

In The
SUPREME COURT OF OHIO

ORIGINAL

Ohio Partners for Affordable Energy, :
Ohio Consumers' Counsel and Ohio :
Manufacturers' Association, and The : Case No. 14-328
Kroger Company, :
: On appeal from the Public Utilities
Appellants, : Commission of Ohio, Case Nos. 12-
: 1685-GA-AIR, *et al.*, *In the Matter of*
v. : *the Application of Duke Energy Ohio,*
: *Inc. for an Increase in its Natural Gas*
The Public Utilities Commission of : *Distribution Rates.*
Ohio, :
: Appellee.

**BRIEF REGARDING BOND REQUIREMENTS
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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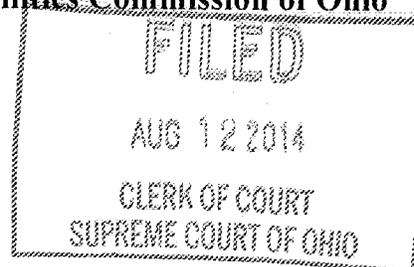
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**BRIEF REGARDING
BOND REQUIREMENTS OF R.C. 4903.16
SUBMITTED ON BEHALF OF APPELLEE,
THE PUBLIC UTILITIES COMMISSION OF OHIO**

INTRODUCTION

Pursuant to the Court's July 29, 2014 order, the Public Utilities Commission of Ohio's (Commission) submits this brief regarding the R.C. 4903.16 bond that should be required in this case. Although no stay is necessary in this case, should the stay be continued, an appropriate level of a bond must be determined for this specific situation and should be commensurate with the level of harm that would occur as a consequence of staying the Commission's order. This approach is necessitated by the nature of the regulatory process of which the stay is a part.

Equally important is the recognition that the legislative bond requirement (that must accompany a stay request) is not intended as a punitive measure but rather functions as a mechanism to carefully balance competing self-interests. This protects the integrity of both the statutory process by which utility rates are established and challenged.

ARGUMENT

A proper understanding of the context within which R.C. 4903.16 operates is important to responding to the Court's question. An order of the Commission is effective immediately. R.C. 4903.15, Appendix at 1. Even where the Commission is reversed, its order remains in effect until the Commission issues a new order. *Cleveland Electric Illuminating Company v. Pub. Util. Comm.*, 46 Ohio St. 2d 105 (1976). Where, as here, the Commission issues an order that gives the utility the ability to collect some level of rate, the utility is both entitled, and, in fact, legally obligated to charge and receive that amount until such time, even after reversal of that Commission order, that the Commission issues a new order.

This system creates the possibility of what some would view as an unfair outcome. It is possible that the Commission could order a rate increase which is imposed and collected for a period of time but the Commission order is later reversed by this Court. This leaves ratepayers in the position of having paid, quite legally, charges that are later determined to be improper going forward. Ratepayers are then unable to be repaid for

these amounts already collected. The Court recognized this effect in its *Keco Industries, Inc. v. Cincinnati and Suburban Tel. Co.*, 166 Ohio St. 254 (1957) decision.

The *Keco* decision has no application in this case. *Keco* dealt with a traditional ratemaking in which the Commission fully reviewed evidence of costs prior to the rate taking effect and set a uniform rate to be charged to customers until a new rate case is decided. There is no mechanism in a traditional ratemaking to review or adjust the rate between rate cases.¹

In more recent decades the Commission has increasingly used adjustable rate mechanism, or riders². In rider proceedings, the Commission establishes a rate based on initial estimates, and this rider is then collected from customers. But in contrast to traditional ratemaking, there is also a rider reconciliation process, colloquially called a “true up”, in which the Commission reviews the rate, normally annually, to match costs actually experienced. This adjustment will then either result in a marginal reduction or increase in future rider rates charged to customers. Examples would be the fuel or transmission cost riders where an initial rate is established based on what costs are expected to be and then the next year the Commission, in setting the next year’s rate, does a correction to make up for any shortfall or overage in the prior year’s rates.

¹ The case below was a rate case but the specific rider at issue here is not a traditional rate. Rather it is a rider subject to adjustment.

² There are certain types of riders where, statutorily, adjustment is limited or not allowed. *See*, R.C. 4928.144, 4928.235(B), Appendix at 2, 2. These are not involved in this case.

Although *Keco* does not apply in this case, it does in others.³ The General Assembly anticipated this perceived problem. It did so by giving this Court the ability to impose a stay pursuant to R.C. 4903.16. When a stay is imposed by this Court, the still lawful Commission-authorized rate is not charged and ratepayers are not required to pay these charges until the case is finally resolved by the Court. The imposition of the stay, consistent with the statute that created it, allows for such a result.

