

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

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods. ) 12-1688-GA-AAM

JOINT REPLY BRIEF ADDRESSING THE APPROPRIATE AMOUNT OF BOND NECESSARY TO CONTINUE THE STAY BY THE KROGER COMPANY, OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO MANUFACTURERS' ASSOCIATION, AND OHIO PARTNERS FOR AFFORDABLE ENERGY

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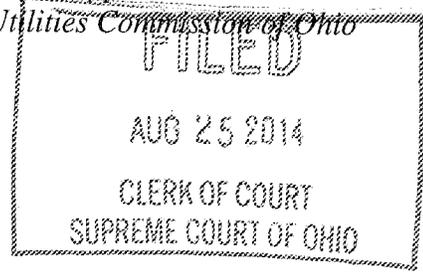
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## I. STATEMENT OF FACTS AND CASE

This Reply Brief is filed to protect approximately 420,000 residential, commercial and industrial natural gas customers of Duke Energy Ohio, Inc. (“Duke” or “Utility”) from paying unlawful charges. The Kroger Company (“Kroger”), Office of the Ohio Consumers’ Counsel (“OCC”), Ohio Manufacturers’ Association (“OMA”) and Ohio Partners for Affordable Energy (“OPAE”)<sup>1</sup> respectfully request this Court to maintain the Stay this Court initially ordered on May 14, 2014, without a bond requirement.

Joint Appellants incorporate the facts as stated in their Joint Brief Addressing the Appropriate Amount of Bond Necessary to Continue the Stay (“Joint Brief”) filed on August 13, 2014. Appellee, Public Utilities Commission of Ohio (“PUCO”), and Intervening Appellee (Duke Energy Ohio, Inc. (“Duke” or “Utility”), filed their Briefs Regarding Bond Requirements that Joint Appellants respond to herein.

## II. ARGUMENT

### A. **Duke will not incur damages from “unrecovered revenues,” because the PUCO has ordered those revenues to be collected from customers through a separate rate mechanism, called the MGP rider.**

Duke’s Bond Brief alleges that it will suffer damages resulting, in part, from revenue that it characterizes as “unrecovered revenue.” Duke states:

Based on the annual amount of the MGP Rider approved by the [PUCO] in the case below, *every week that rates are stayed translates into \$213,533 in unrecovered revenue.*

Duke Bond Brief at 5 (emphasis added). Duke is wrong.

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<sup>1</sup> Collectively “Joint Appellants.”

What Duke calls unrecovered revenues are not unrecovered revenues for all time. If the appeal is unsuccessful, the revenues from the MGP Rider will be collected from customers, but at a later date. Customers will pay the revenues to the Utility if the rider mechanism is reinstated. Because the revenues will be collected later (if Joint Appellants are unsuccessful), there is no valid claim for damages for “unrecovered revenues.” Thus, the Court should not consider Duke’s alleged unrecovered revenues as damages for purposes of establishing a bond requirement. Duke Bond Brief at 5.

Duke’s alleged damages could mistakenly lead this Court to believe that, under the Stay, Duke is foregoing revenues that can never be collected in the future. That is simply not true. If the PUCO Order is ultimately upheld by the Court, then Duke will fully collect all of those revenues from customers. The only harm to the Utility would be that it foregoes the revenues for the time being. It will, however, collect the revenues later, through the rider. Duke’s alleged damages would be limited to the time value of money associated with its delay in collecting the revenues. That is, Duke at most should view its alleged damages as the interest on the delayed revenue stream during the period that the revenues are not collected from customers.

The damages that the Utility could incur under a rider mechanism are different from the damages that it could incur if the rates had been ordered to be collected through a distribution base rate case. For example, if the PUCO authorizes a distribution base rate increase and collection of those base rates is interrupted by a Court-ordered Stay, the utility foregoes the revenues from the base rate case every day the Stay is in place. The utility in that instance cannot rebill customers for the forgone base rates once the Stay is lifted; therefore, those revenues are truly “unrecovered revenues” that cannot be recouped from customers in the future.

