

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

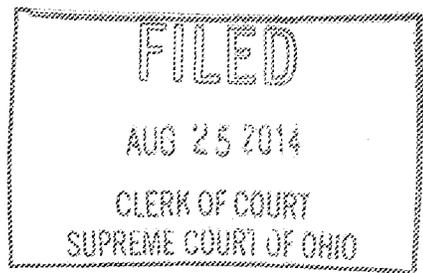
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**Amy. B. Spiller (0047277)**  
Counsel of Record  
**Elizabeth H. Watts (0031092)**  
Associate General Counsel  
Duke Energy Ohio, Inc.  
139 East Fourth Street  
Cincinnati, Ohio 45202  
(513) 287-4359 - Telephone  
(513) 287-4386 - Facsimile  
[Amy.Spiller@Duke-Energy.com](mailto:Amy.Spiller@Duke-Energy.com)  
[Elizabeth.Watts@Duke-Energy.com](mailto:Elizabeth.Watts@Duke-Energy.com)

*Attorneys for Intervening Appellee  
Duke Energy Ohio, Inc.*

**Mike DeWine (0009181)**  
Attorney General of Ohio  
**William L Wright (0018010)**  
Section Chief  
**Thomas W. McNamee (0017352)**  
Counsel of Record  
**Devin D. Parram (0082507)**  
**Katie L. Johnson (0091064)**  
Assistant Attorney General  
Public Utilities Section  
180 East Broad Street, Sixth Floor  
Columbus, Ohio 43215-3783  
(614) 466-4397 - Telephone  
(614) 644-8767 - Facsimile  
[Thomas.McNamee@puc.state.oh.us](mailto:Thomas.McNamee@puc.state.oh.us)  
[Devin.Parram@puc.state.oh.us](mailto:Devin.Parram@puc.state.oh.us)

*Attorneys for Appellee Public Utilities  
Commission of Ohio*



**Bruce J. Weston (0016973)**

Ohio Consumers' Counsel

**Larry S. Sauer (0039223)**

Counsel of Record

**Joseph P. Serio (0036959)**

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

110 West Broad Street

Columbus, Ohio 45215

(614) 466-1312 - Telephone

(614) 466-9475 - Facsimile

[Larry.Sauer@occ.state.oh.us](mailto:Larry.Sauer@occ.state.oh.us)

[Joe.Serio@occ.state.oh.us](mailto:Joe.Serio@occ.state.oh.us)

*Attorneys for Appellant Office of  
the Ohio Consumers' Counsel*

**Robert A. Brundrett (0086538)**

Counsel of Record

Ohio Manufacturers' Association

33 North High Street

Columbus, Ohio 43215

(614) 629-6814 - Telephone

(614) 224-1012 - Facsimile

[RBrundrett@ohiomfg.com](mailto:RBrundrett@ohiomfg.com)

*Attorney for Appellant Ohio  
Manufacturers' Association*

**Kimberly W. Bojko (0069402)**

Counsel of Record

**Mallory M. Mohler (0089508)**

Carpenter Lipps & Leland LLP

280 North High Street

Suite 1300

Columbus, Ohio 43215

(614) 365-4100 – Telephone

(614) 365-9145 – Facsimile

[Bojko@CarpenterLipps.com](mailto:Bojko@CarpenterLipps.com)

[Mohler@CarpenterLipps.com](mailto:Mohler@CarpenterLipps.com)

*Attorneys for Appellant  
The Kroger Company*

**Colleen L. Mooney (0015668)**

Counsel of Record

Ohio Partners for Affordable Energy

231 West Lima Street

Findlay, Ohio 45839

(614) 488-5739 - Telephone

(419) 425-8862 - Facsimile

[cmooney@ohiopartners.org](mailto:cmooney@ohiopartners.org)

*Attorney for Appellant Ohio  
Partners for Affordable Energy*

**Stephen B. Seiple (0003809)**

Counsel of Record

200 Civic Center Drive

P.O. Box 117

Columbus, Ohio 43216

(614) 460-4648

(614) 460-6986

[sseiple@nisource.com](mailto:sseiple@nisource.com)

