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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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

People Working Cooperatively, Inc. ("PWC") files this reply to the *Memorandum Contra People Working Cooperatively's Motion for Extension of Time to File Reply Brief, Phase II¹, and Memorandum Contra "Renewal of Motion to Strike" by The Office of Consumers' Counsel*, filed by the Office of Consumers' Counsel ("OCC") on June 6, 2007 (referred to herein as "OCC Memo Contra") in the above-named proceedings. PWC responds in the order in which OCC makes its arguments.

- OCC has failed to support its argument that PWC has not followed Commission rules in filing its motion for an extension of time; therefore, the Commission should reject its argument and grant PWC's motion for an extension of time.**

OCC contends that PWC failed to abide by the rule regarding motions for extensions, citing to Ohio Administrative Code Rule 4901-1-13 (B) ("Rule 13(B)"). That rule does not apply in this situation. That rule applies when the party who is requesting the extension "intends," before the scheduled filing date, to file a request for extension before

¹The PWC Reply Brief, Phase II, to which OCC refers is *Reply Brief, Phase II, of People Working Cooperatively, Inc. and Renewal of Motion to Strike a Portion of the Brief of the Ohio Partners for Affordable Energy by People Working Cooperatively, Inc.*, filed in these proceedings on June 1, 2007, two days after the filing date set by the presiding Attorney Examiner and accompanied by a *Motion for Extension of Time to File Reply Brief, Phase II, of People Working Cooperatively, Inc.*, which PWC filed under Ohio Administrative Code Rule 4901-1-12 (C).

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the filing date. As can be seen on the attached affidavit of Jock J. Pitts, President of PWC, at no time did PWC intend to file its Reply Brief, Phase II, later than the date on which the attorney examiner presiding over these proceedings set the date for reply briefs for Phase II. At the time that PWC decided to ask for an extension of time, it was too late for PWC to comply with this rule because it planned up until the last minute before the filing deadline to file its brief as scheduled.²

So PWC has filed its motion and reply brief, two days *after* the filing date under Ohio Administrative Code (“OAC”) Rule 4901-1-12 (C) (“Rule 12(C)”), which allows for a party to file a motion under this section without a memorandum contra if the pleading is being filed within five days or less of the scheduled filing date. The necessity of filing its motion for an extension time *after* the scheduled filing date appears to fit PWC’s situation.³ PWC requests that the Commission find that PWC has substantially complied with this Rule 12(C).

Under the newly effective language in this Rule, a party *may*, but does not have to, inquire of all parties whether they object to the expedited ruling. If the movant does not inquire about other parties’ objection to the motion for an extension of time, then parties have the full opportunity to respond, which both OCC and OP&E have done. While OCC claims that PWC asks for “Commission action on its request without a responsive pleading from OCC or any other party,” there are no words to that effect *anywhere* in PWC’s motion and PWC did nothing in its motion to prevent OCC or anybody else from responding.

Nevertheless, OCC states:

² OCC complains that it received no “brief summary” of the motion for an extension of time required under OAC Rule 4901-1-13(B). But since PWC did not make its motion before the reply brief filing date, that rule—and, therefore, that obligation—is inapplicable.

³ OCC’s recasting the PWC Reply Brief, Phase II, filed with its motion for an extension of time, as a “Memorandum Attachment” appears to be driven by OCC’s interpretation of Rule 12(C) that the rule does not allow for the filing of the motion and the reply brief at the same time, an interpretation that is not necessarily definitive, when the filing of the reply brief with the motion is not prohibited by the rule and appears to be permissible under these circumstances.

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.

OCC Memo Contra, at 5. OCC does not say what the "undue advantage for PWC" is, or how granting PWC's motion will disadvantage OCC, except to say that it would have liked an extension of time to file, too. *Id.* But, as previously stated, PWC did not know that it would need an extension of time to file before the filing date. And PWC filed as soon as it could after the filing date, just *two days* after the reply briefs were due. And since the parties now await Commission order with no pleadings, hearings, discovery or other process called for before the order issues, it would seem that a claim of being disadvantaged is not compelling, especially since OCC has been given—and taken—the opportunity to respond. PWC does not understand and therefore cannot comment on OCC's statement about delay in the sentence beginning "[s]imilarly, PWC's statement that the Motion will not result in delay..." in the above quotation from the OCC Memo Contra. Finally, a review of the PWC Reply Brief, Phase II itself shows that PWC did not take any opportunity to review others' reply briefs in order to supplement its own ending arguments.

