

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV

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PUCO

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company To )  
Modify its Non-Residential Generation ) Case No. 03-93-EL-ATA  
Rates to Provide for Market-Based )  
Standard Service Offer Pricing and to )  
Establish a Pilot Alternative )  
Competitively-Bid Service Rate Option )  
Subsequent to Market Development Period. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting ) Case No. 03-2079-EL-AAM  
Procedures for Certain Costs Associated )  
with The Midwest Independent )  
Transmission System Operator. )

In the Matter of the Application of The )  
Cincinnati Gas & Electric Company for )  
Authority to Modify Current Accounting ) Case No. 03-2081-EL-AAM  
Procedures for Capital Investment in its ) Case No. 03-2080-EL-ATA  
Electric Transmission and Distribution )  
System And to Establish a Capital )  
Investment Reliability Rider to be Effective )  
After the Market Development Period. )

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REPLY TO DUKE ENERGY'S MEMORANDUM CONTRA  
MOTION TO STRIKE

BY

THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION AND STATEMENT OF FACTS

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the residential consumers of Duke Energy Ohio, Inc. ("Company" or "Duke Energy," including its predecessor, The Cincinnati Gas and Electric Company), moved on February 15, 2008 to stay the implementation of the October 24, 2007 Order on Remand regarding the

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Infrastructure Maintenance Fund charge that was approved by the Public Utilities Commission of Ohio ("PUCO" or "Commission"). The stay was requested pending final resolution of matters addressed in the above-captioned cases by the Supreme Court of Ohio.

On February 29, 2008, Duke Energy submitted its Memorandum Contra Motion to Stay ("Memo Contra Motion to Stay").

On March 3, 2008, the OCC submitted a Motion to Strike Duke Energy's Memo Contra, stating that Duke Energy's Memo Contra Stay was filed seven days out of time.<sup>1</sup> The OCC also replied to the Memo Contra Motion to Stay in the same pleading.

On March 5, 2007, Duke Energy submitted a Memorandum Contra to the OCC's Motion to Strike ("Memo Contra Motion to Strike"). The instant pleading replies to the Memo Contra Motion to Strike.

## **II. ARGUMENT**

### **A. Duke Energy May Not Choose Which PUCO Entries It Will Respect.**

The Memo Contra Motion to Strike argues that the Commission's timing requirements for pleadings in these cases no longer serve a purpose.<sup>2</sup> The argument reveals Duke Energy's confusion regarding the role of the Commission and that of parties to cases.

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<sup>1</sup> OCC Motion to Strike at 1 (March 3, 2008).

<sup>2</sup> Memo Contra Motion to Strike at 3 (March 5, 2008).

The Commission's procedural rules provide that usual timing requirements for pleadings may be altered by authorized representatives of the Commission.<sup>3</sup> Expedited pleading requirements in these cases were set in 2004, and were reaffirmed by Entry dated February 1, 2007.<sup>4</sup> Duke Energy has never moved to alter the expedited procedures. The expedited requirements for pleadings were *reaffirmed by Entry as recently as January 29, 2008 in the post-decision period*.<sup>5</sup> Duke Energy apparently believes that it (i.e. a party to these cases) may unilaterally decide whether to follow the Attorney Examiners' procedural rulings.

The Commission should reject the Company's view of its role in these proceedings and strike the Memo Contra Motion to Stay.

**B. Duke Energy's Delay Was Prejudicial.**

The Memo Contra Motion to Strike also argues that the OCC did not state that any prejudice resulted from the late submission of the Company's Memo Contra Motion to Stay.<sup>6</sup> Duke Energy is incorrect.<sup>7</sup>

The Motion to Strike states that the OCC was unfairly handicapped by a situation wherein Duke Energy formulated a pleading during the course of two weeks and the OCC had to respond in a single business day after Duke Energy served its pleading late

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<sup>3</sup> Ohio Adm. Code 4901-1-14 ("the attorney examiner . . . may rule . . . upon any . . . procedural matter").

<sup>4</sup> OCC Motion to Strike at 2 (March 3, 2008).

<sup>5</sup> OCC Motion to Strike at 2 (March 3, 2008), citing Entry at 2, ¶(8) (January 29, 2008).

<sup>6</sup> Memo Contra Motion to Strike at 3 (March 5, 2008).

<sup>7</sup> The Company's mode of argument parallels that offered in the Memo Contra Motion for Stay wherein Duke Energy wrongly stated that the OCC did not make certain arguments, despite the fact that the arguments were readily identifiable by any reader of the OCC's pleading. OCC Motion to Strike at 3-4 (March 3, 2008).

on a Friday.<sup>8</sup> As stated above, Duke Energy is not entitled to such an advantage under the Commission's rules or the Attorney Examiners' procedural rulings.

Duke Energy has not presented any circumstances that might justify the result that it seeks. The Memo Contra Motion to Stay should be stricken.

