

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Its Natural Gas Distribution Rates.)	Case No. 2014-0328
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)	Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service.)	Public Utilities Commission of Ohio Case Nos. 12-1685-GA-AIR 12-1686-GA-ATA 12-1687-GA-ALT 12-1688-GA-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.)	

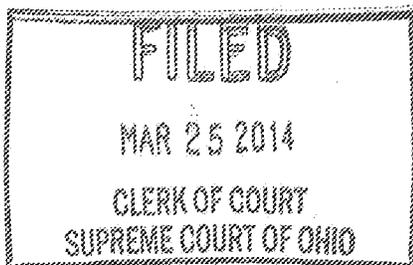
MEMORANDUM OF DUKE ENERGY OHIO, INC., CONTRA JOINT MOTION FOR A STAY OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, THE KROGER COMPANY, OHIO MANUFACTURERS' ASSOCIATION, AND OHIO PARTNERS FOR AFFORDABLE ENERGY

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I. INTRODUCTION

The motion filed by the Office of the Ohio Consumers' Counsel, The Kroger Company, Ohio Manufacturers' Association, and Ohio Partners for Affordable Energy (collectively, Joint Movants) seeks to stay implementation of rates that have been lawfully set by the Public Utilities Commission of Ohio (Commission) and that are consistent with Ohio utility regulatory and environmental policy. The Commission properly ruled that Duke Energy Ohio, Inc., (Duke Energy Ohio) is entitled to recover normal and necessary business costs for investigation and remediation of manufactured gas plant (MGP) sites located on utility property, pursuant to state and federal law.

The recovery of the costs related to environmental investigation and remediation of MGP sites was one part of a rate case proceeding that was well supported factually and legally. The

Commission's decision was entirely consistent with the factual record. The Company supported its request for cost recovery for environmental investigation and remediate with testimony that included a review of the history of MGP plants by the country's leading expert in these matters¹; a detailed explanation of the actual remediation process by the Company employee who manages such activities and who is a leader in the utility industry with respect to MGP remediation², and a discussion of how the remediation complied with state environmental laws, by the Certified Professional under the Ohio Environmental Protection Agency (EPA) Voluntary Action Program (VAP). The VAP Certified Professional testified that the remediation was consistent with applicable standards, protective of human health and the environment, and was performed in a least cost manner.³ Despite ample support in the record and detailed and lengthy explanation from the Commission regarding the bases for its decision, the Joint Movants now seek to stay implementation of the rates resulting from the Commission's order. The motion to stay is fatally flawed and legally defective.

First, because the Joint Movants have failed to provide an undertaking, it is improper under the unambiguous terms of R.C. 4903.16.

Second, the Joint Movants cannot show a likelihood of success in the underlying appeal, which is necessary to support the present motion. For example, the Joint Movants assert that the sites of the MGPs have not been used and useful in providing utility service to customers in over fifty years. This is incorrect. Both sites currently house utility operations and are included in plant in service for purposes of establishing rates.⁴

¹ Duke Energy Ohio Ex. Nos. 20 and 20A (Direct and Supplemental Testimony of Dr. Andrew Middleton)

² Duke Energy Ohio Ex. Nos. 21 and 21A (Direct and Supplemental Testimony of Jessica L. Bednarcik)

³ Duke Energy Ohio Ex. No. 26, (Direct Testimony of Shawn S. Fiore)

⁴ Tr. Vol. IV at 889.

Finally, the Joint Movants' argument that the stay provision set forth in R.C. 4903.16 amounts to a limitation on the Court's authority is meritless. The two cases cited by the Joint Movants both involve quite unrelated facts and inapplicable legal issues. Section 4903.16 places no unconstitutional restriction on the Court's authority but, rather, establishes a condition on the party seeking a stay. Moreover, this exact argument has previously been rejected by the Court. *Office of Ohio Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 575 N.E.2d 157 (1991).

II. ARGUMENT

A. The Joint Movants Have Not Complied With Statute and Must Be Denied.

1. Joint Movants Have Not Executed an Undertaking.

Revised Code Section 4903.16 explicitly requires the following:

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.