- PWC has amply demonstrated that OPAE and OCC in their pleadings have taken a single fact of funding from DE-O, funding that OPAE itself has sought for itself and its Community Action Agency clients, and used that fact to reach conclusions that are not supported by the record, are harmful to PWC, and are untrue.**

OCC argues that the only claim that it made about PWC in its initial brief, Phase II, is that PWC's factual representations in these proceedings lead to only one conclusion, namely, that PWC's issue in these proceedings is a narrow one and therefore not of sufficient weight for the Commission to consider PWC as a stipulation signatory on behalf of the residential consumers in the service territory of Duke Energy-Ohio

("DE-O"). But OCC in its initial brief, Phase II⁴ and certainly OPAE in its Phase I and II pleadings did not stop there. PWC has already responded several times to OPAE's continuing unsubstantiated claims and innuendo about PWC and to OCC's claims about PWC in its initial brief, Phase II and will not repeat its argument here, referring the Commission to PWC's pleadings in response to OPAE in Phase I and II and in to OCC in PWC's Reply Brief, Phase II.

OCC also claims in the OCC Memo Contra that PWC has, in its Reply Brief, Phase II, made no substantive contribution to Phase II of these proceedings, but makes only its continuing objection to the claims by OPAE and OCC about PWC.⁵ But *it was* OCC and OPAE who raised the *bona fides* of PWC in their initial briefs, Phase II. That's why it's an issue and why PWC felt compelled to respond. PWC is responding to the language in OCC's initial brief, Phase II.⁶ So if PWC's reply in the PWC Reply Brief, Phase II, to OCC and OPAE provides "no substantive contribution" to Phase II, then OCC's and OPAE's comments that compelled PWC's reply provide "no substantive contribution" to Phase II and the Commission should totally disregard all language in OCC's and OPAE's initial briefs, Phase II, in which they state their unfair conclusions about PWC and their recommendations about the weight the Commission should give to PWC'S having signed the Phase II stipulation.⁷ And therefore, the Commission's granting PWC's motion to strike the offensive language in OCC's brief as detailed in PWC'S Reply Brief, Phase II,⁸ will be of no adverse consequence for OCC, since,

⁴ *Initial Post-remand Brief, Hearing Phase II, by The Office of the Consumers' Counsel*, filed May 17, 2007 (both confidential and public) in these proceedings (referred to herein as "OCC initial brief, Phase II").

⁵ See OCC Memo Contra, at 10.

⁶ OCC initial brief, Phase II, at 23.

⁷ OCC's contention that PWC's Reply Brief, Phase II, which OCC calls "Motion Attachment," should be ignored should itself be ignored. There is nothing in Commission rule or practice that provides for the Commission's ignoring a brief in proceedings such as these just because some party believes that the position argued in such brief is without merit. See OCC Memo Contra, at 9.

⁸ See PWC's Reply Brief, Phase II, at 9.

according to OCC in the OCC Memo Contra, the topic is of “no substantive contribution” to the resolution of the Phase II issues.

If a valid and worthy issue in this Phase II is whether a stipulation to be adopted by the Commission meets the standards set out by the Ohio Supreme Court for stipulations, then PWC’s Reply Brief, Phase II, and its prior pleadings in response to attacks by OPAE in Phase I and Phase II of these proceedings are as substantive as anything any party has to say about the AAC or SRT. While there has been much discussion in the pleadings filed in Phase I and II of these proceedings about the Ohio Supreme Court standard for Commission review and adoption of stipulations,⁹ that decision does not sanction a party’s use of unsupported assumptions, conclusions and innuendo in its argument about the weight to be given a party-signatory’s support for a stipulation (or for that matter, its dissent). Among the claims made against PWC in these proceedings, the most offensive to PWC include OPAE’s argument leading to the unavoidable conclusion that PWC would sign any stipulation that DE-O would put in front of it regardless of the consequences of that stipulation’s adoption for PWC’s residential consumer clients. And OCC offends the truth when it states, and repeats in the OCC Memo Contra, PWC’s alleged “dependence”¹⁰ on DE-O for funding, the whole of its language leaving the strong impression that PWC’s “dependence” necessarily leads to PWC’s unquestioning support for stipulations supported by DE-O in these cases—and the OCC-proposed consequence of this alleged “dependence,” the Commission’s giving no weight to PWC’s having signed the stipulation.

It’s not surprising that OCC and OPAE want these unsubstantiated assumptions and conclusions to be true—or at least believed by the Commission. In an effort to support their position that the stipulations in these proceedings should not be given any weight by the Commission in reaching its decision in these proceeding and that their

⁹ *Consumers’ Counsel v. Public Utilities Comm’n* (1992), 64 Ohio St. 3d 123.

¹⁰ OCC initial brief, Phase II, at 23 and OCC Memo Contra, at 7-9.

adoption was (regarding the May 20, 2004 stipulation) and would be (regarding the stipulations reached in the remanded proceedings) unlawful, OCC and OP&A want to be able to argue that there is no legitimate residential consumer class support for the stipulations. But to make their point, OCC and OP&A have gone to great lengths to fabricate a set of assumptions and conclusions that are not supported by the record and are untrue. A careful perusal of OP&A's and OCC's unfounded claims against PWC provide no citation to the record anywhere.

