

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc., for the Establishment of a)
Charge Pursuant to Revised Code Section) Case No. 12-2400-EL-UNC
4909.18.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Approval to Change) Case No. 12-2401-EL-AAM
Accounting Methods.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for the Approval of a) Case No. 12-2402-EL-ATA
Tariff for a New Service.)

DUKE ENERGY OHIO'S MEMORANDUM CONTRA MOTION TO STRIKE

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) initiated these proceedings when it filed an application on August 29, 2012, seeking to establish a cost-based state compensation mechanism for the provision of capacity service, deferral authority, and approval for a rider through which deferred amounts would be subsequently recovered (Application).

On September 13, 2012, the attorney examiner issued an entry establishing a deadline for motions to intervene. Thereafter, on October 3, 2012, the attorney examiner issued an additional procedural schedule that included, *inter alia*, a hearing to be held on April 2, 2013. On October 9, 2012, Duke Energy Ohio submitted a motion to vacate the scheduling order (Motion to Vacate), as well as an Interlocutory Appeal (Appeal). On October 16, 2012, a group of intervening parties (Intervenors)¹ filed a Joint Memorandum Contra Duke Energy Ohio's Motion

¹ The Intervenors are: The Office of the Ohio Consumers' Counsel; Ohio Energy Group, Ohio Manufacturers' Association; City of Cincinnati; Ohio Partners for Affordable Energy; Greater Cincinnati Health Council; The Kroger Company; Industrial Energy Users-Ohio; Wal-Mart Stores East, LP, and Sam's East, Inc.; and Cincinnati Bell, Inc.

(Joint Memo Contra). On October 22, 2012, Duke Energy Ohio filed a reply to the Joint Memo Contra (Reply). The following day, Duke Energy Ohio became aware that the Motion erroneously included one sentence referencing expedited treatment and asked the Commission to disregard that reference.

Now, through the filing of a Joint Motion to Strike (Motion to Strike), the Signatory Parties seek to strike Duke Energy Ohio's reply, arguing that no reply is allowed where the movant has sought expedited treatment. Although this argument is superficially correct, on closer inspection, it is not supportable in this instance.

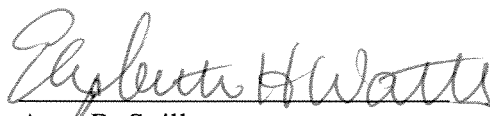
Duke Energy Ohio does not dispute that the Commission's procedural rules, at O.A.C. 4901-1-12(C), do not provide for the filing of a reply in response to a memorandum opposing a motion seeking expedited treatment. The Intervenors apparently ask, through the Motion to Strike, that the Commission uphold the procedural rules with precision. They suggest that they relied, to their alleged disadvantage, on the lone sentence mentioning expedited treatment and that, therefore, the Reply must be stricken.

At first reading, this seems like a reasonable request. But further analysis demonstrates that the only way that the Intervenors can make their argument is by ignoring those very same procedural rules on which they claim to rely with precision. In addition to prohibiting the filing of a reply unless told to do so, O.A.C. 4901-1-12(C) also imposes a specific requirement on the movant that is seeking expedited treatment to explain the basis for such request: "The grounds for such a request **shall** be set forth in the memorandum in support." Duke Energy Ohio did not comply with that requirement. The sole mention of expedited treatment was a single sentence in the Motion to Vacate itself. A request for expedited treatment was not mentioned in the caption of the pleading. No grounds for expedited treatment were proposed or argued in the

memorandum in support of the motion. The possibility of expedited treatment was not mentioned in the conclusory paragraph of the memorandum in support. In this instance, Duke Energy Ohio did not intend to request, nor for its Motion to Vacate to receive, expedited treatment. Thus, the Intervenors knew – from the face of the document – that the one-sentence mention of expedited treatment should be denied under the terms of the applicable rule. If the Intervenors relied upon that sentence and now feel that they were thereby prejudiced, the reliance was of their own making. The Intervenors simply cannot have it both ways; they cannot argue that the rule prohibiting replies should be firmly upheld on the ground that they themselves entirely ignored the terms of that very same rule.

This is a situation in which Duke Energy Ohio, through a simple editing error, allowed a single reference to expedited treatment to remain in its Motion to Vacate. The Intervenors did not contact Duke Energy Ohio to ask whether expedited treatment was being requested. And as noted above, Duke Energy Ohio docketed clarifying correspondence in which it identified the editing error and confirmed that the Company was not seeking expedited treatment of its Motion to Vacate. But the Intervenors have now chosen to ignore this clarification and all of the requirements for seeking expedited treatment and instead needlessly complicate the docket with a misplaced Motion to Strike. Duke Energy Ohio respectfully requests that the Commission issue an order denying the Intervenors' Motion to Strike, thereby allowing Duke Energy Ohio's Reply to be considered.

Respectfully submitted,

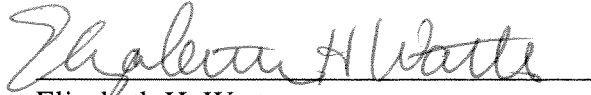
A handwritten signature in cursive script that reads "Elizabeth H. Watts". The signature is written in black ink and is positioned above the typed name.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 13th day of November, 2012, to the following parties.


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