

I. INTRODUCTION AND STATEMENT OF FACTS

The Office of the Ohio Consumers' Counsel ("OCC"), the City of Cleveland, Ohio Partners for Affordable Energy, and a citizens coalition comprised of the Neighborhood Environmental Coalition, the Empowerment Center of Greater Cleveland, the Cleveland Housing Network, and the Consumers for Fair Utility Rates ("Citizens Coalition") (collectively "Joint Advocates"), on January 29, 2009, pursuant to Ohio Adm. Code 4901-1-12 and in furtherance of the interests of the 1.1 million residential consumers in the East Ohio Gas Company d/b/a Dominion East Ohio ("DEO" or "Company") service territory, moved the Public Utilities Commission of Ohio ("PUCO" or "Commission") to Reopen the Record in these proceedings. On February 13, 2009 DEO filed its Memorandum Contra the Joint Motion to Reopen ("Memo Contra Joint Motion to Reopen").

On February 17, 2009, Joints Advocates filed a Joint Motion to Strike DEO's Memo Contra Joint Motion to Reopen on the grounds that DEO's Memo Contra Joint Motion to Reopen was filed seven days out of time. The Joint Advocates also replied to DEO's Memo Contra Joint Motion to Reopen.

On February 19, 2009, DEO filed a Memorandum Contra the Joint Advocates' Motion to Strike ("Memo Contra Joint Motion to Strike"). Pursuant to the timelines established in the PUCO's March 19, 2008 Entry, the instant pleading replies to the Memo Contra Joint Motion to Strike.

II. ARGUMENT

A. DEO May Not Choose Which PUCO Entries It Will Respect.

DEO's Memo Contra Joint Motion to Strike unreasonably argues that the Commission's timing requirements for pleadings in these cases is no longer applicable because it no longer serves a purpose.¹ This argument reveals DEO's confusion regarding the role of the Commission and that of the parties to PUCO cases.

The Commission's procedural rules provide the usual timing requirements for pleadings may be altered by authorized representatives of the Commission.² Expedited pleading requirements were set in this case by a March 19, 2008 Entry ("March 19 Entry"). DEO has never moved to alter the expedited procedures and the Commission never issued any directive or Entry withdrawing those expedited timing requirements. Nonetheless, DEO apparently believes that it may unilaterally decide whether to follow the Attorney Examiner's rulings.

DEO unreasonably argues that the Entry, by its own assessment, is now stale. DEO stated:

The Joint Advocates *sole* argument for striking DEO's Memo Contra Motion to Reopen is that it was untimely pursuant to an eleven-month-old procedural entry * * * this proceeding has concluded and the final order has been appealed.³

The March 19 Entry may be eleven-months-old, but the Commission has not issued a subsequent Entry to rescind it or state that the pleading timeline no longer applies.

¹ Memo Contra Motion to Strike at 3.

² Ohio Adm. Code 4901-1-14 ("the attorney examiner * * * may rule * * * upon any * * * procedural matter").

³ Memo Contra Motion to Strike at 2 (Emphasis added).

Furthermore, DEO filed its updated cost-of-service study (“COSS”) in the same docket wherein the Company argues a final order has been issued, and which Order was subsequently appealed. The docket cannot remain open for the Company to file documents that were required by the October 15, 2008 Opinion and Order, and yet at the same time be closed to other parties and other filings. Therefore, the docket remains open and the March 19 Entry governing the pleading timeline remains in effect, and the generally applicable timelines in Ohio Adm. Code 4901-1-12 do not apply.