*Counsel for Intervening Appellee  
Columbia Gas of Ohio, Inc.*

**Gretchen J. Hummel (0016207)**

2330 Brookwood Road

Columbus, Ohio 43209

(614) 235-5352 - Telephone

(614) 235-5352 – Facsimile

[ghummel@columbus.rr.com](mailto:ghummel@columbus.rr.com)

*Counsel for Amicus Curiae  
Industrial Energy Users - Ohio*

**Mark A. Whitt (0067996)**

Counsel of Record

Andrew J. Campbell

Gregory L. Williams

WHITT STURTEVANT LLP

The Key Bank Building

88 East Broad Street, Suite 1590

Columbus, Ohio 43215

(614)224-3911 – Telephone

(614)224-3960 - Facsimile

[whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)

[Campbell@whitt-sturtevant.com](mailto:Campbell@whitt-sturtevant.com)

[Williams@whitt-sturtevant.com](mailto:Williams@whitt-sturtevant.com)

*Counsel for Intervening Appellees*

*The East Ohio Gas Company D/B/A*

*Dominion East Ohio and Vectren Energy*

*Delivery of Ohio, Inc.*

**David Boehm (0021881)**

**Jody Cohn (0085402)**

**Michael Kurtz (0033350)**

Counsel of Record

Boehm, Kurtz, & Lowry

36 East Seventh St, Suite 1510

Cincinnati, OH 45202

[dboehm@bklawfirm.com](mailto:dboehm@bklawfirm.com)

[mkurtz@bklawfirm.com](mailto:mkurtz@bklawfirm.com)

*Counsel for Amicus Curiae*

*The Ohio Energy Group*

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

**I. INTRODUCTION**

Intervening Appellee, Duke Energy Ohio, Inc., (Duke Energy Ohio) submits this reply brief in response to the Court's Decision on July 29, 2014, denying the motion to lift stay but granting the motion to require bond and seeking briefs on the amount of the bond to be required. In responding to the Court, Joint Appellants continue to challenge their obligation to post a bond. They allege, without substantiation, that they do not have the financial resources or that they represent such a small percentage of Duke Energy Ohio's customers that they should not have to post a bond for the appeal they alone elected to pursue. Joint Appellants further focus their arguments on how they can avoid posting a bond; arguments that involve Duke Energy Ohio or all of its customers assuming Joint Appellants' statutory obligation. These arguments do not assist with the question posed: What is the appropriate bond amount?

A bond has been required. The question before the Court is the amount at which the bond must be set to provide the statutory protections identified in R.C. 4903.16. Joint Appellants have not adequately responded to this question, as directed by Court. As such, Duke Energy Ohio respectfully requests that the Court set the bond amount as discussed in its initial brief on the appropriate bond amount.

**II. DISCUSSION**

**A. A Zero Bond or a *De Minimis* Bond is Inconsistent with the Court's Decision and R.C. 4903.16.**

Joint Appellants, the Office of the Ohio Consumers' Counsel (OCC), The Kroger Company (Kroger), the Ohio Manufacturers' Association (OMA), and Ohio Partners for Affordable Energy (OPAE), assert both individually and collectively that they should not be

required to post bond. But the Court has ordered that a bond is to be posted. Thus, arguments about why no such bond should be required now are moot. Further, as discussed below, arguments about why no such bond should be required are not legally supportable.

The relevant statute, R.C. 4903.16, provides as follows:

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, condition for 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.

As Joint Appellants correctly recognize, the law provides the Court with discretion in determining what level of undertaking is required to satisfy all damages caused by the delay from a stay. Yet Joint Appellants suggest that the amount of the bond should be zero either because they are either exempt from or incapable of posting a bond, or because they should not have to post a bond. R.C. 4903.16 does not contemplate that the appellee bear the burden of a stay of a Public Utilities Commission of Ohio (Commission) order that is affirmed on appeal.