**C. Duke Energy's Case Analogies Fall Far From the Mark.**

Duke Energy argues that the Commission has accepted late pleadings in other cases.<sup>9</sup> Duke Energy did not submit a request for an extension of time pursuant to Ohio Adm. Code 4901-1-13(A).<sup>10</sup> That rule, had it been invoked in a timely manner (and no attempt was made), requires that a request for an extension state "good cause." Duke Energy *does not offer any extenuating circumstances* that might justify the filing of the Company's Memo Contra Motion to Stay a week late.<sup>11</sup>

In the case involving Columbia Gas cited by Duke Energy,<sup>12</sup> one of three parties filed a memorandum contra later than the four business days permitted. The Entry "caution[ed] all parties to comply with scheduling orders in the future."<sup>13</sup> As stated in the OCC's Motion to Strike, Duke Energy's non-compliance with the instructions regarding

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<sup>8</sup> OCC Motion to Strike at 2 and 3 (March 3, 2008).

<sup>9</sup> Memo Contra Motion to Strike at 3 (March 5, 2008).

<sup>10</sup> Had the Company sought a seven-day extension to its deadline, its request would have been timely only if submitted within the deadline for the memorandum contra to the OCC's Motion to Stay. Ohio Adm. Code 4901-1-13(B) ("filed so as to permit the . . . attorney examiner sufficient time to consider the request and to make a ruling prior to the established filing date").

<sup>11</sup> Duke Energy's sole explanation is that its "delay was inadvertent." Memo Contra Motion to Strike at 3.

<sup>12</sup> Memo Contra Motion to Strike at 3 (March 5, 2008), citing *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC, Entry at 4 (January 25, 2008). The Entry only contains three pages.

<sup>13</sup> *In re Columbia Gas of Ohio*, Case No. 07-478-GA-UNC, Entry at 4 (January 25, 2008)

the expedited treatment of pleadings has been habitual in the above-captioned case.<sup>14</sup>

The situation calls for more than another warning.

The other case cited by Duke Energy<sup>15</sup> involved a complaint filed by an industrial customer against the Ohio Power Company in 2005 (“Ormet Case”).<sup>16</sup> The event that triggered the OCC’s interest and involvement in the Ormet Case was a stipulation entered into the record on October 5, 2006.<sup>17</sup> The stipulation affected the Commission’s treatment of rate increases under the generation rate plan for the Ohio Power and Columbus Southern Power Companies in which the OCC had been an active participant.<sup>18</sup> The Commission permitted the OCC’s intervention late in the case based upon the OCC’s statement of these “extraordinary circumstances.”<sup>19</sup> The only matter that is “extraordinary” in the instant case is Duke Energy’s reliance on the Ormet Case as authority for not striking the Memo Contra Motion to Stay when the Company offers “inadverten[ce]” as its only explanation for an untimely filing. Duke Energy filed the applications in these cases and has litigated these cases for over five years. The Company’s missed deadline at this juncture of these cases is not analogous to that presented in the Ormet Case.

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<sup>14</sup> OCC Motion to Strike at 3 (March 5, 2008), citing (as an example only) OCC Letter (September 24, 2007).

<sup>15</sup> Memo Contra Motion to Strike at 3 (March 5, 2008), citing *In re Ormet v. South Central Power Company*, Case No. 05-1057-EL-CSS, Supplemental Opinion and Order at 11 (November 8, 2006). The Supplemental Opinion and Order contains the signatures of Commissioners on page 11.

<sup>16</sup> *In re Ormet v. South Central Power Company*, Case No. 05-1057-EL-CSS, Supplemental Opinion and Order at 3 (November 8, 2006).

<sup>17</sup> Id. at 4.

<sup>18</sup> Id. at 5-6, citing “Case No. 04-169-EL-UNC” (commonly referred to as the “AEP RSP Case”).

<sup>19</sup> Id. at 6.

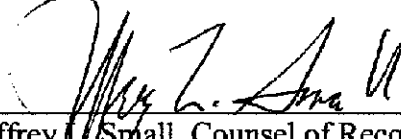
Duke Energy's Memo Contra Motion to Strike does not present any relevant authority that might support its argument against striking the Company's Memo Contra Motion to Stay.

### **III. CONCLUSION**

Duke Energy's Memo Contra was not timely filed. Duke Energy was recently reminded of the expedited procedural procedures on January 29, 2008 in an Attorney Examiner Entry. Duke Energy's Memo Contra should be stricken and ignored.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER  
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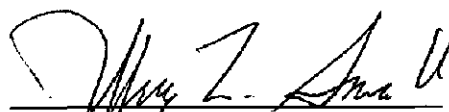


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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply to Memorandum Contra Motion to Strike has been served upon the below-named persons via electronic transmittal this 7<sup>th</sup> day of March 2008.



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