

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

Consolidated Duke Energy Ohio, Inc. Rate)	Case Nos. 03-93-EL-ATA
Stabilization Plan Remand and Rider)	03-2079-EL-AAM
Adjustment Cases.)	03-2080-EL-ATA
)	03-2081-EL-AAM
)	05-724-EL-UNC
)	05-725-EL-UNC
)	06-1068-EL-UNC
)	06-1069-EL-UNC
)	06-1085-EL-UNC

**MEMORANDUM CONTRA PEOPLE WORKING COOPERATIVELY'S
MOTION FOR EXTENSION OF TIME TO FILE REPLY BRIEF, PHASE II,
AND MEMORANDUM CONTRA "RENEWAL OF MOTION TO STRIKE"
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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I. INTRODUCTION

The dust having seemingly cleared a bit six months after the Supreme Court of Ohio remand, briefs and reply briefs in the second and final phase of these cases were filed with the Public Utilities Commission of Ohio ("PUCO" or "Commission") without any participation by People Working Cooperatively, Inc. ("PWC"). Briefs and reply briefs were filed by Duke Energy Ohio, Inc. ("Duke Energy Ohio" or the "Company," including its predecessor company, "CG&E") and the PUCO Staff in support of the stipulation entered into by parties and filed on April 9, 2007 ("2007 Stipulation," Joint

Remand Rider Ex. 1¹), and by the Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Partners for Affordable Energy ("OPAE") in opposition to the 2007 Stipulation.

On June 1, 2007, however, PWC filed a motion styled as a "Motion for Extension of Time to File Reply Brief, Phase II" ("Motion") in which it states that it should be permitted to file a reply brief for Phase II of these proceedings without providing a supporting memorandum.² PWC attaches to its Motion a document styled as a Reply Brief, Phase II, and Renewal of Motion to Strike a Portion of the Brief of Ohio Partners for Affordable Energy ("Motion Attachment") in which, among other matters, PWC asks the Commission to strike *portions of the OCC's Initial Brief in Phase II* of these proceedings.³ The OCC herein opposes PWC's Motion as well as its efforts to strike any portion of the OCC's briefs.

As explained in this Memorandum Contra, PWC's Motion violates the Commission's rules. The Motion Attachment makes no use or citation to the evidence in these cases. Instead, the Motion Attachment continues PWC's efforts in its previous Motion to Strike a Portion of the Brief {sic, Brief} of the Ohio Partners for Affordable Energy ("Motion to Strike"⁴) and expands the scope of its efforts to cover portions of the

¹ For notational convenience, the portions of the case before and after the Court's deliberations are cited separately. The proceedings prior to the appeal are referred to, collectively, as the "*Post-MDP Service Case*," and the proceedings after the appeal are referred to, collectively, as the "*Post-MDP Remand Case*," the latter of which was separated in some respects into Phase I and Phase II. However, a single record exists that is applicable to the ultimate decisions. Exhibit references to the portion of the proceedings in Phase I after remand from the Court contain the word "Remand" to distinguish them from other exhibits. Exhibit references to the portion of the proceedings in Phase II after remand from the Court contain the words "Remand Rider."

² Motion at 2.

³ Motion Attachment at 2 and 9.

⁴ PWC Motion to Strike a Portion of the Initial Brief {sic, Brief} of the Ohio Partners for Affordable Energy (April 27, 2007). PWC also filed a Reply to OPAE's Memorandum Contra on May 14, 2007.

OCC's Initial Phase II Brief. PWC cites Ohio Adm. Code 4901-1-12(C), an administrative rule that it believes can be applied to gain acceptance of its efforts without permitting the OCC the opportunity to submit a responsive pleading. PWC's tactics are peculiar in combination with its alleged concern over providing parties a "fair and equal a footing" in these proceedings.⁵

II. ARGUMENT

A. The Motion for Extension of Time is Improper and Should be Denied.

1. PWC failed to abide with the rule regarding extensions.

PWC's Motion violates the Commission's rules. Ohio Adm. Code 4901-1-13(B), never mentioned by PWC, specifically addresses the situation addressed in its Motion:

A motion for an extension of time to file a document must be timely filed so as to permit the commission, legal director, deputy legal director, or attorney examiner sufficient time to consider the request and to make a ruling prior to the established filing date. If two or more parties have similar documents due the same day and a party intends to seek an extension of the filing date, the moving party must file its motion for an extension sufficiently in advance of the existing filing date so that other parties who might be disadvantaged by submitting their filing prior to the movant submitting its filing will not be disadvantaged. If two or more parties have similar documents due the same day and the motion for an extension is filed fewer than five business days before the document is scheduled to be filed, then the moving party, in addition to regular service of the motion for an extension, must provide a brief summary of the request to all other parties orally, by facsimile transmission, or by electronic message by no later than 5:30 p.m. on the day the motion is filed.

PWC violated every provision in the above-quoted rule.

In violation of Ohio Adm. Code 4901-1-13(B), the Motion was not filed "prior to the established filing date," and certainly not "sufficiently in advance of the existing

⁵ Motion Attachment at 9.

filing date so that other parties who might be disadvantaged by submitting their briefs prior to the movant submitting its filing will not be disadvantaged.” The Motion provides no reason that PWC could not have filed for the additional time within the time period provided for the reply briefs. While PWC electronically served the OCC with its Motion, it did not provide the “brief summary” required by the Commission’s rule. PWC’s Motion violates the procedural rule that specifically addresses motions for an extension, and should be denied.

2. PWC failed to abide with the rule it cites.

PWC misapplies the procedural rule that it cites as authority for its Motion. PWC cites Ohio Adm. Code 4901-1-12(C), and states that “[u]nder the rule . . . a party may file a motion . . . without memorandum in support if the extension is for five (5) days or less.”⁶ The rule, read in conjunction with Ohio Adm. Code 4901-1-12(A), requires that “[a]ll [written] . . . motions shall be accompanied by a memorandum in support”⁷ to explain the party’s request and, upon a “specific request for an expedited ruling,”⁸ permits the Commission to rule on an extension to file pleadings for five days or less “without the filing of memoranda” (i.e. memoranda contra and reply memoranda).⁹ PWC has misapplied and violated these rules.

⁶ Motion at 2.

⁷ Ohio Adm. Code 4901-1-12(A).

⁸ Ohio Adm. Code 4901-1-12(C).

⁹ Id.

A memorandum in support of a written motion is required by Ohio Adm. Code 4901-1-12, and PWC did not provide such a memorandum.¹⁰ The purpose for the rule is illustrated by PWC's Motion. PWC does not provide any reason that it could not make its request for an extension during the many weeks between the end of the hearing and the deadline for Phase II reply briefs. PWC does not explain its remark regarding "conflicting schedules," and does not explain whose schedules were involved.¹¹ The summary statement that PWC's "filing should not cause prejudice" is not explained, a matter of considerable importance when a request for an extension is submitted too late to comply with the Commission's rules and cannot result in an extension of time for other parties such as the OCC to file their corresponding briefs. Granting PWC's Motion would provide an undue advantage for PWC with no good cause to support such an irregular procedure. Similarly, PWC's statement that the Motion will not result in delay is questionable since it was submitted after the end of the briefing schedule and is one to which PWC should expect a reaction from the OCC and OPAE. The summary statements contained in PWC's Motion are not explained or corroborated in a memorandum in support that must accompany a written motion.

Ohio Adm. Code 4901-1-12(C) applies to expedited rulings. PWC, however, failed to make a "specific request for an expedited ruling" that is required by the rule. The other result PWC seeks to invoke by means of its Motion is Commission action on its request without a responsive pleading by the OCC or any other party. PWC asks the

¹⁰ PWC claims there is no requirement for such a memorandum. Motion at 2.

¹¹ Motion at 1. The Motion refers to counsel and "PWC," as though "PWC" is a person and not a corporation. The reference is unclear.

Commission to administer a “fair” process,¹² yet it seeks an extension to only its due date for filing a Phase II reply brief and asks the Commission to strike portions of the OCC’s briefs without providing the OCC with an opportunity to respond.¹³ The Motion should be denied based upon PWC’s failure to comply with Ohio Adm. Code 4901-1-12(C) as well as upon the inadequate and unfair procedure proposed by PWC that is, in part, the basis for the Commission’s procedural rules.