However, this case differs from a base rate case, because all of the remaining \$52.4 million in MGP-related investigation and remediation costs incurred by Duke have been identified and are placed in a deferral account. The deferred MGP-related investigation and remediation dollars are considered a regulatory asset which remains to be collected in the future from customers. If the PUCO's decision is upheld and the Utility is subsequently authorized to collect such revenues from customers, the deferral account would be systematically reduced as collection from customers occurs (in this case over a 57-month period). Duke Bond Brief at 2.

Collection under the MGP Rider can start and stop as ordered by the PUCO. This is in fact what occurred below when the PUCO permitted Duke to implement the rider for 72 days. Subsequently, the PUCO ordered Duke to stop charging customers for the MGP rider, consistent with the Court's ruling to stay implementing the rider. The balance remains in place for potential future collection until fully collected or written off. If this appeal is unsuccessful, Duke will fully collect the total MGP-related deferrals (approximately \$52.4 million).<sup>2</sup> But during the time the stay is in effect, the Utility will not collect the revenue from customers.

It is misleading for Duke to argue that the Stay of the Commission's Order would permanently deprive it of the approved rate increase (the collection of the MGP-related costs). The revenue is not "unrecovered revenue" because it is not permanently foregone as Duke is implying. Duke will *never* be in danger of not collecting the entire \$55.5 million if the appeal is unsuccessful. It will merely be unable to have access to such funds during the period of the stay. Therefore, the monthly collections of the MGP Rider (\$925,396), Duke Bond Brief at 5, are not

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<sup>2</sup> \$55.5 million (PUCO authorized collection amount) - \$3.1 million (Duke collections to date) = \$52.4 million (Current unamortized balance).

a component of damages assuming a 12-month appeal process (\$11,104,758), Id., or an 18-month appeal process (\$16,657,137). Id.

**B. Duke Significantly Over-States Its Damages Resulting From Continuing The Stay.**

As argued above, Duke has significantly over-stated its damages by including unrecovered revenues as a component of its damage calculation. The Court should disregard Duke's argument for all the reasons discussed above.

Duke also calculates the "carrying costs" (interest expense) of 5.32 percent as a component of damages. Duke Bond Brief at 5. Duke simply states:

Applying the Company's long-term debt rate of 5.32 percent, the [Utility] will lose another \$301,067 (carrying costs for 12 month) to \$673,141 (carrying costs for eighteen months)

Duke Bond Brief at 5. However, based upon an estimated Stay Period of approximately one year, the amount of interest estimated by Joint Appellants is \$160,169, which is significantly less than the carrying costs estimated by Duke. See Joint Appellants Bond Brief at Exhibit A. Duke has provided no calculations in support of its alleged interest damages. While Duke alleges its carrying costs calculation is to address the time value of money (Duke Bond Brief at 5) its calculation is nearly double Joint Appellants' calculation that was also made to address the time value of money damages.

Our (Joint Appellants) calculation is made using the same interest rate, 5.32% annually or 0.4433% monthly, used by Duke. The monthly carrying cost (i.e. interest) of the uncollected revenue is calculated by multiplying the monthly interest rate to the average monthly balance of uncollected revenue. The average monthly balance is the average of the monthly beginning balance and the monthly ending balance (the beginning balance plus the monthly interest). In other words, the Joint Appellants' calculation represents the actual monthly compounded interest

costs associated with the un-collected MGP monthly revenues during the Stay period. This amount would fully compensate Duke for any additional interest cost, assuming Duke needed to borrow the money at an annual rate of 5.32%, for not being able to access the monthly MGP Rider revenue of \$925,396 during the Stay period.<sup>3</sup> The Court should accept the Joint Appellant's documented calculation and reject Duke's unsupported calculation.

Duke also argues that there are quantitative and qualitative components to its damages arising from the Stay. Duke Bond Brief at 4. Duke alleges that its financing needs may increase over time from the "lack of recovery" which "reduces the Company's revenues." And Duke complains that staying recovery of the MGP costs has negative implications for its credit rating. However, Duke fails to specify how these factors translate to an appropriate bond amount. Because they are undocumented and unsupported, the Court should give such arguments no consideration in establishing a bond requirement.

