on the merits of the appeal there might be no means by which they could be made whole for their substantial loss of revenues.

R. C. 4903.16 provides for the issuance of a stay of execution of a final order of the Commission:

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

<sup>1</sup> In Cleveland Elec. Illuminating Co. v. Pub. Util. Comm. (1976), 46 Ohio St. 2d 105 the Court held that "the execution of this court's judgment of reversal and remand occurs only when the commission carries out the mandate of this court by its order and not . . . at the moment of this court's reversal by operation of law." (Id. at 112, 113).

appellant of all damages caused by the delay in the enforcement of the order complained of, and for the repayment of all moneys paid . . . in excess of the charges fixed by the order complained of, in the event such order is sustained.

Interpreting this statute, the Court has stated:

. . . 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.

Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co. (1957), 166 Ohio St. 254, 257 (emphasis added).

Justice Douglas noted in his dissenting opinion in MCI Telecommunications Corp. v. Pub. Util. Comm. (1987), 31 Ohio St. 3d 604 that:

R. C. 4903.16 does not detail under what circumstances a stay should be granted or, conversely, denied. Research indicates that this court has never enunciated criteria detailing the circumstances and conditions upon which a stay will be granted. (Id. at 605, 606).

The AEP Companies believe that that assessment continues to be true today. That does not mean, however, that the Court has not provided some guidance on the question of when a stay should be granted. In City of Columbus v. Pub. Util. Comm. (1959), 170 Ohio St. 105, this Court held that:

Patently, Section 4903.16, Revised Code, was designed primarily to apply to a public utility which is dissatisfied with the rates or charges as ordered by the Public Utilities Commission. (Id. at 109).

Therefore, the primary intent of R. C. 4903.16 is to provide protection to a public utility who contends that its rates have been reduced unlawfully.<sup>2</sup> Since the granting of a stay

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<sup>2</sup> A utility would not seek to stay an order increasing rates to a level the utility believes is insufficient since it would want to begin collecting whatever level of increase the Commission authorized, while it argues on appeal that the increase should have been greater.

is the only sure way to provide the needed protection against an unlawful rate reduction, the applicable standard appears to be whether the rate reduction will be in effect for a period of time while the appeal to this Court is pending. While there is no dollar threshold of damage which must be met, the loss of about \$8 million of revenue each month that the Excise Tax credit rider is prematurely effective is sufficient to warrant relief from the Court in the form of a stay.

The AEP Companies are aware that Justice Douglas' dissenting opinion in the MCI case suggested four standards for considering an application for a stay. His suggested standards were:

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. where lies the interest of the public.

(MCI, at 606).

These standards have not been adopted by the Court. Nonetheless, even if they had been adopted by the Court the AEP Companies' application for a stay meets these standards when considered both on an individual standard basis, and when considered collectively. Regarding the likelihood of prevailing on the merits, the Court has the benefit of being able to review the AEP Companies' Merit Brief. This, of course, does not mean that the Court actually should decide the merits of the appeal at this time, particularly in the absence of the Commission's brief. The Court, however, can review the Commission's orders and make its own judgment concerning the depth of legal

support for its orders. Further, it can see from the AEP Companies' Merit Brief that they have raised substantial legal challenges to the Commission's orders. In support of their position the AEP Companies rely on applicable provisions of S.B. 3, decisions of this Court and decisions of the Commission. Two of the Commission's decisions were issued contemporaneously with the orders on review in this appeal and provide four other electric utility companies the opportunity to recover the last privilege year Excise Tax expense which the Commission has denied the AEP Companies.

The AEP Companies do not expect the Court to reach a merit decision at this time. To the extent this factor suggested by Justice Douglas should be considered in ruling on this request for a stay, the AEP Companies believe that their Merit Brief should be considered by the Court and, based on the arguments presented therein, the Court should find that the first factor enumerated above has been satisfied.

The second factor seems to be easily satisfied. Granting a stay is the only certain method to assure that the AEP Companies will not suffer irreparable harm even if they prevail on appeal. For each of the twelve months that the AEP Companies' rates are prematurely reduced, they will lose about \$8 million. While arguments might be raised that even without a stay the AEP Companies can be made whole for the months of lost revenues if the Court reverses the Commission's orders, there is no assurance that such arguments would prevail.