III. PWC’S EFFORT TO STRIKE PORTIONS OF THE OCC’S BRIEFS IS IMPROPER AND SHOULD BE REJECTED.

The Motion Attachment’s purpose is much the same as PWC’s earlier Motion to Strike. The connection between the Motion Attachment and the earlier Motion to Strike is explicit: The Motion Attachment incorporates the same arguments contained in the Motion to Strike and PWC’s Reply to OPAE’s Memorandum Contra Motion to Strike and argues once more for the Commission to strike portions of OPAE’s Initial Phase I Brief.¹⁴ The Motion Attachment, however, extends PWC’s stated desire to see pleadings struck by identifying portions of the initial Phase II briefs of both OPAE *and the OCC*.¹⁵ that offend PWC. Finally, PWC asks the PUCO to strike anything in the reply brief submitted by OPAE that the Commission concludes would offend PWC.¹⁶

¹² See, e.g., Motion Attachment at 9.

¹³ Any reply memorandum filed by PWC should be understood to be an admission by PWC that it has not complied with the Commission’s rules. Ohio Adm. Code 4901-1-12(C), cited by PWC in its Motion (Motion at 1), does not permit a reply memorandum.

¹⁴ See, e.g., Motion Attachment at 8. The arguments that address striking portions of OPAE’s Initial Phase I Brief constitutes an additional pleading that is not permitted by Ohio Adm. Code 4901:1-12(B).

¹⁵ Motion Attachment at 2 and 9.

¹⁶ Motion Attachment at 9 (“that OPAE includes in its reply brief”).

In the event that PWC's Motion Attachment is considered to be analogous to a memorandum in support for an additional motion to strike -- an additional motion that is not contained in PWC's June 1, 2007 pleadings -- the OCC responds to the statements contained in the PWC's Motion Attachment.

A primary part of PWC's irritation seems to be correct characterizations of PWC as a party that is quick to work cooperatively with Duke Energy Ohio while displaying no other litigation activity other than agreeing to higher rates for customers -- including residential customers -- and seeking to strike the statements of OP&E and the OCC.¹⁷ PWC states that it is not "fair" to state that PWC is in "dereliction of their duty to their constituent customer class for their participation . . . as signatories to stipulations."¹⁸ The "different path" taken by OCC in its pleadings, recognized by PWC in its Motion Attachment,¹⁹ is the OCC reliance on statements *by PWC's counsel* regarding PWC's narrow interest in these proceedings.

The OCC's Initial Phase II Brief refers to PWC's dependence on funding by Duke Energy Ohio, referring to such dependence as it is discussed in PWC's Motion to Strike.²⁰ The Motion Attachment states that references to PWC "receiv[ing] funding for its weatherization projects from DE-O" is "factual."²¹ As stated in PWC's Motion to

¹⁷ The only pleadings submitted by PWC since the remand from the Supreme Court of Ohio are its Motion to Strike, a Reply to OP&E's Memorandum Contra PWC Motion to Strike, and the pleadings submitted on June 1, 2007 seeking to strike portions of the briefs submitted by OP&E and the OCC.

¹⁸ Motion Attachment at 6.

¹⁹ *Id.* at 7.

²⁰ OCC Initial Phase II Brief at 23.

²¹ Motion Attachment at 3.

Intervene, filed in 2004,²² PWC's interest in these cases lies "in the funding of and its providing weatherization and energy efficiency services."²³ Thus, as reflected in its own pleadings, PWC's interest in these proceedings is narrow. The Commission should consider the narrowness of PWC's interest and that of other parties, and determine that the stipulation submitted in Phase II of these proceedings -- a settlement of issues related to technical elements of the FPP, the AAC, and the SRT -- is not in the public interest.²⁴ In contrast to PWC's narrow interests, all residential customers of Duke Energy Ohio (including low income customers) are the OCC's "constituent customer class." This interest has been consistently articulated by the OCC from the beginning of these cases and not simply in post-hearing pleadings.²⁵ The OCC's authority to represent *all* residential customers is also statutory.²⁶

