

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy of Ohio, Inc. for an Increase in Its Natural Gas Distribution Rates.	:	Case No. 2014-0328
	:	On Appeal from the Public Utilities Commission of Ohio
In the Matter of the Application of Duke Energy of Ohio, Inc. for Tariff Approval.	:	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 of Ohio, Inc. for Approval of an Alternative Rate Plan for Gas Distribution Service.	:	
	:	
	:	
In the Matter of the Application of Duke Energy of Ohio, Inc. for Approval to Change Accounting Methods.	:	

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**AMICUS BRIEF OF OHIO EDISON COMPANY, THE TOLEDO EDISON COMPANY, AND THE CLEVELAND ELECTRIC ILLUMINATING COMPANY IN SUPPORT OF APPELLEES ON APPELLANTS' PROPOSITIONS OF LAW FOUR AND FIVE**

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## INTRODUCTION

Appellants<sup>1</sup> contend in their fourth and fifth propositions of law that they are excused from complying with the “undertaking” requirement of R.C. 4903.16, either because the statute is unconstitutional or because R.C. 2505.12 frees the OCC from the obligation to post a bond. If either argument had merit, it would result in a disruptive sea-change in Ohio’s public utility law and radically alter the balance of utility and customer interests carefully set out in Title 49 of the Revised Code. Ohio Edison Company, The Toledo Edison Company, and The Cleveland Electric Illuminating Company (collectively “FirstEnergy”) respectfully submit that neither argument has merit. Indeed, both arguments directly contradict established precedent of this Court, and Appellants have not carried their burden of showing why that precedent should be overruled. This Court should re-affirm its consistent and long-established precedent holding that an appellant appealing from an order of the Public Utilities Commission of Ohio (“Commission”) and seeking a stay from this Court must post a bond to compensate an appellee utility for “all damages caused by the delay in the enforcement of” the Commission’s order.

## ARGUMENT

Accepting either of Appellants’ arguments would disrupt and upset the balance established by the General Assembly and thereby cause serious adverse consequences for the utility industry and utility customers. The bond requirement in R.C. 4903.16 protects utilities from damages they could suffer from a stay of a Commission-approved rate increase, while likewise protecting customers from damages they could suffer from a

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<sup>1</sup> Ohio Consumers’ Counsel (“OCC”), The Kroger Company (“Kroger”), the Ohio Manufacturers’ Association (“OMA”), and Ohio Partners for Affordable Energy (“OPAE”).

stay of a Commission-approved rate decrease. Ohio's rule against "retroactive ratemaking" prohibits utilities from recovering lost revenue due to under-charges and from refunding past over-charges. *Lucas County Comm'rs v. Pub. Util. Comm.*, 80 Ohio St.3d 344, 348, 686 N.E.2d 501 (1997); *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 258, 141 N.E.2d 465 (1957). By making utility ratemaking prospective only, the General Assembly has "balanced the equities" in a manner fair to both utilities and customers. *Lucas County Comm'rs*, 80 Ohio St.3d at 348. As this Court recently observed, any party that objects to how the equities have been balanced should take their complaint to the General Assembly, not to this Court. *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 20.

By staying a Commission order without requiring Appellants to post a bond in the amount of anticipated damages, the Court adversely disturbs this balance and improperly interjects itself into the General Assembly's space. If stays are granted without a bond requirement, utilities will suffer increased "regulatory lag" – the lag "between the time costs increase and the time those costs may be recovered through increased rates." *Pike Natural Gas Co. v. Pub. Util. Comm.*, 68 Ohio St.2d 181, 186, 429 N.E.2d 444 (1981). Stays granted without cost to the appellant encourage trivial appeals simply to delay implementation of Commission orders for a year or more. Adoption of Appellants' arguments effectively will render moot R.C. 4903.15, under which Commission orders are immediately effective upon entry.

If appellants are not required to post a bond for damages, the number of stays issued are likely to increase, and, despite the fact that this Court generally upholds Commission-approved rates, utilities will not be able to recover the revenue lost during



the stay. In every case in which the Commission-approved rate prevails, the lack of a bond will subject utilities (or customers in the case of Commission-approved rate decreases) to the very harm the bond requirement is designed to prevent.

Accepting either of Appellants' arguments would incent more litigation and increase regulatory costs. This Court's resources will be taxed further, given that appeals from Commission orders are afforded a direct path to this Court. And the lack of compensation for the harm caused by drawn-out appeals will increase the utilities' cost of doing business by increasing the risks and costs of providing utility service. Utilities and the Commission will have to factor this risk into increased rates of return for utilities, which in turn will increase retail rates. Appellants' arguments are a hornet's nest that should not be kicked.

**APPELLANTS' PROPOSITION OF LAW NO. 4:** Under Art. IV, § 2(B)(2)(d) of the Ohio Constitution, an appeal from a final Commission order is governed entirely by statute, and R.C. 4903.16 obligates an appellant seeking a stay of the Commission order to post a bond for the prompt payment by the appellant of all damages caused by the delay of the enforcement of the order complained of. (*City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 163 N.E.2d 167 (1959), syll. para. 3, approved and followed.)

Appellants argue that R.C. 4903.16 is unconstitutional because it violates the separation of powers doctrine by restricting the Court's ability to exercise its inherent authority to issue stays. Appellants' Brief, pp. 19-25. Appellants misread the Constitution. No separation-of-powers concern exists here because Art. IV, § 2(B)(2)(d) of the Ohio Constitution directs that the Court's review of an appeal taken from a final Commission order is wholly controlled by statute.