Finally, Duke alleges that it may be unable to resume collections once the Stay is lifted after an unsuccessful appeal. Duke states:

*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.*

Duke Bond Brief at 4 (emphasis added). This argument presumes that the PUCO would refuse to permit Duke to resume the Rider once the Court determines that the PUCO's original order should be upheld. There is no basis to believe that the PUCO would disregard the Court's order and not permit the Rider to resume. This argument should be rejected for purposes of determining an appropriate bond.

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<sup>3</sup> \$925,396 = \$55,523,788/60 month.

**C. Joint Appellants' Argument For Zero Bond Or A De Minimis Bond Amount Should Be Adopted By This Court in order to provide a real remedy for customers.**

The Court should reasonably balance customers and Duke's interests and find that the appropriate bond should be zero or a nominal amount. As explained above, Duke's calculations of damages are disingenuous, over-stated, or unsupported by record evidence in this case. Therefore, the Court should not rely on Duke's arguments to establish a bond.

As Joint Appellants have consistently argued, if the appeal is unsuccessful, then there is a carrying charge mechanism available to the Court for addressing damages resulting from the Stay. The Court can order the PUCO to resume collection of the MGP-related investigation and remediation costs with interest to address the collection delay. This is the collection mechanism described in Section 3 (a) of Joint Appellants' Bond Brief.

Duke in its Bond Brief has recognized that the PUCO did not contemplate a Stay being granted on this appeal. Duke states:

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.

Duke Bond Brief at 4. Therefore, even Duke acknowledges that, if the appeal is unsuccessful, the Court will instruct the PUCO to decide how to calculate the remaining unamortized MGP deferral to be recovered through the MGP Rider. That calculation could include an interest component to compensate Duke for the delay in collecting cost from customers that resulted from the Stay. See Joint Appellants' Bond Brief at 10-15. Therefore, Duke's alleged damages would be zero and the bond amount should also be zero or a de minimis amount.

Because Duke will collect the full \$52.4 million from customers if the appeal is unsuccessful, the alleged damages for the Stay Period are limited to interest expense (time value

of money) calculated based on the delay in collecting charges during the Stay Period. Joint Appellants have estimated the interest expense to be \$160,169, which is significantly less than the \$3.1 million<sup>4</sup> that Duke has *already collected from customers* prior to the Stay being granted and implemented. See Joint Appellants Bond Brief Exhibit A. Duke may never be required to refund this already-collected \$3.1 million, even if the Court rules in favor of customers. This is the reason why no bond is required to cover the estimated interest. Customers of Duke have already paid \$3.1 that can be applied to Duke's alleged damages

On the other hand, if the Stay is lifted, Duke could collect from customers an additional \$11.1 million<sup>5</sup> during the pendency of the appeal that may never be refunded, even if the appeal is successful. The Court should weigh the relative harm to Duke (which has already been remedied) against the harm to Duke's customers (which cannot be remedied) during the pendency of the appeal. The Court should conclude that the Stay should not be lifted.

Moreover, the Court should find that there is no basis to require Joint Appellants to post a bond.

#### **D. The PUCO Presents No Reason To Lift the Stay.**

The PUCO suggests that *Keco Industries*, 166 Ohio St. 254, 141 N.E.2d 465 does not apply in this case because this case involves a Rider, not base rates. PUCO Bond Brief at 3. The PUCO states:

In more recent decades the Commission has increasingly used adjustable rate mechanism, or riders. 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.

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<sup>4</sup> \$2,220,000 (from March 3, 2014 to May14, 2014) + \$925,000 (from May 14, 2014 to June 13, 2014) = \$3,145,000.

<sup>5</sup> \$925,000 per month x 12 months = \$11,100,000.