The legal argument put forth by the OCC, that it is akin to a "public officer" and therefore should be exempt from posting a bond, has previously been discussed and rejected. But in persisting with its argument, the OCC conflates the definitions of "state officer" pursuant to R.C. 4911.06 and "public officer" pursuant to R.C. 2505.12. In doing so, the OCC contends that it is not required, as a "public officer," to post a supersedeas bond. R.C. 2505.12 has no application here – a supersedeas bond has neither been requested nor required. Indeed, R.C. 2505.03(B) expressly provides that the provisions of Chapter 25 of the Revised Code do not

apply where other sections of the Revised Code do. The General Assembly has made express provision for appellate review of Commission decisions in Chapter 49 of the Revised Code. And R.C. 4903.16 requires a bond before a Commission decision may be stayed. In pursuing this appeal under Chapter 49 of the Revised Code, the OCC must comply with the requirements of that chapter.

Joint Appellants also summarily allege that two of the other entities – OP&E and OMA – are financially incapable of posting a bond. Kroger does not deny its financial strength but instead argues that its billings from Duke Energy Ohio reflect only a small percentage of Duke Energy Ohio’s revenues and it is therefore unfair to expect Kroger to post the full bond amount. These unsubstantiated assertions are not only irrelevant to the terms of the applicable law, but they are also untimely and cannot now excuse the legal obligation associated with Joint Appellants’ decision to pursue an appeal, as ordered by the Court.

**1. The time value of money is insufficient to protect Duke Energy Ohio during the pendency of the stay.**

Joint Appellants argue that the only alleged cognizable harm to Duke Energy Ohio is the lost interest on the amount remaining in the rider to be collected from customers. Duke Energy Ohio has demonstrated in its initial brief why lost interest is insufficient to reimburse it for all damages caused by a delay in the recovery of environmental remediation costs authorized by the Commission. Those arguments will not be repeated here. Rather, for sake of efficiency, Duke Energy Ohio responds to the incorrect calculations of lost interest offered by Joint Appellants.

Joint Appellants’ only calculations begin with interest expense resulting from a delay in collections under the rider. (See Joint Brief Addressing the Appropriate Amount of the Bond, OCC Exhibit A.) This calculation, however, is deficient. Joint Appellants correctly calculated interest on one month’s amount. But they failed to calculate interest on the ever-increasing

accumulated balance. An example may serve to illustrate this point. Assume \$100 will be deposited every month, at 12 percent interest. In the first month, interest on half of the deposit, or \$50, will be earned. With the second month's deposit, interest will again be earned on one half of the \$100 deposited in that second month. But in the second month, interest will also be earned on the amounts already in the account from the prior month's deposit. Duke Energy Ohio's interest calculation, ranging from \$301,067 to \$673,141, properly accounts for interest on the accumulated balance.

Joint Appellants' second calculation confirms that Duke Energy Ohio will incur damages while the stay is in place. (Joint Brief Addressing the Appropriate Amount of the Bond, OCC Exhibit B.) In this calculation, Joint Appellants examine two potential scenarios should the Commission's decision be affirmed. The first scenario assumes that the Commission will authorize Duke Energy Ohio to recover its previously approved environmental remediation expenses over the same five-year period that was contemplated in its November 13, 2013, Opinion and Order. In that instance, recovery of the previously authorized amount would be complete in March 2019. In the second scenario, Joint Appellants assume that the Commission will start the five-year collections period anew after the appellate process has concluded. In that instance, recovery will not be complete in March 2019. The Joint Appellants' net present value calculation is only partly correct because it ignores the harm to Duke Energy Ohio during the stay, when it is not collecting any amounts authorized by the Commission. It does, however acknowledge the financial impact to Duke Energy Ohio resulting from the stay.

In offering these calculations, Joint Appellants conclude with the suggestion that any harm resulting from the time value of money be remedied through the rider. That is, Joint Appellants propose that all customers respond to this harm. As discussed elsewhere in this reply,

Duke Energy Ohio's other customers should not be forced to fulfill the bond requirement imposed upon Joint Appellants.

**2. Amounts Already Collected from Customers are Not an Appropriate Substitute for Joint Appellants' Obligation to Post a Bond.**

Joint Appellants next argue that the amounts previously collected from Duke Energy Ohio's customers are sufficient to protect it from any damages caused by the stay. (Joint Brief Addressing the Appropriate Amount of Bond, at pg. 8.) This argument is misplaced. Ohio's regulatory design mandates that public utilities charge only those rates that have been approved by the Commission. *The Cleveland Electric Illuminating Co. v. Pub. Util. Comm.*, 46 Ohio St. 2d 105, 107 (1976). In the proceeding underlying this appeal, the Commission authorized Duke Energy Ohio to recover previously incurred environmental remediation expenses and further approved the rates to be charged to customers on a monthly basis. Duke Energy Ohio thus lawfully collected remediation expenses from its customers prior to the time the Commission suspended such collection in response to the stay.