In Columbus S. Power Co. v. Pub. Util. Comm. (1993), 67 Ohio St. 3d 535, the Court considered that appellant's request that the Commission be instructed on remand to provide a mechanism for the appellant to recover the Commission-authorized level of gross annual revenues, the recovery of which had been deferred pursuant to a

Commission-imposed rate increase phase-in plan which the Court had found the Commission lacked authority to impose. An intervening appellee argued that the Court's decision in the Keco Industries case prohibited such recovery. The Court rejected that argument, noting that such a reading of the Keco Industries case would "extend that holding to situations where reversal results in higher rates being set, in order to prevent utilities from recovering revenues not collected during the pendency of an appeal." Columbus S. Power Co. v. Pub. Util. Comm., at 541. This language suggests that there is a right to collect revenues, not collected during the pendency of an appeal, which the Court ultimately decides should have been collected.

The Court went on, however, to point out that in that case, because of the nature of a rate increase phase-in plan, the Commission already had "specifically authorized recovery of the deferred revenues in question and, thus, those revenues constitute a portion of the rates to which [the appellant] is entitled." (Id.). Therefore, it may be that the Court's willingness to direct the Commission to provide a mechanism for that appellant to recover the deferred revenues was linked to the specific facts of that case, rather than to a broader belief that in all cases the Court has the ability to make an appellant utility company whole when it is determined on appeal that rates set by the Commission were unlawfully low.

It also should be noted that in Justice Douglas' concurring opinion in the Columbus S. Power Co. case he questioned the vitality of the "so-called rule against retroactive ratemaking." (Id. at 549). Justice Douglas suggested "that perhaps the time has come for the General Assembly, the commission and/or this court to meet modern-day utility regulation with new and innovative thinking." (Id. at 550). In the over seven

years since that opinion was issued, no decisions of this Court or the Commission have addressed Justice Douglas' suggestion and S.B.3. made no general statutory changes in this regard.<sup>3</sup> Those instances in which the Court has directed the Commission to act on remand in a manner which makes an appellant who prevails on appeal whole continue to be the exception, not the norm. Therefore, the AEP Companies cannot afford to rely on the possibility that the Court would issue a ruling that will make them whole for the revenues lost during the pendency of this appeal. Instead, they must seek this stay as the only certain method to protect themselves against an inability to recover the revenues lost during this appeal beginning May 1, 2001.

The next standard suggested by Justice Douglas is whether substantial harm to other parties would result from granting the stay. R.C. 4903.16 addresses this question by requiring that if a stay is granted the appellant must execute an undertaking payable to the state in the sum prescribed by the Court with surety to the satisfaction of the Clerk of the 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 . . . in excess of the charges fixed by the order complained of, in the event such order is sustained." The undertaking provisions of R.C. 4903.16 give this Court discretion in determining the appropriate amount and form of the undertaking to be furnished by the appellant, given the type of order at issue and the potential pecuniary impact of granting the stay.

In this regard, the Court could look to R.C. 4909.42 for a method of protecting customers. That provision addresses the procedure to be followed for putting proposed rates in effect if the Commission has not timely ruled on a rate case brought under R.C.

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<sup>3</sup> As discussed below, R. C. 4928.33(B) does address this issue.

4909.18. Since the present appeal arises from a proceeding initiated under newly-enacted R.C. Chapter 4928, R.C. 4909.42 does not directly apply. However, that section does describe a process – an undertaking signed by two officers of the utility, under oath, promising to refund any amounts collected over the rate ultimately established, with interest at the rate stated in R.C. 1343.03, and the refund accomplished in a manner prescribed by the Commission – which could be adopted in this proceeding. If a surety is required the AEP Companies are prepared to secure a surety bond to the satisfaction of the Clerk of the Court.

