

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Power Company for Authority to Case) Case No. 13-2385-EL-SSO
Establish a Standard Service Offer)
Pursuant to §4928.143, Revised Code,)
in the Form of an Electric Security Plan.)

In the Matter of the Application of Ohio) Case No. 13-2386-EL-AAM
Power Company for Approval of Case)
Certain Accounting Authority.)

**REPLY TO RESA’S MEMORANDUM CONTRA MOTION TO STRIKE
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers’ Counsel (“OCC”) moved ¹ to strike the Retail Energy Supply Association’s (“RESA”) “Response to the Application for Rehearing of Ohio Power Company.” On July 21, 2015 RESA filed a Memorandum Contra OCC’s motion to strike.

RESA argues in its Memorandum Contra that in its “Response” to Ohio Power’s application it asked to “significantly change AEP Ohio’s request.”² Thus, it implies that its Response is really a “memorandum contra” and “should be considered as opposition to AEP Ohio’s Application for Rehearing.”³ Alternatively, RESA alleges that it is not prohibited from filing a pleading in support of an application for rehearing, and cites a 2007 Attorney Examiner Entry as support for its argument.⁴

¹ OCC’s Motion was filed on July 20, 2015.

² RESA Memorandum Contra at 3 (July 21, 2015).

³ Id.

⁴ Id. at footnote 2.

RESA's arguments, however, are misguided and lack support. The PUCO should strike RESA's "Response" as OCC requested.

In its Memorandum Contra OCC's motion, RESA claims for the first time that its "Response" did not endorse AEP Ohio's third assignment of error. But a review of the "Response" reads otherwise. RESA "join[ed] with AEP Ohio asking that there be greater flexibility to develop a POR [purchase of receivables] proposal."⁵ It claimed that "AEP Ohio's request is reasonable and the clarification it seeks could actually save time and effort."⁶ It "support[ed] AEP Ohio's request for greater leeway for the MDWG [Market Development Working Group] to develop the POR program details."⁷

Nowhere in the "Response" did RESA state that it wanted to significantly change AEP Ohio's request. Nor did RESA state that it was opposed to AEP's Application for Rehearing. Such revisionist tactics should be seen for what they are –an attempt at circumventing the PUCO rules that do not allow for a memorandum in support filed without the PUCO's permission.

RESA relies on a 2007 Attorney Examiner Ruling as support for not following the PUCO's rules. It claims that a single Attorney Examiner ruling⁸ refusing to strike a memo in support of a pleading (which was not an application for rehearing) means that a filing that supports an application for rehearing is not prohibited under Ohio Adm. Code 4901-1-35.

⁵ RESA Response at 3.

⁶ Id. at 2.

⁷ Id. at 3.

⁸ In Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases, Case No. 03-93-EL-ATA, Entry (Jan. 2, 2007).

The PUCO should not rely on the 2007 Attorney Examiner ruling for two reasons. First, the Attorney Examiner ruling did not address the specific type of pleading filed in this case—a memorandum contra to an application for rehearing. Rather the 2007 Attorney Examiner ruling was directed at a motion to quash subpoenas and motion for protective order, not an application for rehearing.

And second the Commission (not an Attorney Examiner) has ruled on this precise issue, but come to a contrary conclusion. The PUCO ruled that under the rules which govern applications for rehearing (Ohio Adm. Code 4901-1-35), a memorandum in support is not permitted.¹ *In the Matter of the Establishment of Carrier-to Carrier Rules*, Case No. 06-1344-TP-ORD, Entry on Rehearing at ¶6 (Oct. 17, 2007). In that ruling, the PUCO appropriately struck portions of parties’ “memorandum contra” that were in actuality “memorandum in support.”⁹ It concluded that if a party believes that it is necessary to inform the Commission of its support for another party’s rehearing position, it should file a motion for leave to file a memorandum in support.¹⁰

But here RESA inexplicably failed to seek leave to file its “Response” in support of AEP Ohio’s application for rehearing. And neither did RESA address the prejudice to OCC that comes as a result of RESA not following the PUCO’s rules.

The PUCO should strike RESA’s “Response.” Doing so will encourage parties, including RESA, to follow the PUCO’s rules.

⁹ Id.

¹⁰ Id.

Respectfully submitted,

BRUCE J. WESTON
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MEMORANDUM IN SUPPORT

On June 29, 2015, OCC, Ohio Manufacturers' Association, and Ohio Power Company ("AEP Ohio") filed applications for rehearing on the Public Utilities Commission of Ohio Second Entry on Rehearing, issued May 28, 2015. Notably, the Retail Energy Supply Association ("RESA") chose not to seek rehearing.