Brief Regarding Bond Requirements for PUCO at 3 (Aug. 12, 2014) (citations omitted). Following the PUCO's position, the Stay initially granted by the Court is unnecessary as the PUCO could lawfully require Duke to refund any amount recovered during this appeal. Thus, the PUCO argues that *Keco* only applies to traditional ratemaking and does not apply to adjustable rate mechanisms. Brief Regarding Bond Requirements for PUCO at 3 (Aug. 12, 2014). However, Joint Appellants are not certain that the Court will accept the position that the Rider can be used to provide refunds to customers for rates that are determined by this Court to be unlawful.<sup>6</sup> Nevertheless, the Joint Appellants' argument with regard to the deferrals that will be recovered through the Rider is consistent with the PUCO's argument. Because implementing a carrying charge on the already existing deferrals will protect Duke from any alleged harm from the Stay, Duke could recover all of the deferred MGP-related investigation and remediation costs in this case plus interest through the MGP Rider mechanism.

The PUCO argued that a nominal bond would be insufficient. PUCO Bond Brief at 8. However, as Joint Appellants argued on brief, the Court should recognize that the bond requirement is problematic in this case, and should not lift the Stay for that requirement or set the level at an amount that will make it impossible to satisfy. First, OCC is exempt from posting a bond. Ohio law provides for an exemption that relieves the OCC from having to post a bond -- or "execute an undertaking" as bonding is referred to in R.C. 4903.16. Jt. Bond Brief Appx. at 00019 See R.C. 2505.12, Jt. Bond Brief Appx. at 000018. Second, Kroger may be a large national corporation, but it is one customer taking natural gas distribution service from Duke, and its billings represent a relatively small percentage of Duke's total revenues. Therefore, it

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<sup>6</sup> See *In re Application of Columbus S. Power Co.*, 138 Ohio St.3d 448, 2014-Ohio-462, ¶ 53 (Court holding that despite a mechanism in rates that would allow prospective adjustments, *Keco* precludes present rates from making up for excessive rate charged in the past.)

would be unfair to expect or require one customer, such as Kroger, or a group of customers to post a bond for the entire amount of any alleged damages resulting from the Stay. OPAAE, a non-profit corporation whose members are primarily Community Action agencies, does not have the resources to post anything other than a nominal bond. The OMA is also a non-profit organization that does not have such resources.

However, if the appeal is not successful, the Court can maintain the Stay and allow interest on the deferrals to prevent any alleged harm to Duke. The Stay is needed to protect consumers and, therefore, should not be lifted.

### III. CONCLUSION

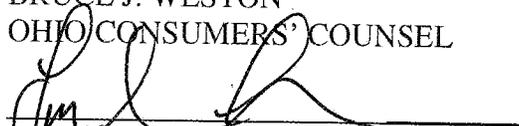
The PUCO has argued that the Stay is unnecessary because the rider mechanism for the charges to customers does not invoke the rule against refunds under *Keco*. As such, any collections later found to be unlawful could be refunded. Nonetheless, the Stay should not be lifted for this reason because the Court's past rulings suggest that customers are at risk for being denied refunds in the event this appeal is successful in reversing the PUCO's Order.

As for the amount of the bond, Duke has over-stated its calculations for damages arising from the Stay. Duke had already collected \$3.1 million from customers before the Court issued the Stay. If the Stay is maintained, Duke suffers a mere \$160,169 from the time value of money during the Stay, an amount far less than the amount already collected and may not refunded. But consumers will suffer if the Stay is lifted or bond is set so high that Joint Appellants cannot post it. This is because, as noted by Justice Pfeifer, the Court has been unwilling to order refunds when they are justified, based on its interpretation of *Keco*. The potential harm to customers is in excess of \$14.2 million (\$3.1 million collected from customers before the stay was implemented and \$11.1 million collected from customers during the pendency of the appeal if

the Stay is lifted) that may not be refunded even if the appeal is successful. Therefore, the Court should reject Duke's arguments of its alleged harm. The Court should prevent the irreparable harm to customers if a bond is set so high that it cannot be posted. Duke has experienced no harm and will experience no harm. The Court should establish a bond requirement of zero or a de minimis amount.

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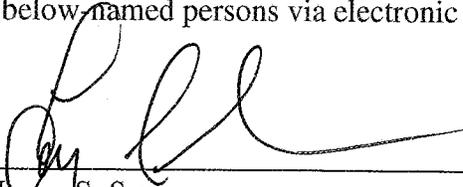
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