The AEP Companies believe that such an undertaking would protect customers from any harm, let alone substantial harm from the issuance of a stay. The General Assembly, by including the undertaking requirement in R.C. 4903.16 has provided a procedure which meets this third standard suggested by Justice Douglas.

The last standard suggested by Justice Douglas is determining where lies the public interest. The plain language of R. C. 4903.16, which does not impose any condition on obtaining a stay of a rate reduction other than an undertaking and an adequate surety, indicates that the public interest lies in the grant of a stay in the case of an order reducing rates. In addition, the AEP Companies believe that specifically in the rate unbundling process under S.B. 3 the interest lies in adopting a mechanism (such as a stay) which results in the effect of a ruling by this Court reversing the Commission's order, being implemented in a manner which places the parties in the positions they would have been in had the Commission ruled properly in the first instance.

Adopting such a mechanism is consistent with the intent of R.C. 4928.33 (B). The intent of R.C. 4928.33(B) (a copy of which is attached for the Court's convenience) is to protect customers and utilities from the Commission not issuing a final order adopting a transition plan (including a rate unbundling plan) on a timely basis or issuing an order which later is reversed. How that procedure works when an order on appeal has been "enjoined in whole or in part pending appeal to a court" is not so clear. The statute seems to contemplate the Commission reissuing its final order as an interim order. Then, when the appeal is concluded, a final order consistent with this Court's ruling would be issued; and if the Court's opinion finds that the original final order, which had been reissued on an interim basis, was in error, the new final order would reconcile the difference between the new final order and the original final order/interim order. However, R.C. 4903.16 requires that when the order is enjoined on appeal, i.e., a stay is granted, an undertaking with surety must be executed by the appellant. That undertaking would act to protect, in this instance, the customers and there would be nothing to reconcile.

While R.C. 4928.33(B) addresses interim transition plan orders, it is apparent that the General Assembly had in mind that when a final transition plan order is later issued, or when an appeal in which a part of the Commission's order was stayed is finally resolved, there should be a reconciliation of the amounts finally determined to be proper, as compared to the amounts set on an interim basis.

This reconciliation mechanism was established to assure that if the Commission erred in setting, for instance, the level of shopping credits available to customers or the amount of transition revenues to which a utility is entitled, the utility and its customers

could be placed in the positions they would have been in had the Commission ruled properly in the first instance.

It is unclear, however, how this new statute might work in the context of an appeal alleging an unlawful reduction in the unbundled rates. Therefore, a stay from this Court pursuant to R. C. 4903.16 is the only certain protection available to the AEP Companies in this context. Moreover, if the Court were to determine that the AEP Companies should follow the procedure set forth in R. C. 4928.33(B), protection under that statute is not available unless the Court first enjoins the portion of the Commission's orders being appealed. In that context, R. C. 4928.33(B) provides an independent basis for the Court to grant this application for a stay.

#### Conclusion

R.C. 4903.16 contemplates the granting of the relief sought at this time by the AEP Companies. As the Court has said, there is a right to secure a stay of the collection of new rates. (Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co., supra.). Recently enacted R. C. 4928.33(B) also contemplates the granting of this application for stay. Without a stay the AEP Companies stand to lose, beginning May 1, 2001, about \$8 million each month that this appeal is pending (for up to twelve months) even if the Court ultimately rules in favor of the AEP Companies. On this basis alone, a stay should be granted.

Moreover, a stay is warranted under the standards suggested by Justice Douglas. The likelihood of success on the merits of this appeal is sufficiently high, particularly when viewed in the context of the potential for irreparable loss of about \$100

million, that a stay should be issued. With an undertaking and surety to the satisfaction of the Clerk of this Court customers will be protected from any harm that could be caused by the granting of a stay. Finally, a stay coupled with an undertaking is consistent with the public interest because at the end of this appeal, win or lose, the AEP Companies and their customers then will be in the position they should have been in had the Commission made a proper ruling in the first instance on the timing of the Excise Tax credit to rates.