PWC claims that it seeks to prevent "a chilling effect on intervenor participation" in its efforts to strike portions of briefs.²⁷ PWC apparently gives no consideration to the

²² PWC Motion to Intervene (March 9, 2004). No other PWC motion to intervene exists. PWC states that it was merely delayed in stating an interest in Phase II of these proceedings that addressed the levels of various riders and trackers. Motion Attachment at 7. The hearings for the riders and trackers were originally set for late 2006. See, e.g., *In re Duke Energy Ohio's AAC Charge*, Case No. 06-1085-EL-UNC, Entry at 3 (November 29, 2006) (hearing for December 5, 2006 delayed). PWC did not intervene in any of those cases.

²³ PWC Motion to Intervene at 2 (March 9, 2004). PWC states that "[p]arties intervene because they want something from the Commission process and usually that outcome involves money." Motion Attachment at 6. The OCC's briefs contrast the narrow interests satisfied by Duke-affiliated companies' payments to some parties to these cases with the broad, public interest that is served by properly determining standard service offer rates that lie at the core of these proceedings. See, e.g., OCC Initial Phase II Brief at 23 (May 17, 2007). Indeed, from PWC's statement of interest in its Motion to Intervene, no purpose is served by PWC's involvement in Phase II of these proceedings except to solidify its service to its benefactor, Duke Energy Ohio.

²⁴ OCC Initial Phase II Brief at 31.

²⁵ See, e.g., OCC Motion to Intervene at 1 and 8 (February 4, 2003).

²⁶ R.C. Chapter 4911.

²⁷ Motion Attachment at 2.

negative effect on the quality of representation that would result if PWC's efforts to strike statements in briefs were successful. In its June 1, 2007 pleadings, PWC argues at some length regarding OPAE's briefs, and then simply states that portions of the OCC's briefs should be stricken for the purpose of "consistency."²⁸ PWC's final policy statement regarding "fair" pleadings is that the Commission, without any further motion on the part of PWC and without any identification and justification of objectionable content on the part of PWC, should identify the portions of a reply brief that should be stricken.²⁹ It is PWC's proposed actions that, if adopted, would threaten a "chilling effect on intervenor participation."³⁰ PWC's Motion should be denied and its Motion Attachment should be ignored.

IV. CONCLUSION

PWC's Motion violates the Commission's rule regarding requests for an extension of time to make a filing. The Ohio Administrative Code section cited in PWC's Motion is misapplied. PWC's effort to submit its recent pleading without providing the OCC an opportunity to respond is especially inappropriate in light of PWC's failure to follow the Commission's rules of practice. The Motion should be denied, and the Motion Attachment should be ignored.

PWC's "Reply Brief" makes no substantive contribution to Phase II of these proceedings, but is largely devoted to a renewed effort to strike comments that it finds were critical of PWC. PWC's original effort was directed at OPAE's initial brief in

²⁸ Id. at 2 and 9.

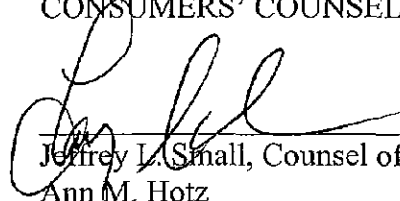
²⁹ Id. at 9 (final bullet point).

³⁰ Id. at 2.

Phase I of these proceedings. The most recent effort renews PWC's effort to strike OPAC's arguments and expands that effort to include the OCC's criticisms of PWC's actions in these cases. The Commission should reject PWC's suggestion that portions of briefs should be struck simply because PWC has been criticized for not taking into account that the 2007 Stipulation does not, as a package, provide benefits to residential customers. Residential customers, including low-income residential customers, will be burdened with the rate increases that are provided for in the 2007 Stipulation.

Respectfully submitted,

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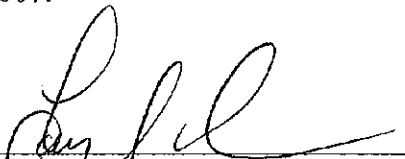
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Memorandum Contra PWC's Motion for Extension of Time to File Reply Brief* has been served upon the below-named persons via electronic transmittal and by regular U.S. Mail service, postage prepaid, this 6th day of June 2007.


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