The stay, and the associated bond, pertain to the period during which the stay is in effect. The stay does not – and cannot – address prior periods during which authorized rates were lawfully collected. And the requisite bond amount to address prospective harm to arise during the pendency of the appeal, therefore, cannot be substituted with such amounts that were rightfully collected prior to the stay.

**3. Joint Appellants' Alternate Mechanisms, Which Excuse Their Obligation to Post a Bond, Unfairly and Improperly Burden All of Duke Energy Ohio's Customers.**

- a. **The Commission has previously ordered that Duke Energy Ohio cannot recover carrying charges on its prior, lawfully incurred remediation expenses.**

In yet another alternate proposal that attempts to eliminate their obligation to post a bond, Joint Appellants reargue their cause on the merits and raise issues from unrelated proceedings. Specifically, Joint Appellants suggest that, in lieu of posting a bond, the Court can order the Commission to impose carrying charges on the prior remediation expenses that the Commission authorized Duke Energy Ohio to recover. As the Joint Appellants maintain, there is a carrying charge mechanism that exists that would “balance the parties’ interests.” (Joint Brief Addressing the Appropriate Amount of Bond, at pg. 10.) But this statement is predicated upon a prior order that is not the subject of this appeal and has since been altered by the decision at issue.

As Joint Appellants note, the Commission authorized Duke Energy Ohio in 2009 to defer environmental remediation expenses and did, at that time, allow it to accrue carrying charges on those amounts. *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Remediation Costs*, Case No. 09-712-GA-AAM, Entry (November 12, 2009). But four years later, the Commission altered this decision, eliminating both the accrual and recovery of carrying charges for environmental remediation expenses. Opinion and Order, at pg. 59 (November 13, 2013). Indeed, as the Commission opined, “carrying costs should not be borne by the ratepayers.” *Id.* Despite this finding, which has not been challenged on appeal, Joint Appellants contend that the Court can instruct the Commission to impose upon all customers the obligation to pay carrying costs. Joint Appellants contend that ratepayers would be no worse off in such a circumstance, where they are forced to finance the bond requirement imposed upon Joint Appellants through the assumption of carrying costs. Such an outcome would be contrary to regulatory principles and would impose costs upon customers who are not represented before this Court.

- b. The purported trust account option offered by Joint Appellants is not provided for under R.C. 4903.17.**

Joint Appellants' final and least logical alternative is predicated upon R.C. 4903.17, a provision that allows for amounts collected during a stay to be deposited in a trust account. Joint Appellants are not suggesting that the Court allow Duke Energy Ohio to resume collection of its previously authorized remediation expenses, with such collections deposited in a trust account. Rather, they contend that the interest Duke Energy Ohio may accrue on its deferred balances is an appropriate substitute. That is, Joint Appellants propose that the stay remain in force and effect, that no remediation costs be recovered from customers during the pendency of the appeal, and that interest on future deferred balances be deemed sufficient to have satisfied the language of R.C. 4903.17. But the law does not contemplated substitutes. It speaks to the collection of dollars that are placed in trust. And as Joint Appellants are not asking the Court to enable recovery under the rider to resume, they cannot avail themselves of R.C. 4903.17. In addition to this deficiency, Joint Appellants' argument fails as a practical matter because Duke Energy Ohio is not accruing carrying charges on any amounts it has incurred for environmental remediation, pursuant to Commission order.

**4. Duke Energy Ohio's requested bond amount is well reasoned and based upon precedent.**

Joint Appellants argue that Duke Energy Ohio has failed to provide any reasonable basis for computing the appropriate bond amount. In doing so, they first refer to Duke Energy Ohio's motion to lift the stay, wherein Duke Energy Ohio sought a bond for the full amount of the environmental remediation expenses the Commission authorized it to recover, plus interest. This request is consistent with existing precedent. Indeed, in recent appeals, two separate public utilities each received a stay of a Commission decision and each posted a bond for the full amount at issue. See, *In re: Application of East Ohio Gas Co.*, 134 Ohio St.3d 1493, 984 N.E.2d

35, 2012-Ohio-2117, Motion for Stay of The East Ohio Gas Company dba Dominion East Ohio, at pg. 3 (January 11, 2013) and *Ohio Edison Company, et al. v. Pub. Util. Comm.*, Case No. 2013-2026, Motion for Stay, at pg. 5 (December 24, 2013).