In short, absent a stay, the AEP Companies might forever be denied their right to collect charges which this Court ultimately may hold they were legally entitled to collect. With a stay, however, the right of the AEP Companies to collect those charges while this appeal is pending is protected, and the right of their customers to a refund in the event the AEP Companies do not prevail herein is nonetheless guaranteed. A stay is in the public interest and necessary to avoid irreparable injury and manifest injustice to the AEP Companies which otherwise would result if the Commission's orders are reversed or vacated by this Court.

For the foregoing reasons, the AEP Companies respectfully urge the Court, pending a determination of the merits of the appeal, to stay the execution of the portion

of the Commission's orders requiring that the Excise Tax credit to rates begin on May 1, 2001.

Respectfully submitted,

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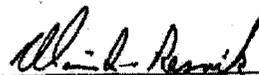
## Sec. 4928.33.

(B) IF THE COMMISSION FAILS TO ISSUE, BY OCTOBER 31, 2000, A FINAL ORDER APPROVING A TRANSITION PLAN, OR SUCH A FINAL ORDER HAS BEEN ENJOINED IN WHOLE OR IN PART PENDING APPEAL TO A COURT, THE COMMISSION SHALL ISSUE AN INTERIM ORDER PRESCRIBING A TRANSITION PLAN, TO HAVE EFFECT ON AN INTERIM BASIS ONLY, AND CONTAINING THE PLAN COMPONENTS REQUIRED BY DIVISION (A) OF SECTION 4928.31 OF THE REVISED CODE AND PROVIDING FOR THE OPPORTUNITY FOR TRANSITION REVENUE RECEIPT IF SUCH AN APPLICATION WERE INCLUDED IN THE PLAN FILED BY THE UTILITY UNDER THAT SECTION. THE INTERIM ORDER IS SUBJECT TO SECTION 4903.15 OF THE REVISED CODE BUT IS NOT SUBJECT TO REVIEW AND APPEAL UNDER CHAPTER 4903, OF THE REVISED CODE.

AN INTERIM PLAN PRESCRIBED UNDER THE INTERIM ORDER SHALL BE EFFECTIVE FOR THE ELECTRIC UTILITY BEGINNING ON THE STARTING DATE OF COMPETITIVE RETAIL ELECTRIC SERVICE AND SHALL CONTINUE IN EFFECT UNTIL SUCH TIME AS ANY OTHER REPLACEMENT TRANSITION PLAN TAKES EFFECT PURSUANT TO A FINAL COMMISSION ORDER OR RESOLUTION OF AN APPEAL. ANY INTERIM PLAN SO PRESCRIBED SHALL COMPLY WITH THE APPLICABLE PROVISIONS OF SECTION 4928.34 OF THE REVISED CODE. A FINAL COMMISSION ORDER SHALL PROVIDE FOR A RECONCILIATION OF THOSE AMOUNTS DETERMINED IN THE FINAL ORDER RELATIVE TO DIVISION (A) OF SECTION 4928.31 OF THE REVISED CODE AS COMPARED TO THE INTERIM AMOUNTS AS DETERMINED UNDER THIS DIVISION.

Proof of Service

I certify that a copy of Appellants Columbus Southern Power Company's and Ohio Power Company's Application for Stay was sent by ordinary U.S. mail to counsel of record for all parties to this appeal at the following addresses on this 8<sup>th</sup> day of March, 2001.



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99-1729-EL-ETP

The Supreme Court of Ohio

FILED

APR 13 2001

MARCIA J. MENDEL, CLERK  
SUPREME COURT OF OHIO

Columbus Southern Power  
Company and Ohio Power  
Company,  
Appellant,

Case No. 00-2260

v.

Public Utilities Commission  
of Ohio,  
Appellee.

E N T R Y

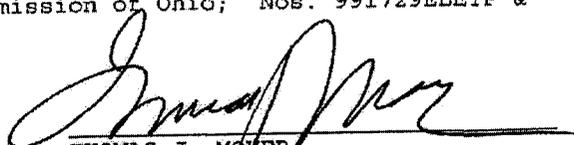
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ATTORNEY GENERAL'S OFFICE  
PUCO

This cause is pending before the Court as an appeal from the Public Utilities Commission of Ohio. Upon consideration of appellant's motion for stay of enforcement of the portion of the Entry on Rehearing of the Public Utilities Commission of Ohio which is the subject of this appeal and the motion for leave to intervene as appellee by Robert S. Tongren, in his capacity as the Ohio Consumers' Counsel or, in the alternative, notice of his filing of an amicus brief in support of the appellee,

IT IS ORDERED by the Court that the motion for stay be, and hereby is, denied.