Yet, on July 9, 2015, RESA filed a pleading entitled "Memorandum in Response" to Ohio Power's Rehearing. In its Memorandum in Response, RESA states that "AEP Ohio's request is reasonable" (as to AEP Ohio's third assignment of error).¹¹ RESA also states that it is joining AEP in seeking the relief it requested in its Application for Rehearing (greater flexibility to develop a purchase of receivables program in the working group).¹² In other words RESA, through its responsive pleading, was supporting the Application for Rehearing. Indeed, RESA's support (its "joining") of AEP Ohio's application for rehearing can be construed as an application for rehearing by RESA

¹¹ RESA Memorandum in Response at 2 (July 9, 2015).

¹² Id.

because it seeks the same remedy that AEP Ohio sought in its application. Additionally, RESA did not seek PUCO permission to file its pleading.

There are two problems with RESA's filing. First, RESA's filing is nothing less than an untimely application for rehearing. Second, there is no PUCO rule that permits the filing of a "Memorandum in Response," or pleadings that support other parties' pleadings. Additionally, RESA failed to seek leave of the PUCO for filing its pleading—something it must do if it seeks to inform the PUCO of its support for another party's rehearing position.

Under R.C. 4903.10 applications for rehearing must be filed within thirty days of when the PUCO issues an Order.¹³ Applications for rehearing on the PUCO's May 28, 2015 Order were due on or before June 29, 2015. RESA's pleading was filed on July 9, 2015, ten days after applications for rehearing were due. As discussed above, a review of RESA's pleading and its recommendations make it clear that it is seeking rehearing, like AEP Ohio. Thus, the PUCO has no jurisdiction to consider RESA's "Memorandum in Support" because RESA failed to comply with the statutory deadline. See *Greer v. Pub. Util. Comm.* (1961), 172 Ohio St. 361, 176 N.E.2d 416.

Second, there is no provision in the Ohio Administrative Code that permits a filing of a "Memorandum in Response" to an Application for Rehearing. Rather Ohio Adm. Code 4901-1-35(B) provides for a "Memorandum Contra" to be filed after the filing of an Application for Rehearing. This provision of the Code, like other provisions, does not present an opportunity to file a responsive pleading that supports another party's

¹³ R.C. 4903.10.

filing.¹⁴ RESA however, ignored the PUCO rules, and filed a pleading that is not permitted by rule.¹⁵

It is consistent with PUCO precedent to strike the Memorandum in Response and not consider it. The PUCO has ruled that Rule 4901-1-35, Ohio Adm. Code is limited in scope to the filing of memorandum contra applications for rehearing.¹⁶ The PUCO has specifically ruled that memorandum in support of another parties' application for rehearing is not permitted under PUCO rules.¹⁷ In that ruling, the PUCO appropriately struck portions of parties' "memorandum contra" that were in actuality "memorandum in support."¹⁸ It concluded that if a party believes that it is necessary to inform the Commission of its support for another party's rehearing position, it should file a motion for leave to file a memorandum in support.¹⁹ RESA failed to do so here.

Moreover, permitting RESA to add new arguments at this late stage in the process would be unfair because OCC has no opportunity to respond to such arguments. This is prejudicial to OCC. Had RESA followed the rules and filed a timely application for rehearing, OCC would have had the opportunity to respond to its arguments in a

¹⁴ See, e.g., *In the Matter of the Complaint of Westside Cellular Inc. v. GTE Mobilnet*, Case No. 93-1758-RC-CSS, Entry at ¶10 (Mar. 23, 1995), holding that there are no allowances for pleadings which support another parties' interlocutory appeal (refusing to consider a parties' response in support of interlocutory appeal).

¹⁵ See, e.g., *In the Matter of the Application of Numerous Subscribers of Lake Milton Exchange of United Telephone Company of Ohio*, Case No. 83-1624-TP-PEX, 1987 Ohio PUC LEXIS 1563, Opinion and Order at 8 (Apr. 28, 1997) (striking a responsive pleading that was not specifically authorized by PUCO rule); *In the Matter of the Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire*, Case No. 86-927-TP-COI, Entry on Rehearing at ¶4 (May 24, 1990) (striking a reply to a Memoranda Contra Application for Rehearing).

¹⁶ *In the Matter of the Establishment of Carrier-to Carrier Rules*, Case No. 06-1344-TP-ORD, Entry on Rehearing at ¶6 (Oct. 17, 2007).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Memorandum Contra. But here, with its arguments presented for the first time in a Memorandum in Response, OCC is denied the ability to respond.

For these reasons, OCC urges the PUCO to strike from the record RESA's July 9, 2015 pleading.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply** by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 28th day of July, 2015.

/s/ Maureen R. Grady

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Summary: Reply Reply to RESA's Memorandum Contra Motion to Strike by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.