When parties believe that they have to do what OCC and OP&A have done regarding PWC in these proceedings, it must mean that they cannot argue to their desired outcomes in these proceedings based on the record before the Commission and without going beyond the record, beyond the truth. If OCC and OP&A have to resort to the fabrications and innuendo they use to support their arguments about the weight to be given PWC's having signed the stipulations in these proceedings, then their position, based on the record in these proceedings, must be unsupportable.

Again, PWC will not repeat its responses to OCC's arguments made in its initial brief, Phase II and to which PWC responded in its Reply Brief, Phase II, which PWC urges the Commission to accept and consider.

3. Conclusion

PWC urges the Commission, therefore, regarding these Phase II proceedings:

1. to grant PWC's motion for an extension of time to file its Reply Brief, Phase II and to give full consideration to the issues that it raises in the PWC Reply Brief, Phase II;
2. to find that the OCC's assumptions, conclusions and innuendo that are nowhere supported in the record of these proceedings are unacceptable and harmful and to grant PWC's request that all such unsubstantiated assumptions, conclusions

and innuendo be stricken¹¹ from OPAE'S and OCC's pleadings in Phase I and II of these proceedings;

3. to find as valid and conforming to the law and to adopt the stipulation that has been signed by PWC and others, including the Commission Staff, and presented to the Commission for its consideration and adoption in this Phase II as a just and reasonable resolution, supported by record evidence, of the many and complex issues of this Phase II.

Respectfully submitted on behalf of
PEOPLE WORKING COOPERATIVELY, INC.



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¹¹ As set forth in PWC's Reply Brief, Phase II, at 8-9.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply, of People Working Cooperatively, Inc. to the OCC Memo Contra has been served on the following parties of record in this proceeding by e-mail this 11th day of June, 2007.


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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE CONSOLIDATED)
DUKE ENERGY OHIO, INC. RATE) Case Nos. 03-93-EL-ATA *et al.*
STABILIZATION PLAN REMAND AND)
RIDER ADJUSTMENT CASES)

AFFIDAVIT OF JOCK J. PITTS

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

I, JOCK J. PITTS, being first duly cautioned and sworn, hereby state as follows:


1. I am the President of People Working Cooperatively, Inc. ("PWC"), a Cincinnati-based, Ohio non-profit corporation whose mission is to provide critical home repairs, including weatherization services, for the very low-income elderly and disabled homeowners residing in the Duke Energy-Ohio ("DE-O") service territory. PWC has been an intervenor in the earlier phase of this proceeding before the appeal resulting in a remand of the initial RSP case to the Public Utilities Commission of Ohio ("Commission") for this second phase. I give direction to our counsel for matters in which PWC intervenes at the Commission. I make this statement in support of PWC's *Reply of People Working Cooperatively, Inc. to Office of Consumers' Counsel Memorandum Contra*, to be filed with the Commission on June 11, 2007 in the above-named proceedings, Phase II.

2. Because of statements made by the Office of Consumers' Counsel ("OCC") and the Ohio Partners for Affordable Energy ("OPAE") in their initial briefs, filed in Phase II of these proceedings, PWC determined that it would file a reply to those statements and planned on submitting its reply brief, Phase II on May 30, 2007, the date on which the attorney examiner presiding over Phase II set as the date by which reply briefs were to be filed. PWC worked with

its counsel to prepare that reply beginning shortly after the filing of the initial briefs, Phase II and PWC's counsel's retrieval, and counsel's and, in some instances, my review of the briefs. PWC's counsel traveled out of state during the interim between the initial and reply briefs. Nonetheless, counsel completed the brief for what was expected to be final review and approval by me. On the date that the reply brief was due, I was traveling out of state but had a copy of the brief for my review, which would not be possible until late in the day. Upon that review, I determined that the brief required revision that could not be completed in time for filing timely.

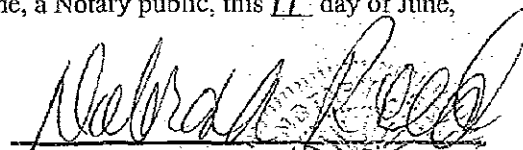
3. PWC's decision to revise the brief, which caused its late filing, was prompted by PWC's hope that a less candid expression of its offense and outrage about the issues and accusations with which it has had to grapple in these proceedings, which are described in detail in its pleadings, would make all possibility of future collaboration with OCC, with whom it shares the important mission of providing services to residential consumers of energy services in DE-O's service territory, impossible. So I decided at the 11th hour on the night of filing date to have the brief revised. These have been difficult cases for PWC because it cannot comprehend how parties, whose synergistic approaches to serving the same client base that could be so powerful, have become opponents in these proceedings.

Further Affiant sayeth naught.


Jock J. Pitts, President

SWORN TO AND SUBSCRIBED before me, a Notary public, this 11th day of June, 2007.

(SEAL)


Notary Public

DEBORAH REED
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 09-23-11