IT IS FURTHER ORDERED by the Court that the motion for leave to intervene be, and hereby is, granted.

(Public Utilities Commission of Ohio; Nos. 991729ELETP & 991730ELETP)

  
THOMAS J. MOYER  
Chief Justice

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7-11-03

IN THE SUPREME COURT OF OHIO

The Cincinnati Gas & Electric Company	:	No. <b>03-1207</b>
Appellant,	:	Appeal from the Public
v.	:	Utilities Commission of
The Public utilities Commission of Ohio,	:	Ohio
Appellee.	:	Public Utilities Commission
	:	of Ohio
	:	Case No. 03-1145-EL-GAG

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MOTION FOR STAY  
OF  
THE CINCINNATI GAS & ELECTRIC COMPANY

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JUL 11 2003

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IN THE SUPREME COURT OF OHIO

The Cincinnati Gas & Electric Company : No.  
: :  
Appellant, : Appeal from the Public  
: Utilities Commission of  
v. : Ohio  
: :  
The Public utilities Commission of Ohio, : Public Utilities Commission  
: of Ohio  
Appellee. : Case No. 03-1145-EL-GAG  
: :

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MOTION FOR STAY  
OF  
THE CINCINNATI GAS & ELECTRIC COMPANY

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OHIO

Motion for Stay of Appellant The Cincinnati Gas & Electric Company

Appellant, The Cincinnati Gas & Electric Company (CG&E), hereby moves the honorable Supreme Court of Ohio to stay the Entry, and Entry on Rehearing, of the Public Utilities Commission of Ohio (Commission) issued in Case No. 03-1145-EL-GAG. CG&E timely filed its Motion to Intervene pursuant to O. A. C. 4901-1-11 as a party with a real and substantial interest in the case below. The case involves the application of the Village of Indian Hill (Indian Hill) for certification as a governmental aggregator operating within CG&E's certified territory and dependent upon a variety of services performed by CG&E. The Commission's June 10, 2003, Entry denied CG&E's Motion to Intervene and granted Indian Hill's certification.

CG&E timely filed its Application for Rehearing in accordance with R. C. 4903.10, and a Motion for Stay, on June 12, 2003. The Commission denied CG&E's Application for Rehearing and Motion for Stay in its Entry on Rehearing of July 8, 2003. Thereafter, CG&E timely filed its Notice of Appeal and seeks this Motion for Stay with respect to Case No. 03-1145-EL-GAG. CG&E is prepared to post an appropriate bond, payable to the State, in an amount, if any, determined by the Court, pursuant to R. C. 4903.16. CG&E's Motion for Stay is fully supported by the attached Memorandum in Support.

Memorandum in Support of CG&E's Motion for Stay

CG&E respectfully requests that the Court issue, pursuant to R. C. 4903.16, a stay of the Commission's Entry of June 10, 2003, and of its Entry on Rehearing of July 8, 2003 in Case No. 03-1145-EL-GAG. CG&E requests a stay because CG&E is likely to prevail on the merits of this case, the Commission's decision causes CG&E immediate and irreparable harm, a stay will not harm any other party to this case, and a stay benefits the public interest.

In the first instance R. C. 4903.16 states the conditions necessary to obtain a stay from the Court regarding a Commission decision.<sup>1</sup> Revised Code Section 4903.16 permits the Court to issue a stay upon application by the appellant, three days notice to the Commission, and the execution of an undertaking in an amount determined by the Court sufficient to pay costs associated with the delay of the Commission's decision.<sup>2</sup>

In order to satisfy the conditions of R. C. 4903.16 CG&E has filed its Notice of Appeal and Motion for Stay with the Commission's docketing division. Such filing begins the three-day notice period. Therefore, the Court may issue a stay effective July 12, 2003. Further, CG&E will post an undertaking as determined by the Court, if any is necessary. CG&E

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<sup>1</sup> Ohio Rev. Code Ann. § 4903.16 (Baldwin 2003).