The Office of the Ohio Consumers' Counsel (OCC), one of the Joint Movants herein, argues on behalf of the Joint Movants that they are entitled to a stay without compliance with the statutory provisions that are in place to protect a party in the position of Duke Energy Ohio. The OCC has made this same argument on multiple occasions, to no avail. In fact, this Court explained the law in detail on one of those occasions, even though the issue was moot. The Court explained that "R.C. 4903.16 provides for the procedure that *must* be followed when

seeking a stay of a final order of the Commission.” *Office of Consumers’ Counsel v. Pub. Util. Comm.*, (1991) 61 Ohio St.3d 396 at 403, 575 N.E.2d 157 at 162 (1991) (emphasis added). The Court then reiterated as follows:

In *Columbus v. Pub. Util. Comm.* (1959), 170 Ohio St. 105, 10 O.O.2d 4, 163 N.E.2d 167, it was held by this court that the statutory procedures control the process for appealing final Commission orders. In its interpretation of this statute, in *Columbus*, this court concluded that “any stay of an order of the commission is dependent on the execution of an undertaking by the appellant... .

Id.

The Court therefore declined to issue a stay and again admonished the appellant that, if the appellant had wished to stay the collection of the rates authorized by that order, pending the appeal, it should have complied with all of the requirements of the statute. The instant case is identical in that the Joint Movants have again neglected to follow the requirements of R.C. 4903.16. The outcome must be the same.

2. The Requirement for a Bond is Not in Conflict with the Ohio Constitution.

In this case, there are *four* Joint Movants, yet only OCC claims the right to seek a stay without complying with the law. The remaining Joint Movants have footnoted out of argument wherein OCC claims that no bond is required. Conspicuously, no claim is made on the part of the other three Joint Movants as to why they are entitled to a stay without complying with the law. The other three Joint Appellants offer no explanation as to why they should not be required to comply with the statute. Instead, only one Joint Movant (OCC) claims that the bond requirement in R.C. 4903.16 is unconstitutional under the separation of powers doctrine and also that the public officer exemption under

R.C.2505.12 entitles Joint Movants to a stay without posting the required undertaking. Both arguments are legally unsupportable.

The utility regulatory process, including the appeal process from rate orders, is entirely statutory. R.C. 4903.13. Indeed, the Commission may exercise only that authority that is granted to it by statute. A right to seek a stay of Commission orders is a statutory mechanism, not an inherent judicial power. Joint Movant's argument is based upon an assumption to the contrary. The Joint Movants argue that the right to appeal Commission order is judicially created and may not be infringed upon by the General Assembly. Joint Movants misunderstand that, instead, the right to appeal is entirely statutory.

OCC argues, separate from the other three Joint Movants, that it is exempt from the need to post a bond, because it is a "public officer." R.C. 2505.09 authorizes Ohio courts to issue stays upon the execution of a supersedeas bond, but Ohio law exempts from this requirement certain parties, including "[a]ny public officer of the state or of any of its political subdivisions who is suing or is sued solely in the public officer's representative capacity." R.C. 2505.12.

OCC proposes that it is a "public officer," for purposes of this exemption, due to language in R.C. 4911.06. But its status as a "state officer" under R.C. 4911.06 is entirely unrelated to the term "public officer" as used in R.C. 2505.12. R.C. 4911.06 states that the consumers' counsel shall be considered a state officer for purposes of section 24 of Article II, Ohio Constitution. That section of the Ohio constitution merely explains that certain state officers are liable to be impeached. The intent of R.C. 4911.06 is, thus, to make clear that the consumers' counsel may be removed from office for

certain specified reasons. R.C. 2505.12 has a distinctly different purpose. R.C. 2505.12 is contained with the title of the Revised Code dealing with appellate courts. It specifies that a supersedeas bond is not required for certain public officers. But neither R.C. 2505.12 nor R.C. 4911.06 encompasses the consumers' counsel. Therefore, the exemption from the bonding requirement is not applicable to OCC.