The General Assembly did not stop there. It went on to recognize that the stay itself could create unfairness. Where a stay is granted and the Commission order is ultimately affirmed by this Court, the utility has been deprived (for the pendency of the appeal) of the receipt of the amounts lawfully authorized.⁴ This is harm and this is just the sort of harm that arises in this case as the result of the stay of the Commission order

³ Specifically, where a non-adjustable rate has been established, whether that is through a base rate proceeding or an electric security plan under R.C. 4928.143, or otherwise.

⁴ The discussion here is limited to orders which increase rates. The Commission issues many kinds of orders doing many different kinds of things. It is impossible and meaningless to try to discuss all the various kinds of harms that could result to, for example, the development of competitive markets, system reliability, other competitors, the public at large, that might be occasioned by the stay of other sorts of orders, and so this brief will not speculate in those areas.

in this case⁵ To deal with the possibility that fixing one potential problem⁶ might cause another, the General Assembly logically created the bonding requirement.

The purpose of the bonding requirement is clear from the language of the statute which provides in pertinent part:

...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.

R.C. 4903.16, Appendix at 1 (emphasis added). The General Assembly recognized that the failure to implement a Commission order can cause damage. Given that the kinds, and value of harm could vary tremendously, the Court was given the discretion to fashion a bond that is appropriate to the situation presented in the specific case. The statute provides that the bond shall be "...in such sum as the supreme court prescribes..." Thus the Court should consider the circumstances presented in a specific case wherein a stay is sought and determine what sort of bond is necessary in that case to pay "...all damages caused by the delay in the enforcement of the order complained of..." This requires an

⁵ The harm caused by the stay may come in other forms too but the appellee utility is in the better position to explain what those other harms might be and this brief shall leave the development of those other forms of harm to the utility rather than to speculate about them.

⁶ Remembering that, because a refund can be accomplished here, there is no need for a stay in the first place.

assessment in each case as to what the correct amount is to accomplish the statutory goal, namely to make the utility whole from the damage caused by delaying or suspending implementation of the Commission order. Given that the harm can vary widely in type and degree, this analysis can only be done on a case-by-case basis. Again, the bonding requirement is part of a legislative compromise to balance competing interests. It is not, nor should it be, viewed as punitive in nature.

Historically this Court has not been presented with a situation where it needed to do this sort of case-by-case analysis. Rather it has seen two different scenarios.

Most commonly the Court has been presented with an appellant seeking a stay and offering no bond at all. This Court has virtually always rejected this sort of application. Although the Court has not stated a reason for doing so, the statute itself *requires* a bond. The statute states "... the appellant shall execute an undertaking..." While a bond is mandatory, the level and terms of the bond are discretionary with the Court. Where no bond is offered in any form, a stay cannot be issued as per the plain words of R.C. 4903.16.

The other scenario that the Court has seen has been where a bond in the amount of the full value of the amount at issue in the case has been offered. In these situations the Court has granted a stay. Again no reason has been provided for this action but it is reasonable to assume that "...all damages caused by the delay in the enforcement of the order complained of..." should not, at least in most cases, exceed the amount at issue in the appeal.

Neither of these scenarios is particularly instructive about the situation at hand. Here the Court is attempting to do the balancing that the statute contemplates. It must determine what amount of money is necessary to make Duke Energy Ohio whole should the Commission order ultimately be affirmed. The bonding issue should focus upon potential harm and not on the substantive merits of the case.

Determining the correct amount is not a simple matter. It is fairly obvious that the utility will be denied the use of the funds that would otherwise have been collected during the pendency of this case. It is difficult to assess what this might be as it cannot be known today how long the case will be pending. This is not the only source of uncertainty however. It may be necessary for the utility to borrow funds to cover the amounts not received due to the stay. This may have effects on the cost of debt for the company. There may be tax consequences. There may be other consequences of which the Commission is unaware. Aside from the obvious loss of the use of the funds, the Commission is not in a position to speak to what the full level of the harm that would result from the issuance of a stay of this order. Rather the company is the only party that is in a position to speak to this topic with knowledge. At this point the Commission can only observe that a stay will deprive Duke Energy Ohio of more than a million and a half dollars⁷ of revenue each month that this case is pending with the Court. Not having this revenue stream will deprive the company of the use of those funds. There may be more harm than

⁷ The Commission authorized the recovery of \$55 million over three years without interest, and this calculates as $\$55,000,000 / 36 = \$1,527,777$ per month.

this but even looking to the loss of use of funds alone a nominal bond is not sufficient. The actual argument of what the specific amount would be necessary to make the company whole must be left to the company itself.