<sup>2</sup> *Id.*

asserts that delaying the implementation of the Commission's decision would not damage any party.

The affected parties to this case are Indian Hill, the residents of Indian Hill, and Dominion Retail, Inc. (Dominion), Indian Hill's chosen retail electric generation provider. Indian Hill does not benefit monetarily from its arrangement with Dominion; therefore, there is no possible damage to Indian Hill. Dominion is free to offer retail electric generation service directly to consumers residing in Indian Hill at the same price that it has agreed to provide to consumers in the Indian Hill aggregation pool. Dominion's only statutory right as a competitive retail electric service provider certified by the Commission is to solicit customers.<sup>3</sup> Residents of Indian Hill are free to contract with any certified competitive retail electric service provider at any price. Therefore, neither Dominion nor Indian Hill residents suffer harm. For these reasons CG&E urges the Court not to require any undertaking of CG&E.

Rule of Appellate Procedure 7 also governs CG&E's request for a stay from the Court of the Commission's decision in Case No. 03-1145-EL-GAG.<sup>4</sup> Pursuant to Rule of Appellate Procedure 7, before the Court may issue a stay, CG&E must have sought a stay from the Commission and must post an appropriate bond.<sup>5</sup> CG&E did seek a stay from the Commission, which the Commission denied in its Entry on Rehearing

<sup>3</sup> Ohio Rev. Code Ann. § 4928.10 (Baldwin 2003).

<sup>4</sup> OHIO R. APP. PRO. 7 (West Group 2003).

<sup>5</sup> *Id.*

dated July 8, 2003. CG&E is willing to post such bond as the Court may require but, as previously discussed, does not believe that a bond is necessary because no party would suffer damage during the pendency of this appeal. Therefore, CG&E has satisfied the conditions for stay set forth in Rule of Appellate Procedure 7.

The Court has opined that a stay is "a matter of right" if the appellant posts a bond pursuant to Ohio Rule of Civil Procedure 62(B).<sup>6</sup> Specifically the Court held:

"Pursuant to [Civ.R. 62], *defendants-appellants are entitled to a stay of the judgment as a matter of right. The lone requirement of Civ.R. 62(B) is the giving of an adequate supersedeas bond.* Civ.R. 62(C) makes this requirement unnecessary in this case, *and respondent has no discretion to deny the stay.* Therefore, the evidentiary hearing on the stay and the related depositions are inappropriate proceedings."<sup>7</sup>

CG&E agrees with the Court's holding and believes that it is applicable to the Commission because, pursuant to R. C. 2505.03 and for purposes of appeal, the Commission is treated as if it were a trial court.<sup>8</sup> Further, there is no conflict with R. C. Chapter 119 because it governs the Commission only regarding rulemaking proceedings.<sup>9</sup> Therefore, CG&E asserts that the Commission was required to grant a stay pending appeal upon posting of an appropriate bond by CG&E.

<sup>6</sup> *State Fire Marshall v. Curl*, 87 Ohio St. 3d 568, 571, 722 N.E.2d 73, 75 (2000).

<sup>7</sup> *Id.* (quoting *Ocasek v. Riley*, 54 Ohio St. 2d 488, 490, 377 N.E.2d 792, 793 (1978) (emphasis added).

<sup>8</sup> Ohio Rev. Code Ann. § 2505.03 (Baldwin 2003).

<sup>9</sup> Ohio Rev. Code Ann. § 119.01 (Baldwin 2003)

The Court has never expressly applied its holdings in *State Fire Marshall* and *Ocasek* to the Commission. Nor has the Court directly applied R. C. 2505.03 to the Commission. In the absence of specific direction from the Court the Commission has applied a four-part test suggested by Justice Douglas in a dissent in *MCI v. Pub. Util. Comm'n* regarding whether to grant a stay.<sup>10</sup> The test adopted by the Commission is as follows:

- (a) Whether there has been a strong showing that movant is likely to prevail on the merits;
- (b) Whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay;
- (c) Whether the stay would cause substantial harm to other parties; and
- (d) Where lies the public interest.<sup>11</sup>

Although CG&E does not agree that the four-part test adopted by the Commission is applicable to stay a Commission decision pending appeal, CG&E also meets each element of the Commission's test.

