

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
	:	
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In the Matter of the Application of Duke Energy of Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service.	:	
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In the Matter of the Application of Duke Energy of Ohio, Inc., for Approval to Change Accounting Methods.	:	
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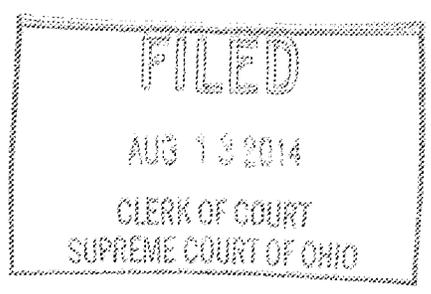
**BRIEF ON APPROPRIATE BOND AMOUNT
OF INTERVENING APPELLEE
DUKE ENERGY OHIO, INC.**

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**BRIEF ON APPROPRIATE BOND AMOUNT
OF INTERVENING APPELLEE DUKE ENERGY OHIO, INC.**

Counsel for Intervening Appellee, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) submits this brief in response to the Court's Decision on July 29, 2014, denying the motion to lift stay but requiring a bond and seeking briefs on the amount of the bond to be posted.

In the proceeding below, the Public Utilities Commission of Ohio (Commission) correctly recognized that Duke Energy Ohio should be permitted to recover costs related to environmental investigation and remediation of former manufactured gas plants (MGP) sites in Cincinnati, Ohio. The Commission noted that such costs are "necessary in order for Duke to stay in business and comply with current environmental laws and regulations; thus they are part of providing current service and are properly recoverable." *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates, et al.*, Opinion and Order, at p.55, Joint Appellant's Appx. at 000126, 2013 PUC LEXIS 259 at 128-29 (Nov. 13, 2013). The Commission approved recovery of prudently incurred prior costs through Rider MGP and further established a detailed review process pursuant to which Rider MGP would be subsequently updated. Specifically, the Commission instructed Duke Energy Ohio to seek authority, on an annual basis, before updating its Rider MGP to recover costs incurred in the prior year. The Commission further stated that, in respect of each subsequent rider proceeding the Company would have the burden of proving that a prior year's costs were prudently incurred.

The Commission authorized the Company to recover was \$55,523,788, to be amortized over five years. On November 27, 2014, Duke Energy Ohio submitted a tariff in compliance with the Commission's November 13, 2013, Opinion and Order (Opinion) and this tariff was

approved on February 21, 2014. Duke Energy Ohio's approved tariff permitted recovery of \$925,396 per month, which represents the total amount recoverable of \$55,523,788, divided by 60 months.

On March 17, 2014, Joint Appellants moved this Court to grant a stay of the Commission's Opinion, and the January 8, 2014, Entry on Rehearing (Entry). Joint Appellants sought to stay the effective date of MGP Rider , which had been implemented pursuant to the Commission's Order and Entry. On May 14, 2014, this Court granted the joint motion for stay. On July 29, 2014, the Court denied Duke Energy Ohio's motion submitted by Intervening Appellee to lift the stay, but required Joint Appellants to post a bond pursuant to Ohio Revised Code (R.C.) 4903.16. The Court further requested legal argument on the amount of the bond to be posted.

The purpose of a bond generally is to ensure that the enjoined party can recover the monetary damages it suffers, if it is wrongfully enjoined. *Bookfriends, Inc. v. Taft*, 223 F.Supp2d 932, 953 (S.D. Ohio 2002). In balancing the comparative convenience or inconvenience from granting or withholding an injunction, the Court will take into consideration what means it has of putting the party who may be ultimately successful in the position he would have stood if his legal rights had not been interfered with. *City of Cleveland v. Court of Appeals for the Eighth Circuit*, 104 Ohio St. 96, 107, 135 N.E. 377, 380 (1922), quoting *Russell v. Farley*, 105 U.S. 433, 438, 26 L. Ed 1060, (1881). Ohio statutory law reflects these principles. Indeed, R.C. 4903.16 provides that an appellant shall execute an undertaking that is conditioned for the payment by appellant of all damages caused by the delay in the enforcement of the order complained of, and 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 Court has long recognized that the stay

remedy is the exclusive monetary remedy for parties aggrieved by Commission orders, and “ ‘any person who feels aggrieved’ ” by an order has “a right to secure a stay of the collection of the new rates after posting a bond.” *In re Application of Columbus So. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, para.17), quoting *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 257 (1957).

