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**In The  
SUPREME COURT OF OHIO**

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

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

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**INTRODUCTION**

A stay is not needed to protect the Appellants' interests. A refund of the collections would be possible through the reconciliation process for this rider. If a stay is retained that stay causes harm to Duke Energy Ohio (the company) by denying it the use of substantial funds to which it would otherwise be entitled. R.C. 4903.16 remedies this by requiring a bond commensurate with the level of the harm caused.

Appellants have introduced a number of arguments that attempt to cloud this relatively simple requirement. These arguments are discussed *seriatim* below. All should be rejected. The Court should require a bond in the amount of the estimated time value of the payments that the company will not receive.

## ARGUMENT

### A. This case does not involve a *supersedeas* bond.

It is argued that there should be no bond requirement in this case because the Consumers' Counsel is exempt from providing a *supersedeas* bond pursuant to R.C. 2505.12. This provision exempts state officers from posting a *supersedeas* bond. R.C. 4911.06 is cited as establishing that Consumers' Counsel is a "state officer". However only a portion of R.C. 4911.06 is quoted. The provision in its entirety says, "The consumers' counsel shall be considered a state officer for the purpose of section 24 of Article II, Ohio constitution."

Section 24 of Article II in turn provides:

The governor, judges, and all state officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office under the authority of this state. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law.

Consumers' Counsel is a "state officer" for purposes of impeachment. Impeachment however has no relevance to the matter at hand and the argument must be rejected.

Additionally, the *supersedeas* bond provisions have no application in this case. The *supersedeas* bond provisions arise from the default appeal process. This process has

application where there is no specific appeal process provided. The statute is perfectly clear:

*Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.*

R.C. 2505.03(B), App. at 1 (emphasis added). Also perfectly clear is that other sections of the Revised Code do apply to appeals of Commission decisions like R.C. 4903.16.

The *supersedeas* bond requirements are irrelevant to this case and Appellants' argument should be rejected.

**B. Characteristics of the appellant are irrelevant.**

Appellants attempt to distract this Court from the statutory purpose of the exercise. The purpose of the bond is "...for the prompt payment by the appellant of all damages caused by the delay in the enforcement of the order complained of..." The bond is to ensure payment for the harm that the stay caused. That is all there is to it. Nothing about the Appellant figures into this. Whether the Appellant is large or small, rich or poor, governmental or private-sector, none of that matters. The focus of the examination must be on the harm caused and nothing else because that is what the law requires.

In the current situation, the nature of that harm is clear. The company is harmed in exactly the same way, in exactly the same amount regardless of who the Appellant is. Attempts to foster sympathy for the Appellants are not meaningful under the statute and should be rejected.

**C. Hypothetical alterations to the Manufactured Gas Plant (MGP) rider are not relevant.**

Appellants attempt to misdirect the Court by suggesting that the dollar value of the harm to the company created by the stay could be added to the amount of the MGP collections if the appeal is unsuccessful. That is not what would happen. The Commission orders on appeal herein are final. They would be in effect but for the stay. In the event that they are affirmed, the orders would simply go back into effect. There is no provision for adding anything to the environmental remediation costs in the rider, it does not even accrue interest. The company would simply be out the use of the funds to which it was entitled. This is exactly the sort of harm that the legislature recognized and addressed with R.C. 4903.16.

Appellants' argument fails to recognize statutory law which provides:

A final order made by the public utilities commission shall be reversed, vacated, or *modified* by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such *order was unlawful or unreasonable*.

R.C. 4903.13 (emphasis added), App. at 1-2. Appellants' argument assumes this Court can modify a Commission order while affirming it. This is an *impossibility* and Appellants' argument should be rejected.

That the company could seek a new Commission order with new provisions to compensate it for its lost use of funds because of the stay is cold comfort. Why should the company be forced to re-litigate, with the risk of a new appeal and a new stay, to obtain that to which it is already entitled? It must be remembered that the company prevailed before the Commission. The agency charged with making ratemaking decisions has spoken and decided that the company is entitled to recover the amounts of money in the ways specified in the orders below. The General Assembly has determined that the way to protect the utility's interests is via a bond requirement. As much as Appellants wish it were otherwise, the General Assembly believes a bond is the proper mechanism.

**D. The partial collections of the MGP rider reduce but do not eliminate the harm created by the stay.**

Appellants correctly observe that the company collected some charges under the MGP rider prior to the stay being issued. They then claim that this partial collection eliminates the harm that flows from the stay. This claim is baseless.

As discussed previously, harm is caused to the company because the stay prevents it from receiving money to which it is otherwise entitled. That it has received a small portion of the money to which it is otherwise entitled means that, as to that portion, the company does have the use of those funds and is not harmed. That is not the matter of concern here.