First, CG&E is likely to prevail on the merits. The question before the Court is a question of law. Therefore the Court has "complete and independent power of review."<sup>12</sup> Revised Code Section 4928.08(B) prohibits a governmental aggregator from providing a competitive retail

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<sup>10</sup> *In re Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI (Entry on Rehearing at 5) (February 20, 2003) (see *MCI v. Pub. Util. Comm'n*, 31 Ohio St. 3d 604, 606, 510 N.E.2d 806, 807 (1987)).

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

<sup>12</sup> *Ohio Edison Company v. Pub. Util. Comm'n*, 78 Ohio St. 3d 466, 469, 678 N.E.2d 922, 925 (1997).

electric service "without first...providing a financial guarantee sufficient to protect customers and electric distribution companies from default."<sup>13</sup> The Commission agreed that the requirement of a financial guarantee is applicable to governmental aggregators but decided not to require such a guarantee in direct conflict with the statute, stating:

*Although the statutory financial guarantee requirement set forth in Section 4928.08(B), Revised Code, encompasses governmental aggregators, this requirement can be met by the financial guarantee of the CRES provider of generation service to the governmental aggregator. There is no need that both the CRES provider and the aggregator each separately provide such a guarantee to the EDU.*<sup>14</sup>

It is blackletter law that "[a]ll words of a statute are presumed to mean something."<sup>15</sup> Further, "[t]he ordinary and natural import of words consistent with the common sense of the community, is to be adopted in arriving at the legislative intent."<sup>16</sup> The dictionary defines "guarantee" as "an undertaking to answer for the payment of a debt or the performance of a duty of another in the case of the other's default or miscarriage."<sup>17</sup> If the Court permits the Commission's holding to stand it will eliminate the "financial guarantee" specifically required of governmental aggregators by R. C. 4928.08(B). Nothing in R. C. 4928.08(B) permits the Commission

<sup>13</sup> Ohio Rev. Code Ann. § 4928.08(B) (Baldwin 2003).

<sup>14</sup> *In re Indian Hill*, Case No 03-1145-EL-GAG (Entry at 2) (July 8, 2003) (emphasis added).

<sup>15</sup> *The Cincinnati, Hamilton & Dayton Railway Company v. Kleybolte*, 80 Ohio St. 311, 314, 88 N.E. 879 (1979).

<sup>16</sup> *Id.*

<sup>17</sup> *Merriam Webster's Collegiate Dictionary*, Tenth Edition (1994).

to eliminate the financial guarantee required of a governmental aggregator in favor of the financial guarantee required of other competitive retail electric service providers.

Given the direct conflict between the Commission's Entry and Entry on Rehearing, and the statutory requirements of R. C. 4928.08(B), the Commission's lack of reasoning in its decision and because the Commission reached its determination without providing due process to CG&E, CG&E believes that it has made a strong showing that it is likely to prevail on the merits.

Second, CG&E would suffer irreparable harm in the absence of a stay. Not only Indian Hill, the governmental aggregator at issue in this case, but all other governmental aggregators, may immediately commence aggregation without providing any financial guarantee to protect CG&E and its customers from default. With regard to Indian Hill that means that CG&E is immediately at risk for up to \$5,000,000. If applied to CG&E's certified territory the risk to CG&E is in excess of \$100,000,000. CG&E provided the calculation for liability in its Application for Rehearing but was denied the opportunity to make a proffer of facts to the Commission because the Commission denied CG&E intervention and the right to present evidence, in the case below.<sup>18</sup>

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<sup>18</sup> In the absence of a factual record CG&E has attached the Commission's Entry and Entry on Rehearing, and CG&E's Application for Rehearing, to this Motion for Stay pursuant to Rule of Appellate Procedure 7.