The language in R.C. 4903.16 does not specifically address how damages are to be determined for purposes of setting the amount of the bond. However, the Court has previously accepted the rationale applied by an appellant that has posted a bond in compliance with this statute. See, *In re Application of East Ohio Gas Co.*, 134 Ohio St.3d 1493, 984 N.E.2d 35, 2012-Ohio-2117 (2013). In that instance, the appellant utility company posted a bond for an amount equal to the full amount in dispute, plus interest. A similar approach was recently employed by The Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (the FirstEnergy Companies), when they sought to stay an order of the Commission directing the FirstEnergy Companies to refund their customers over \$43 million. *Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company v. Pub. Util. Comm.*, Case No. 2013-2026, Motion for Stay, (December 24, 2013). In that proceeding, after the Court granted the motion for stay, the FirstEnergy Companies submitted a notice of filing of bond in an amount that represented “the amount required by the Entry,” or \$43,362,796.50, plus interest. *Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company v. Pub. Util. Comm.*, Case No. 2013-2026, Notice of Filing of Bond, (February 14, 2014). These recent cases are informative, as they provide one methodology for determining an appropriate bond amount.

Also important to the determination is the fact that staying rates that have been approved by the Commission causes harm. The harm to the Company while recovery is stayed causes

additional potential financial consequences. For example, the Company's financing needs may increase over time leading to larger debt issuances and additional financing costs as the lack of recovery reduces the Company's revenues. In addition, the rating agencies are very focused on the Company's ability to recover costs, both quantitatively and qualitatively. Quantitatively, the potential need for debt and financing cost, noted previously, puts downward pressure on the Company's key credit metrics. Qualitatively, the rating agencies review the Company's business risk, which includes: regulatory and state business environments; recovery mechanisms; the timeliness of recovery; and the risk of political intervention. The scope, clarity, transparency, supportiveness and granularity of utility legislation, decrees, and rules are also considered during the evaluation of the Company's credit rating. Staying recovery has negative implications to these qualitative areas.

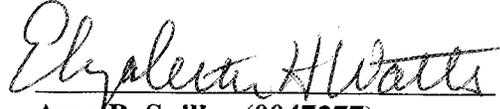
Understandably, the Commission's Opinion in the proceeding below does not address the manner in which Duke Energy Ohio's Rider MGP, designed to recover costs for environmental investigation and remediation, will be calculated when the appeal process has concluded. Should the Court affirm the decision below, Duke Energy Ohio would need the Commission's approval to reinstate the Rider MGP rate for collection. This is because Duke Energy Ohio can only collect rates as approved by the Commission. With regard to later circumstance, the Company does not, and cannot, know today when the Commission may rule. Therefore, the bond amount required in this proceeding must be sufficient to protect the Company in the event it is unable to resume recovery of the rider as before. Accordingly, Joint Appellants must be required to post bond in an amount sufficient to protect the Company in the case that it is unable to resume collecting the principal amount in the rider, plus the time value of that recovery as an ongoing rate. The bond amount must also account for the qualitative and quantitative risks addressed above.

Based on the annual amount of the MGP Rider approved by the Commission in the case below, every week rates are stayed translates into \$213,533 in unrecovered revenue. Added to the value of the delayed recovery, the Company' is also subject to a loss in the form of time value of money. Applying the Company's long term debt rate of 5.32 per cent, the Company will lose another \$301,067 (carrying costs for twelve months) to \$673,141 (carrying costs for eighteen months), depending on how long the Company's rates are suspended. Combining the value of revenue collected under the rider itself with the time value of money, the Company proposes that the bond be set at a minimum of \$11,405,825 (annual amount of \$11,104,758 plus carrying costs of \$301,067) up to \$17,330,278 (eighteen month revenue amount of \$16,657,137 plus carrying costs of \$673,141).

To calculate the amount of time that the interest would be collected, Duke Energy Ohio has conservatively assumed that the Court will require twelve to eighteen months from the time the rates were suspended to resolve this appeal. Duke Energy Oho submits this brief pursuant to the Court's order and offers its best analysis given the facts of the proceeding. However, Duke Energy Ohio recognizes that the statute grants the Court discretion with regard to determining the appropriate amount of bond required. Should the Court wish any additional information, Duke Energy Ohio will provide additional briefing as needed.

For the foregoing reasons, Duke Energy Ohio respectfully requests that the Court approve the amount of the bond as requested herein.

Respectfully submitted,



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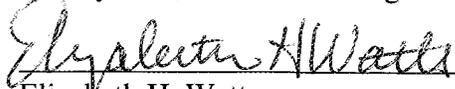
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