CONCLUSION

In sum, no stay is needed in this case as *Keco* does not apply and ratepayers could receive a refund if the order is reversed. However, should the Court choose to continue a stay, the Court must look to this specific situation in this case and determine what bond amount will be sufficient to cover "...all damages caused by the delay in the enforcement of the order complained of..." While it is clear that the level of the bond must be more than a merely nominal amount, because real harm is created by the stay, only the company can provide specifics. While R.C. 4903.16 requires a bond as part of the stay process, the level and terms of the obligation reside with the Court.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Brief Regarding Bond Requirements of R.C. 4903.16, 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 12th day of August, 2014.



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APPENDIX

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4903.15 Orders effective immediately - notice.

Unless a different time is specified therein or by law, every order made by the public utilities commission shall become effective immediately upon entry thereof upon the journal of the public utilities commission. Every order shall be served by United States mail in the manner prescribed by the commission. No utility or railroad shall be found in violation of any order of the commission until notice of said order has been received by an officer of said utility or railroad, or an agent duly designated by said utility or railroad to accept service of said order.

4903.16 Stay of execution.

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.

4928.143 Application for approval of electric security plan - testing.

(A) For the purpose of complying with section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan as prescribed under division (B) of this section. The utility may file that application prior to the effective date of any rules the commission may adopt for the purpose of this section, and, as the commission determines necessary, the utility immediately shall conform its filing to those rules upon their taking effect.

(B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20 , division (E) of section 4928.64 , and section 4928.69 of the Revised Code:

(1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.

(2) The plan may provide for or include, without limitation, any of the following:

(a) Automatic recovery of any of the following costs of the electric distribution utility, provided the cost is prudently incurred: the cost of fuel used to generate the electricity supplied under the offer; the cost of purchased power supplied under the offer, including the cost of energy and capacity, and including purchased power acquired from an affiliate; the cost of emission allowances; and the cost of federally mandated carbon or energy taxes;

(b) A reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009. Any such allowance shall be subject to the construction work in progress allowance limitations of division (A) of section 4909.15 of the Revised Code, except that the commission may authorize such an allowance upon the incurrence of the cost or occurrence of the expenditure. No such allowance for generating facility construction shall be authorized, however, unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Further, no such allowance shall be authorized unless the facility's construction was sourced through a competitive bid process, regarding which process the commission may adopt rules. An allowance approved under division (B)(2)(b) of this section shall be established as a nonbypassable surcharge for the life of the facility.

(c) The establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility, was sourced through a competitive bid process subject to any such rules as the commission adopts under division (B)(2)(b) of this section, and is newly used and useful on or after January 1, 2009, which surcharge shall cover all costs of the utility specified in the application, excluding costs recovered through a surcharge under division (B)(2)(b) of this section. However, no surcharge shall be authorized unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility. Additionally, if a surcharge is authorized for a facility pursuant to plan approval under division (C) of this section and as a condition of the continuation of the surcharge, the electric distribution utility shall dedicate to Ohio consumers the capacity and energy and the rate associated with the cost of that facility. Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

(d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals,

including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;

(e) Automatic increases or decreases in any component of the standard service offer price;

(f) Consistent with sections 4928.23 to 4928.2318 of the Revised Code, both of the following:

(i) Provisions for the electric distribution utility to securitize any phase-in, inclusive of carrying charges, of the utility's standard service offer price, which phase-in is authorized in accordance with section 4928.144 of the Revised Code;

(ii) Provisions for the recovery of the utility's cost of securitization.

(g) Provisions relating to transmission, ancillary, congestion, or any related service required for the standard service offer, including provisions for the recovery of any cost of such service that the electric distribution utility incurs on or after that date pursuant to the standard service offer;

(h) Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code to the contrary, provisions regarding single issue ratemaking, a revenue decoupling mechanism or any other incentive ratemaking, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility. The latter may include a long-term energy delivery infrastructure modernization plan for that utility or any plan providing for the utility's recovery of costs, including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization. As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.

(i) Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.

(C)

(1) The burden of proof in the proceeding shall be on the electric distribution utility. The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

(2)

(a) If the commission modifies and approves an application under division (C)(1) of this section, the electric distribution utility may withdraw the application, thereby terminating it, and may file a new standard service offer under this section or a standard service offer under section 4928.142 of the Revised Code.

(b) If the utility terminates an application pursuant to division (C)(2)(a) of this section or if the commission disapproves an application under division (C)(1) of this section, the commission shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's most recent standard service offer, along with any expected increases or decreases in fuel costs from those contained in that offer, until a subsequent offer is authorized pursuant to this section or section 4928.142 of the Revised Code, respectively.