Duke Energy Ohio observed, in its initial brief on the appropriate bond amount, that this precedent exists. It further offered another approach for the Court's consideration. The Joint Appellants, however, have focused their efforts on how they can burden Duke Energy Ohio or all of its customers with their obligation. These arguments are not responsive to the Court's instruction and thus fail to reflect a plausible alternative for determining the appropriate bond amount.

**5. Whether *Keco Industries, Inc. v. Cincinnati and Suburban Tel. Co.*, negates a stay is immaterial to the question pending.**

In its initial brief on the appropriate bond amount, the Commission comments that a stay was not necessary here, as *Keco Industries, Inc. v. Cincinnati and Suburban Tel. Co.*, 166 Ohio St. 254 (1957) is not applicable.<sup>1</sup> (Brief Regarding Bond Requirements by the Public Utilities Commission of Ohio, at pg. 3.) The Commission then generally discusses a rider reconciliation or true-up mechanism in which estimated costs that are collected from customers are annually reviewed. In this particular instance, an estimate that forms the basis of a collected rate is adjusted so that, ultimately, the amount that customers pay reflects actual costs. The Commission states, in a footnote, that this appeal concerns such a true up mechanism. (Brief Regarding Bond Requirements by the Public Utilities Commission of Ohio, at pg. 3, footnote 1.) This statement, however, is not accurate.

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<sup>1</sup> The Commission previously opposed the Joint Appellants' motion for stay, not because it was unnecessary but because Joint Appellants had failed to post a statutorily required bond. (Memorandum Contra Appellants' Joint Motion for Stay by the Public Utilities Commission of Ohio.)

Duke Energy Ohio's request to recover its previously incurred remediation expenses was pursued in the context of a base rate proceeding. The Commission reviewed these expenses and the evidence concerning same under the R.C. 4909.05 – the ratemaking statute. Thus, before any expenses were authorized for recovery via a rider, the Commission confirmed that such expenses had been actually and prudently incurred. Consequently, the Commission approved a rider that was not predicated upon estimated costs to be incurred but instead actual costs that had been incurred.

As the remediation process is ongoing, the Commission further ordered annual filings pursuant to which the rider would be adjusted. Importantly, however, the Commission did not authorize Duke Energy Ohio to change the rates collected under its rider to reflect estimated or expected costs. Rather, it instructed Duke Energy Ohio to submit a filing that details the environmental remediation costs incurred in the prior year. Opinion and Order, at pg. 72. And before it will be allowed to update the rider to incorporate the prior year's expenses, Duke Energy Ohio must prove that such expenses were prudent. *Id.* Thus, Duke Energy Ohio has not been authorized to automatically update its rider through which environmental remediation expenses are recovered, using estimates that are subsequently adjusted. Rather, it can only alter the rider after a determination by the Commission that its prior, actual expenses were prudently incurred. The circumstances giving rise to Duke Energy Ohio's recovery, therefore, cannot be characterized as a true up to which *Keco* does not apply.

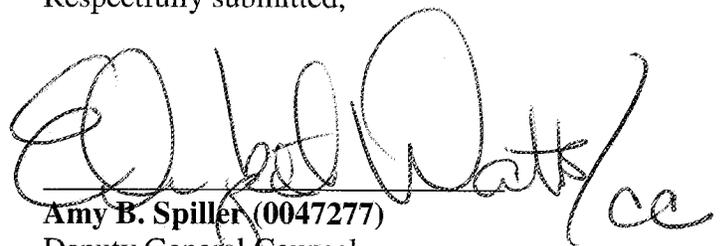
### **III. CONCLUSION**

In determining the appropriate amount of bond, the Court need look no further than the plain language of the statute, which explicitly states that it must be sufficient to cover “all damages caused by the delay in the enforcement of the order complained of... .” During the

pendency of this proceeding and while the stay is in place, the Company is unable to recover any of the approximate \$55 million dollars in environmental remediation expenses that it has already incurred or the additional, approximately \$8.3 million, that it incurred in 2013. As explained by the Company in its Initial Brief on Bond Amount, every week for which 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).