Parties to a Commission proceeding have no right to appeal a Commission order except as provided by statute. Ohio Const. Art. IV, § 2(B)(2)(d); *City of Columbus v. Pub. Util. Comm.*, 170 Ohio St. 105, 107, 163 N.E.2d 167 (1959) (citing *Lindblom v. Board of*

*Tax Appeals*, 151 Ohio St. 250, 85 N.E.2d 376 (1949), syll. para. 2). The only statutory path for an appeal from a final Commission order is to this Court under R.C. 4903.13, and that final order is effective immediately upon entry by the Commission. R.C. 4903.15. An appeal does not automatically stay implementation of the Commission's order, but an appellant may move to stay execution under R.C. 4903.16. The appellant seeking to stay the Commission's order must "execute an undertaking, payable to the state in such a sum as the supreme court prescribes . . . conditioned for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of." R.C. 4903.16. Thus, the appellant's posting of a bond to ensure the prompt payment of "all damages" is a necessary precondition to the Court's issuance of a stay.

Appellants' separation-of-powers argument is easily rebutted by the plain language of the Ohio Constitution. When appeals are taken from Commission orders, this Court has only that "revisory jurisdiction . . . as may be conferred by law." Ohio Const. Art. IV, § 2(B)(2)(d). The General Assembly has defined the scope of the Court's jurisdiction by granting it exclusive authority to hear appeals of Commission orders and to issue stays of enforcement of such orders. R.C. 4903.12, 4903.16. As this Court has consistently found, R.C. 4903.16 mandates that the posting of a bond for anticipated damages is a precondition for the Court to grant a stay. *See Keco Industries*, 166 Ohio St. at 258 ("the General Assembly provided *that there is no automatic stay* of any order, but that it is necessary for any person aggrieved thereby to take affirmative action, and if he does so he is required to post bond" (emphasis in original)). The bond must be sufficient "for the prompt payment . . . of all damages caused by the delay in the enforcement of the [Commission's] order . . ." R.C. 4903.16. Thus, for Appellants to

obtain a stay of a Commission order, they must post an adequate bond. *E.g., In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 18; *Office of Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 403, 575 N.E.2d 157 (1991).

The bond requirement is mandated by the Ohio Constitution and by statute, as this Court held more than fifty years ago. *See, e.g., City of Columbus*, 170 Ohio St. at 109. Thus, Appellants' reliance on *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, and *State v. Hochhausler*, 76 Ohio St.3d 455, 668 N.E.2d 457 (1996), is entirely misdirected as neither involved this Court's revisory jurisdiction under Art. IV, § 2(B)(2)(d) of the Ohio Constitution. Given the clear language of the Ohio Constitution and the Court's precedent, it is not surprising that this Court has rejected OCC's arguments on a number of previous occasions. *See In re Application of Duke Energy*, 121 Ohio St.3d 1491, 2009-Ohio-2514, 907 N.E.2d 316 (denying OCC's motion for stay); *Consumers' Counsel v. Pub. Util. Comm.*, 124 Ohio St.3d 1490, 2010-Ohio-670, 922 N.E.2d 226 (denying OCC's motion for stay); *In re Application of the East Ohio Gas Co.*, 122 Ohio St.3d 1500, 2009-Ohio-4233, 912 N.E.2d 106 (denying OCC's motion for stay)). The Court should follow this clear precedent here.

Importantly, Appellants have failed to satisfy the Court's three-part test for overruling precedent, which applies equally to Appellants' separation-of-powers argument and its R.C. 2505.12 argument addressed below. The Court may overrule existing precedent only where "(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create

an undue hardship for those who have relied upon it.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, syll. para. 1. Not only have Appellants failed to show that *City of Columbus* and every subsequent decision from this Court was wrong or that circumstances have changed, but Appellants have not even attempted to satisfy the second and third prongs of the *Galatis* test. On those failures alone, the Court should reject Appellants’ arguments seeking to overrule *City of Columbus* and its progeny. See *Ohio Apt. Ass’n v. Levin*, 127 Ohio St.3d 76, 2010-Ohio-4414, 936 N.E.2d 919, ¶ 31.

**APPELLANTS’ PROPOSITION OF LAW NO. 5: Appellants’ Entitlement to a Stay of a Final Commission Order Is Governed Exclusively by R.C. 4903.16 and not by the Public Office Exemption in R.C. 2505.12.**

OCC proposes an alternative reason why it should not have to post a bond under R.C. 4903.16: it is a public officer under R.C. 2505.12 and, therefore, exempt from giving a *supersedeas* bond. Appellants’ Brief at 26-28. This exact argument was considered and rejected by this Court in *City of Columbus*, and it should be rejected again here. See *City of Columbus*, 170 Ohio St. at 111 (Herbert, J., dissenting) (arguing unsuccessfully in dissent that R.C. 2505.12 should offer alternative to R.C. 4903.16’s bond requirement).

Chapter 2505’s own language makes clear that R.C. 2505.12 does not apply to Commission appeals. Section 2505.03(B) states that an appeal is governed by Chapter 2505 **unless** other sections of the Revised Code apply. In appeals from Commission orders, other sections of the Revised Code do apply – R.C. 4903.12, 4903.13 and 4903.16. See also *City of Columbus*, 170 Ohio St. at 108 (the “statutes of Ohio provide the method of appealing from final orders of the Public Utilities Commission to this court.”). Therefore, Chapter 2505 does not apply to appeals of Commission orders, and

R.C. 2505.12 does not excuse OCC from satisfying the bond requirement in R.C. 4903.16.

### CONCLUSION

For all of the reasons stated above, FirstEnergy respectfully request that this Court reject Appellants' fourth and fifth propositions of law and reaffirm its long-established precedent that appellants challenging a Commission order on appeal must post an appropriate bond as a precondition to obtaining a stay of that order.

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