(D) Regarding the rate plan requirement of division (A) of section 4928.141 of the Revised Code, if an electric distribution utility that has a rate plan that extends beyond December 31, 2008, files an application under this section for the purpose of its compliance with division (A) of section 4928.141 of the Revised Code, that rate plan and its terms and conditions are hereby incorporated into its proposed electric security plan and shall continue in effect until the date scheduled under the rate plan for its expiration, and that portion of the electric security plan shall not be subject to commission approval or disapproval under division (C) of this section, and the earnings test provided for in division (F) of this section shall not apply until after the expiration of the rate plan. However, that utility may include in its electric security plan under this section, and the commission may approve, modify and approve, or disapprove subject to division (C) of this section, provisions for the incremental recovery or the deferral of any costs that are not being

recovered under the rate plan and that the utility incurs during that continuation period to comply with section 4928.141 , division (B) of section 4928.64 , or division (A) of section 4928.66 of the Revised Code.

(E) If an electric security plan approved under division (C) of this section, except one withdrawn by the utility as authorized under that division, has a term, exclusive of phase-ins or deferrals, that exceeds three years from the effective date of the plan, the commission shall test the plan in the fourth year, and if applicable, every fourth year thereafter, to determine whether the plan, including its then-existing pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, continues to be more favorable in the aggregate and during the remaining term of the plan as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. The commission shall also determine the prospective effect of the electric security plan to determine if that effect is substantially likely to provide the electric distribution utility with a return on common equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility. If the test results are in the negative or the commission finds that continuation of the electric security plan will result in a return on equity that is significantly in excess of the return on common equity that is likely to be earned by publicly traded companies, including utilities, that will face comparable business and financial risk, with such adjustments for capital structure as may be appropriate, during the balance of the plan, the commission may terminate the electric security plan, but not until it shall have provided interested parties with notice and an opportunity to be heard. The commission may impose such conditions on the plan's termination as it considers reasonable and necessary to accommodate the transition from an approved plan to the more advantageous alternative. In the event of an electric security plan's termination pursuant to this division, the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan.

(F) With regard to the provisions that are included in an electric security plan under this section, the commission shall consider, following the end of each annual period of the plan, if any such adjustments resulted in excessive earnings as measured by whether the earned return on common equity of the electric distribution utility is significantly in excess of the return on common equity that was earned during the same period by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. Consideration also shall be given to the capital requirements of future committed investments in this state. The burden of proof for demonstrating that significantly excessive earnings did not occur shall be on the electric distribution utility. If the commission finds that such adjustments,

in the aggregate, did result in significantly excessive earnings, it shall require the electric distribution utility to return to consumers the amount of the excess by prospective adjustments; provided that, upon making such prospective adjustments, the electric distribution utility shall have the right to terminate the plan and immediately file an application pursuant to section 4928.142 of the Revised Code. Upon termination of a plan under this division, rates shall be set on the same basis as specified in division (C)(2)(b) of this section, and the commission shall permit the continued deferral and phase-in of any amounts that occurred prior to that termination and the recovery of those amounts as contemplated under that electric security plan. In making its determination of significantly excessive earnings under this division, the commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company.

4928.144 Phase-in of electric distribution utility rate or price.

The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.

4928.235 Duration of final financing order.

(A)

(1) A final financing order shall remain in effect until the phase-in-recovery bonds issued under the final financing order and all financing costs related to the bonds have been paid in full.

(2) A final financing order shall remain in effect and unabated notwithstanding the bankruptcy, reorganization, or insolvency of the electric distribution utility or any affiliate of the electric distribution utility or the commencement of any judicial or nonjudicial proceeding on the final financing order.

(B) A final financing order is irrevocable and the public utilities commission may not reduce, impair, postpone, or terminate the phase-in-recovery charges authorized in the final financing order or impair the property or the collection or recovery of phase-in costs.

(C)

(1) Except as provided in division (C)(2) of this section, under a final financing order, the electric distribution utility retains sole discretion regarding whether to assign, sell, or otherwise transfer phase-in-recovery property, or to cause phase-in-recovery bonds to be issued, including the right to defer or postpone such assignment, sale, transfer, or issuance.

(2) Subsequent to a financing order being issued or becoming final and taking effect, but before phase-in-recovery bonds have been issued, if market conditions are such that customers will not realize cost savings from the issuance of the phase-in-recovery bonds, the electric distribution utility shall not proceed with the securitization under the issued or final financing order.