CG&E asserts that such risk, unlawfully, unreasonably, and immediately, thrust upon it, constitutes irreparable harm.

Third, the stay would not harm any other parties. Neither the Commission nor Indian Hill has any financial stake in the outcome of this case. No consumer has objected to CG&E's request for a stay. Although the Ohio Consumer's Counsel sought intervention, which, like CG&E's intervention, the Commission denied, if a default occurs residential customers, like all other customers, would ultimately pay the cost of default. Revised Code Section 4928.08(B) is designed to "protect customers and electric distribution utilities from default." As previously discussed, both consumers and competitive retail electric service providers continue to have the opportunity to independently contract for generation service with each other. Further, no consumer has a statutory right to any particular retail electric generation rate except the standard service offer rate of CG&E.<sup>19</sup> A stay does not harm any party.

Finally, the public interest lies in the issuance of a stay. In developing a competitive retail electric market Ohio has taken a conservative approach. If the Court does not grant a stay and a default occurs during the pendency of the appeal, CG&E and its shareholders, consumers, or both, will suffer harm. The Commission will have to determine who assumes such liability uncollectible in the market.

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<sup>19</sup> Ohio Rev. Code Ann. §§ 4928.35, 4928.34 (Baldwin 2003).

Given the amount of money at stake, and the impact that such default can have on CG&E, consumers, and the state, it is in the public interest to establish the rules before plunging ahead. The Court need only take notice of the effect of a requirement that utilities purchase generation in the market at a high price and sell at a regulated frozen price that is lower, to understand what might happen if the competitive retail electric supplier chosen by a governmental aggregator were to default and force the electric distribution utility to purchase generation in the market. California placed such a requirement on the Pacific Gas & Electric Company and Southern California Edison and each was forced into bankruptcy.<sup>20</sup> Defaults do happen in Ohio. In CG&E's service territory there have been four defaults due to bankruptcy of gas or electric certified suppliers, including Titan Energy, Energy Co-op, Enron, and New Power. There will likely be other defaults in the future.

CG&E meets the standard of any test that the Court may apply to CG&E's request for a stay. For the reasons stated above CG&E respectfully requests that this honorable Court grant its Motion for Stay pending the outcome of CG&E's appeal.

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<sup>20</sup> See *Pacific Gas & Electric Company v. Lynch*, 216 F. Supp. 2d 1016, 1042 (2002)

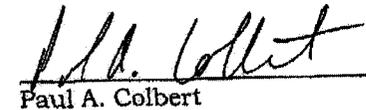
Respectfully submitted,



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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 11th day of July, 2003.



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03-1145-EL-CAG

The Supreme Court of Ohio

FILED

SEP 10 2003

MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

The Cincinnati Gas & Electric :  
Company, :  
Appellant, :  
v. :  
The Public Utilities :  
Commission of Ohio, :  
Appellee. :

Case No. 03-1207

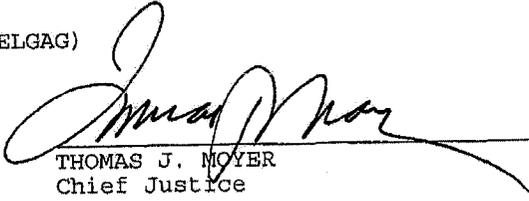
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This cause is pending before the Court as an appeal from the Public Utilities Commission of Ohio. Upon consideration of appellant's motion for stay of the entry, and entry on rehearing, of the Public Utilities Commission of Ohio issued in Case No. 03-1145-EL-GAG, the motion for leave to intervene of the Village of Indian Hill, and the motion to dismiss appeal of Cincinnati Gas & Electric Company by the Village of Indian Hill,

IT IS ORDERED by the Court that the motion for leave to intervene be, and hereby is, granted.

IT IS FURTHER ORDERED by the Court that the motion for stay and motion to dismiss appeal be, and hereby are, denied.

(P.U.C.O.; No. 031145ELGAG)

  
THOMAS J. MOYER  
Chief Justice

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