The harm to the company flows from the funds that are not collected due to the grant of the stay. It is the lack of access to those funds that harms it. That harm exists

regardless of whether or not there were partial collections. The partial collection is not a counter-balance to the harm the company experiences

**E. R.C. 4903.17 is not applicable in this case.**

Appellants argue that R.C. 4903.17 could eliminate the obvious harm to the company that results from the grant of a stay. This is wrong in at least two ways, R.C. 4903.17 is not applicable in this case and, even if it were, it would only serve to continue the harm to the company not to eliminate it. To understand this we must examine the terms of the statute which provide:

The supreme court, in case it stays or suspends the order or decision of the public utilities commission in any matter affecting rates, joint rates, fares, tolls, rentals, charges, or classifications, may also by order direct the public utility or railroad affected to pay into the hands of a trustee to be appointed by the court, to be held until the final determination of the proceeding, under such conditions as the court prescribes, *all sums of money collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended.*

R.C. 4903.17, App. at 2 (emphasis added). The amounts to be paid to the Court's trustee under this section are the amounts *above* what would have been collected *if the order had not been stayed*. Quite obviously this section is only applicable in a situation where the Commission has ordered a *reduction of an existing rate*. In that situation the grant of a stay would allow the utility to continue to collect the old, higher rate.

By way of example, if the Commission had ordered a rate to be reduced from \$5 per month to \$4 per month, a utility might appeal and seek a stay. If the stay was granted under R.C. 4903.16 the utility could continue to collect the old \$5 rate. The Court would

however have the option under R.C. 4903.17 to require the utility to pay the amount in excess of the stayed rate to the trustee. The company would charge the full \$5 but pay \$1 (the amount in excess of the stayed order) to the trustee. Ultimately the Court would direct the trustee to pay the funds based on the outcome of the case.

It is obvious from the words of the statute that R.C. 4903.17 has no application here. There is no amount to be paid to a trustee. The trustee holds:

*...all sums of money collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended.*

There are no sums of money collected in excess of the sums payable if the order had not been stayed (indeed no sums collected at all). If the order had not been stayed, the MGP rider would be collected. Because there is a stay, the rider is not imposed and nothing is collected. The section is designed for a situation where a rate reduction has been ordered and then stayed. This case does not present that situation and therefore R.C. 4903.17 has no application.

Even if the statute worked in the way that Appellants wished, it would not cure the harm to the company, it would merely preserve it. The harm to the company occurs because it does not have the use of funds to which it would otherwise be entitled.

Whether the company does not have access to this money because it is never collected, or because it is collected but then given to a trustee, the effect on the company is the same.

It does not have the money and is, therefore, harmed. Even if the collections were placed

in an interest-bearing account no account pays an interest level equivalent to the cost to the company to borrow those funds<sup>1</sup>, it is still harmed.

Appellants' arguments regarding R.C. 4903.17 should be rejected

### **CONCLUSION**

We conclude where we began. No stay is needed in this case to protect the Appellants' interests. A refund of the collections would be possible through the reconciliation process for this rider.

Should the Court choose to continue the unneeded stay, that stay causes harm to the company by denying it the use of substantial funds to which it would otherwise be entitled. R.C. 4903.16 recognizes this possibility and provides that a bond must be required which is in keeping with the level of the harm caused.

Appellants wish that the law were otherwise but the statute is clear, where there is substantial harm there must be a substantial bond and this Court should so order.

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<sup>1</sup> It must always cost more to borrow money from a bank than the bank pays in interest on deposits. If this were not true, banking would collapse.

Respectfully submitted,

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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Reply 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 22<sup>nd</sup> day of August, 2014.



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# **APPENDIX**

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**2505.03 Appeal of final order, judgment, or decree.**

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure.

When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

**2505.12 No supersedeas bond required for certain appeals.**

An appellant is not required to give a supersedeas bond in connection with any of the following:

(A) An appeal by any of the following:

(1) An executor, administrator, guardian, receiver, trustee, or trustee in bankruptcy who is acting in that person's trust capacity and who has given bond in this state, with surety according to law;

(2) The state or any political subdivision of the state;

(3) Any 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 as that officer.

(B) An administrative-related appeal of a final order that is not for the payment of money.

**4903.13 Reversal of final order - notice of appeal.**

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable. The proceeding to obtain such

reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

#### **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.

#### **4903.17 Order in case of stay.**

The supreme court, in case it stays or suspends the order or decision of the public utilities commission in any matter affecting rates, joint rates, fares, tolls, rentals, charges, or classifications, may also by order direct the public utility or railroad affected to pay into the hands of a trustee to be appointed by the court, to be held until the final determination of the proceeding, under such conditions as the court prescribes, all sums of money collected in excess of the sums payable if the order or decision of the commission had not been stayed or suspended.

#### **4911.06 Consumers' counsel considered state officer.**

The consumers' counsel shall be considered a state officer for the purpose of section 24 of Article II, Ohio constitution.

#### **§ 2.24 Who liable to impeachment, and punishment**

The governor, judges, and all state officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office under the authority of this state. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law.