Furthermore, the exemption under R.C. 2505.12 would not, in any case, apply to the appeal of a Commission order, as the undertaking required by R.C. 4903.16 is not a supersedeas bond. A supersedeas bond is designed to ensure that the appellee receives the benefit of the judgment if successful. *See* R.C. 2505.09. The undertaking required with regard to Commission orders, on the other hand, is meant to protect against the damages caused by the delay in enforcement of a legal Commission order. The two are not comparable, making any bonding exemption inapplicable.

B. The Joint Movants Cannot Establish the Necessary Requirements to Obtain a Stay.

The Joint Movants correctly note that there is no controlling precedent in Ohio setting forth the conditions under which an order of the Commission shall be stayed. However, the Court has urged adoption of the four-part analysis set forth in the dissenting opinion of Justice Douglas in *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St. 3d 604, 606, 510 N.E.2d 806 (1987) (Douglas, J., dissenting). In that case, Justice Douglas discussed four factors to consider when examining a request for a stay of a Commission order

- (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.

Here, the Joint Movants meet none of these factors.

1. The Joint Movants Have Not Shown Substantial Likelihood of Success on the Merits

The Joint Movants claim that the Commission's Opinion and Order is inconsistent with Ohio's ratemaking formula. However, in making this argument, the Joint Movants misapply R.C. 4909.15. The Commission's Opinion and Order is appropriately based upon ratemaking authority in R.C. 4909.15(A)(4) and years' of precedent. Virtually every rate case ever prosecuted before the Commission includes an analysis of the *prudence and reasonableness* of allowable expenses. The remediation costs stemming from compliance with Ohio and federal environmental law were, as determined by the Commission in this case, a normal and necessary cost of doing business. As explained by the Commission, the incurrence of these costs was necessary in order for the Company to remain in business and to be in compliance with Ohio law.⁵ Because the Commission found that such costs "were a necessary cost of doing business as a public utility" in response to Ohio and federal law and that such costs "are a current cost of doing business," it found that recovery of such costs, to the extent determined to be "appropriate and prudent," is permissible.

In arguing substantial likelihood of success on the merits, the Joint Movants assert that the MGP properties are unrelated to facilities that are used and useful in service to current customers and that, therefore, the Commission's decision is wrong. This is a legal theory that was argued in the case and rejected by the Commission. The Commission has explicitly denied the notion that the recovery of investigation and remediation costs must be examined under this paradigm. The Commission clearly stated that the applicable statute is R.C. 4909.15(A)(4) and that the costs of investigating and remediating MGP sites are necessary costs incurred for

⁵ Opinion and Order at pg. 55.

rendering utility service. Thus, these are costs that may be treated as expenses incurred during the test year.⁶ The Commission's decision is replete with references to a very comprehensive record supporting its decision. The decision is well within the Commission's authority. This is a test year expense that has been deferred and recovered much like other expenses that are typically recovered in a rate case.

The argument advanced by Joint Movants that costs are only recoverable if directly associated with used and useful plant is inconsistent with CERCLA⁷ and Ohio environmental law. Furthermore, that argument is nonsensical in the context of MGP sites, as the contaminants that resulted from MGP operations can move onto and off of utility property. Many similar expenses are not directly related to a particular piece of utility property, real estate, or personal property, but rather simply relate to the cost of running a viable business, such as certain taxes, travel expenses, insurance, etc.

Additionally, the Joint Movants argue that the Commission erred when it found that the Company had met its burden of proof with respect to whether remediation costs were prudently incurred. This too is a well-worn argument, and one that failed to persuade the Commission. The Commission devoted a great deal of effort, in its Opinion and Order, exhaustively detailing the facts that it relied upon and the legal basis for its decision.⁸ The Commission found that the Company's experts were compelling and that OCC's expert simply was not.⁹ Weighing the evidence is well within the Commission's expertise, responsibility, and authority. In this case, there is ample factual support in the record to demonstrate that the Company met its burden of proof. The Order is replete with reference to the Company's witness testimony. The

⁶ Opinion and Order at pg. 58.

⁷ The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, (CERCLA).

⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Rates*, Case No. 07-589-GA-AIR, Entry at pg. 2 (June 4, 2008).

⁹ Opinion and Order at pg. 64.