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Elizabeth H. Watts", with a stylized "ce" at the end. The signature is written over a horizontal line.

**Amy B. Spiller (0047277)**  
Deputy General Counsel  
Counsel of Record

**Elizabeth H. Watts (0031092)**  
Associate General Counsel  
Duke Energy Ohio, Inc.  
139 East Fourth Street  
Cincinnati, Ohio 45202  
(513) 287-4359 - Telephone  
(513) 287-4386 - Facsimile

Amy.Spiller@Duke-Energy.com  
Elizabeth.Watts@Duke-Energy.com

*Attorneys for Intervening Appellee  
Duke Energy Ohio, Inc.*

## CERTIFICATE OF SERVICE

The undersigned certifies that, on this 26<sup>th</sup> day of August, 2014, a copy of the foregoing Brief on Appropriate Bond Amount was served by ordinary mail, on the following:

**Bruce J. Weston (0016973)**  
**Larry S. Sauer (0039223)**  
**Joseph P. Serio (0036959)**  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
110 West Broad Street  
Columbus, Ohio 45215

*Attorneys for Appellant Office of  
the Ohio Consumers' Counsel*

**Robert A. Brundrett (0086538)**  
Counsel of Record  
Ohio Manufacturers' Association  
33 North High Street  
Columbus, Ohio 43215

*Attorney for Appellant Ohio  
Manufacturers' Association*

**Colleen L. Mooney (0015668)**  
Counsel of Record  
Ohio Partners for Affordable Energy  
231 West Lima Street  
Findlay, Ohio 45839

*Attorney for Appellant Ohio Partners for  
Affordable Energy*

**Kimberly W. Bojko (0069402)**  
Counsel of Record  
**Mallory M. Mohler (0089508)**  
Carpenter Lipps & Leland LLP  
280 North High Street  
Suite 1300  
Columbus, Ohio 43215

*Attorneys for Appellant  
The Kroger Company*

**Mike DeWine (0009181)**  
**William L. Wright (0018010)**  
**Thomas W. McNamee (0017352)**  
**Devin D. Parram (0082507)**  
**Katie L. Johnson (0091064)**  
Assistant Attorney General  
Public Utilities Section  
180 East Broad Street, Sixth Floor  
Columbus, Ohio 43215-3783

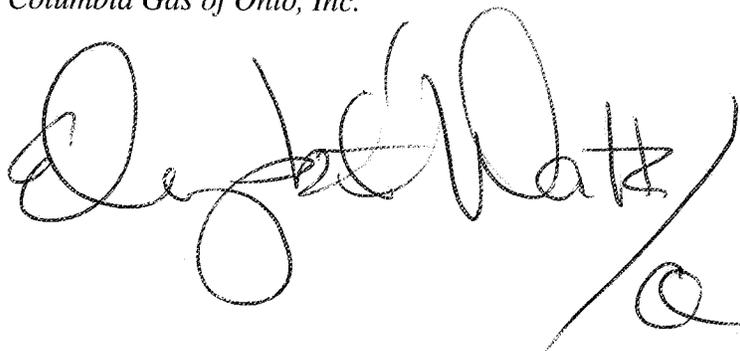
*Attorneys for Appellee Public Utilities  
Commission of Ohio*

**Mark A. Whitt (0067996)**  
Counsel of Record  
Andrew J. Campbell  
Gregory L. Williams  
Whitt Sturtevant LLP  
The Key Bank Building  
88 East Broad Street, Suite 1590  
Columbus, Ohio 43215

*Counsel for Intervening Appellees  
The East Ohio Gas Company D/B/A  
Dominion East Ohio and Vectren Energy  
Delivery of Ohio, Inc.*