Commission specifically discussed the evidence of record with regard to the history of MGP plants, as supported by the Company's witnesses;¹⁰ the legal requirement for remediation, as supported by the Company's witnesses;¹¹ the nature and extent of remediation work undertaken¹² and why, in each case, such work was required, as supported by the Company's witnesses;¹³ and the cost control methods employed to ensure that the work was accomplished prudently and in a cost effective manner, again as supported by the Company's witnesses.¹⁴

The only opposing witness who testified about the environmental elements of the investigation and remediation of the MGP sites was one who is not even licensed to work under the Ohio Environmental Protection Agency's Voluntary Action Plan (VAP) program. That witness, James R. Campbell, sponsored by the OCC, had significant shortcomings with respect to his experience and ability in relation to this area of inquiry.¹⁵ Dr. Campbell had no in-depth, first-hand knowledge of the MGP sites.¹⁶ The Joint Movants thus failed to refute the soundness of the Company's decisions or the prudence of the MGP investigation and remediation.

The Commission Staff, understandably, did not take a position with regard to prudence, in the Staff Report of Investigation. The Commission Staff is not charged with responsibility for analysis and advocacy as related to environmental matters. Such issues are within the purview of the Ohio Environmental Protection Agency.

In summary, the Company provided experts who testified at length to all of the factors necessary to prove that the remediation of the MGP sites was performed in compliance with Ohio law, at the lowest and responsibly least cost and in the most expedient manner. The

¹⁰ Opinion and Order at pp. 23-25.

¹¹ Opinion and Order at pp. 30-31.

¹² Opinion and Order at pp. 43-46.

¹³ Opinion and Order at pp. 30-31, 36-37, 38, 43-45.

¹⁴ Opinion and Order at pp. 60-63.

¹⁵ Opinion and Order at pg. 64.

¹⁶ Id.

testimony presented by opponents failed to convince the Commission otherwise. The Joint Movants cannot hope to prevail on the merits in this appeal.

In a final argument, Movants suggest that they may succeed on appeal simply because the Commission did not reach a unanimous decision in these proceedings. However, it is undeniable that a majority of the public utilities commissioners constitutes a quorum for the transaction of any business or performance of any duty or the exercise of any power. The act of the majority is the act of the commission.¹⁷ A majority of the Commissioners reached the conclusion to allow recovery of prudently incurred costs for environmental investigation and remediation. The existence of a minority position is irrelevant to the legality and sustainability of the Commission's decision.

2. The Joint Movants Cannot Support the Existence of Irreparable Harm.

The Joint Movants assert that the implementation of lawfully determined rates will irreparably harm customers. However, as the Court has opined, the Joint Movants already have an adequate remedy at law. Where, as here, an adequate remedy exists, the Ohio Supreme Court has ruled that it will not interfere by granting an extraordinary remedy.¹⁸

The Joint Movants cite several cases in support of the notion that customers will be harmed by the collection of lawfully approved rates for MGP-related costs prior to the time when all appeals are exhausted. But the cited cases do not involve matters even remotely related to the types of issues incumbent upon the Commission to decide, given its authority and statutory foundations. In *FOP v. City of Cleveland*, the Eighth District Court of Appeals held that harm is

¹⁷ R.C. 4901.08

¹⁸ *Goodall v. Crofton*, 33 Ohio St. 271, 275 (1877).

irreparable “when there could be no plain, adequate and complete remedy at law... .¹⁹ This case is inapposite here since there is an adequate remedy at law.

The Joint Movants refer to additional cases that are not helpful. In *Tilberry v. Body*, the Court addressed the termination of a partnership leasehold.²⁰ The case involved statutes governing the winding up of a partnership agreement and the interests of each partner under the partnership. The question addressed in *Tilberry v. Body* was not one related so much to irreparable harm, but rather, it was a question of whether a trial court’s order of partnership dissolution constitutes a partial disposition which does not satisfy the requirements of a “final judgment” for purposes of Civ. R. 54(B). This Court held that such an order is final and appealable pursuant to R.C.2505.02.²¹ Although Joint Movants cite to *Tilberry* in the context of whether or not there is an effective legal remedy if the order takes effect, the facts are so far afield of the facts that pertain in this proceeding that the reasoning of the Court in *Tilberry* is unhelpful.

Sinnott v. Aqua-Chem, Inc., involved an asbestos claim.²² The Court in *Sinnott* discussed the nature of a final appealable order and compliance with statutes in Chapter 25, Revised Code. In *Sinnott*, the Court stated that one part of the test for determining whether an order granting or denying a provisional remedy is final and appealable, is whether the appealing party would not be afforded a meaningful or effective remedy by an appeal following a final judgment as to all proceedings.²³ However this Court in *Sinnott*, referred to H.B.292, where the General Assembly distinguished asbestos litigation from other types of litigation. And the stated concern was with reducing litigation costs and thereby preserving the resources of asbestos defendants so that more

¹⁹ *FOP v. City of Cleveland*, 141 Ohio App. 63, 81 (8th Dist. 2001), citing *Cleveland v. Cleveland Elec. Illuminating Co.*, 115 Ohio App.3d 1, 12 (8th Dist. 1996), appeal dismissed, 78 Ohio St.3d 1419 (1997).

²⁰ *Tilberry v. Body*, 24 Ohio St.3d 117, 493 N.E.2d 954 (1986).

²¹ *Id.* at 119.

²² *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 122, 161 2007-Ohio-5584, 876 N.E.2d 1217 (2007).

²³ *Id.* at 162.

injured plaintiffs can be made whole.²⁴ There is no similar legislative concern in this case. Again, these matters are unrelated to Joint Movants' present argument.

Finally, Appellants bolster the argument that a stay is needed to avoid harm to customers, and claim that the Commission authorized amortization of the deferred remediation costs over a three-year period.²⁵ Appellants claim that the Company will collect two-thirds of the total costs before a decision on the appeal is reached. Again, Appellants misstate the facts here. In addition to disallowing carrying charges on costs incurred for remediation, the Commission further determined that costs should be amortized over *five* years.²⁶

3. Issuance of the Requested Stay Will Cause Harm to Another Party.

The Joint Movants claim that Duke Energy Ohio will not be harmed by issuance of a stay. However, the Joint Movants have significantly misconstrued the facts in this regard. Pointing to the Commission's 2009 order allowing deferral of the MGP investigation and remediation costs, the Joint Movants assert that the Commission has authorized carrying costs.²⁷ This is simply incorrect. That order only authorized the initial deferral of the costs, not recovery of the deferred amounts. The Commission order that is under appeal explicitly *rejected* any ability for the Company to recover carrying costs.²⁸ Thus, the Company has no ability to be made whole from a delay, as there is a lag between the time the money is spent and the recovery is approved. A stay of the implementation of the lawfully approved rates would indeed be harmful to Duke Energy Ohio.

²⁴ Id. at 163.

²⁵ Memorandum in Support., p.21.

²⁶ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, et al., Opinion and Order at p.23 (November 13, 2013).

²⁷ Joint Motion for a Stay at p.14.

²⁸ *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, et al., Opinion and Order at p.60, (November 13, 2013).

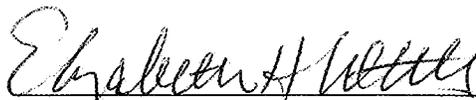
4. The Joint Movants Do Not Adequately Address That Which Is in the Public Interest.

Finally, the Joint Movants refer to the fact that these are “difficult times” and suggest that a stay would provide some “relief to customers who are already burdened by the fragile economy.” The Commission and this Court are always mindful of customers’ interests and likely well aware of the state of the economy. But it remains in the public interest to have reliable, safe, and clean energy available to customers. The balance created in the regulatory process takes all of this into consideration. The Commission, mindful of such concerns rendered its decision. The rates ordered by the Commission in its proceeding were lawful, reasonable and supported by the record. A stay is not in the best interest of the public.

III. CONCLUSION

For the above reasons, Duke Energy Ohio respectfully requests that the Joint Movants’ Motion be denied. However, if the Court grants the stay, Duke Energy Ohio respectfully requests the Court to require the Joint Movants to provide the statutorily required undertaking in an amount sufficient to protect Duke Energy Ohio.

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