**Stephen B. Seiple (0003809)**  
Counsel of Record  
200 Civic Center Drive  
P.O. Box 117  
Columbus, Ohio 43216

*Counsel for Intervening Appellee  
Columbia Gas of Ohio, Inc.*



**Gretchen J. Hummel (0016207)**

Counsel of Record

2330 Brookwood Road

Columbus, Ohio 43209

*Counsel for Amicus Curiae*

*Industrial Energy Users - Ohio*

**David Boehm (0021881)**

**Jody Cohn (0085402)**

**Michael Kurtz (0033350)**

Counsel of Record

Boehm, Kurtz, & Lowry

36 East Seventh St, Suite 1510

Cincinnati, OH 45202

*Counsel for Amicus Curiae*

*The Ohio Energy Group*

## APPENDIX

**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.

#### **4903.16 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.

#### **4909.05 Report of valuation of property.**

As used in this section:

(A) A "lease purchase agreement" is an agreement pursuant to which a public utility leasing property is required to make rental payments for the term of the agreement and either the utility is granted the right to purchase the property upon the completion of the term of the agreement and upon the payment of an additional fixed sum of money or title to the property vests in the utility upon the making of the final rental payment.

(B) A "leaseback" is the sale or transfer of property by a public utility to another person contemporaneously followed by the leasing of the property to the public utility on a long-term basis.

(C) The public utilities commission shall prescribe the form and details of the valuation report of the property of each public utility or railroad in the state. Such report shall include all the kinds and classes of property, with the value of each, owned, held, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be owned or held as of the date certain, by each public utility or railroad used and useful, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, for the service and convenience of the public. Such report shall contain the following facts in detail:

- (1) The original cost of each parcel of land owned in fee and in use, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be owned in fee and in use as of the date certain, determined by the commission; and also a statement of the conditions of acquisition, whether by direct purchase, by donation, by exercise of the power of eminent domain, or otherwise;
- (2) The actual acquisition cost, not including periodic rental fees, of rights-of-way, trailways, or other land rights held, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be held as of the date certain, by virtue of easements, leases, or other forms of grants of rights as to usage;
- (3) The original cost of all other kinds and classes of property used and useful, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain, in the rendition of service to the public. Such original costs of property, other than land owned in fee, shall be the cost, as determined to be reasonable by the commission, to the person that first dedicated or dedicates the property to the public use and shall be set forth in property accounts and subaccounts as prescribed by the commission. To the extent that the costs of property comprising a coal research and development facility, as defined in section 1555.01 of the Revised Code, or a coal development project, as defined in section 1551.30 of the Revised Code, have been allowed for recovery as Ohio coal research and development costs under section 4905.304 of the Revised Code, none of those costs shall be included as a cost of property under this division.
- (4) The cost of property constituting all or part of a project leased to or used by the utility, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be leased to or used by the utility as of the date certain, under Chapter 165., 3706., 6121., or 6123. of the Revised Code and not included under division (C)(3) of this section exclusive of any interest directly or indirectly paid by the utility with respect thereto whether or not capitalized;
- (5) In the discretion of the commission, the cost to a utility, in an amount determined to be reasonable by the commission, of property constituting all or part of a project leased to the utility, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be leased to the utility as of the date certain, under a lease purchase agreement or a leaseback and not included under division (C)(3) of this section exclusive of any interest directly or indirectly paid by the utility with respect thereto whether or not capitalized;
- (6) The proper and adequate reserve for depreciation, as determined to be reasonable by the commission;
- (7) Any sums of money or property that the company may have received, or, with respect to a natural gas, water-works, or sewage disposal system company, is projected to receive as of the date certain, as total or partial defrayal of the cost of its property;

(8) The valuation of the property of the company, which shall be the sum of the amounts contained in the report pursuant to divisions (C)(1) to (5) of this section, less the sum of the amounts contained in the report pursuant to divisions (C)(6) and (7) of this section.

The report shall show separately the property used and useful to such public utility or railroad in the furnishing of the service to the public, the property held by such public utility or railroad for other purposes, and the property projected to be used and useful to or held by a natural gas, water-works, or sewage disposal system company as of the date certain, and such other items as the commission considers proper. The commission may require an additional report showing the extent to which the property is used and useful, or, with respect to a natural gas, water-works, or sewage disposal system company, projected to be used and useful as of the date certain. Such reports shall be filed in the office of the commission for the information of the governor and the general assembly.

**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.