DEO speculated as to why the Commission reduced the response times as set forth in the March 19 Entry.⁴ DEO further argued that the reasons for the expedited timelines no longer exist.⁵ In making this argument, DEO speculated as to why the March 19 Entry was issued, and then decided on its own that those reasons are no longer applicable. However, the reasons why the timelines were reduced in the first place or whether those reasons remain applicable today may make for an interesting intellectual discussion, but are irrelevant to the Commission’s decision on the merits of Joint Advocates’ Joint Motion to Strike. The only issue that is important to the determination of whether DEO filed its Memo Contra Joint Motion to Reopen in a timely manner is whether the Entry was still in full force and effect. Even DEO does not try to argue that the Entry is no longer applicable, or that its Memo Contra Motion to Reopen was timely filed within the expedited time frames of that Entry. Therefore, the Commission should reject the Company’s view of its role in these proceedings and Strike the Memo Contra Motion to Strike.

⁴ Memo Contra Motion to Strike at 3.

⁵ Memo Contra Motion to Strike at 3.

B. DEO's Delay Should Not Be Rescued By a Waiver.

DEO makes the unconvincing argument that the Commission can waive the requirements of the March 19, 2008 Entry. It is true that, pursuant to Ohio Adm. Code 4901-1-38(B), the Commission has the authority to waive certain requirements under its rules. Ohio Adm. Code 4901-1-38(B) states:

The commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case.

But DEO did not file the motion referenced in the Rule for asking the Commission to waive the filing requirements, which would have been proper procedurally under the Commission's rules. Neither did DEO make a motion to file its pleading out of time or explain the good cause necessary for the Commission to act on its own. Since neither prong of the rule has been met there is no basis for the Commission to rescue DEO from its dilemma.

C. DEO's Delay Was Prejudicial

The Memo Contra Joint Motion to Strike also argues that the Joint Advocates did not state any prejudice resulted from the late submission of the Company's Memo Contra Motion to Reopen.⁶ DEO is incorrect.

The Joint Motion to Strike states that the Joint Advocates were unfairly handicapped by a situation wherein DEO filed a pleading, at 5:21 p.m. on a Friday afternoon before the Presidents' Day holiday weekend which was formulated during the

⁶ Memo Contra Motion to Strike at 4-5.

course of a two-week period, thus leaving the Joint Advocates a single business day to respond to that pleading under the timeline in the PUCO's Entry.⁷ As stated above, DEO is not entitled to such an advantage under the Commission's rules or the Attorney Examiners' procedural rulings.

DEO further attempts to evade responsibility for its own actions by trying to turn the tables and misdirect the Commission away from DEO's own failure to comply with the Commission's Entry, and instead asks the Commission to consider how that misstep affected the Joint Advocates. DEO's twisted logic is that its actions did not prejudice the Joint Advocates. Unbelievably, the basis for this argument was that because the Joint Advocates were able to comply with the very response time requirement that DEO did not, the joint Advocates were not prejudiced. DEO argued:

Even under the Entry's response times, they were able to *timely* file a Reply to DEO's pleading."⁸

DEO's admission that Joint Advocates filing was timely speaks volumes, and the counter-point to this argument is that DEO's filing was untimely. The question for the Commission is not whether the Joint Advocates could or could not file a responsive pleading in a timely manner, but rather whether DEO filed its Memo Contra Motion to Reopen in a timely manner. The answer to that question is clear that they did not.

DEO then took its arguments to an even higher degree of absurdity. DEO argued:

If such problems had been presented by DEO's pleading, the appropriate course would have been to contact the parties and file an expedited motion for an extension of time. The Joint Advocates, perhaps sensing a potential technicality in their favor and an opportunity to avoid the

⁷ Joint Motion to Strike at XXX.

⁸ Memo Contra Motion to Strike at 4.

merits, did none of these things and simply moved to strike.⁹

DEO's argument seems to be that it does not matter that DEO was not in compliance with the March 19 Entry, because the late filing was only a technicality. In making this argument DEO fails to cite to any regulatory rule that requires a party to meet some requirements while permitting parties not to meet others that are only technicalities. DEO also argues that its failure to meet a deadline is somehow the Joint Advocates' responsibility, and that Joint Advocates should have filed an expedited motion for an extension of time. This DEO argument is an unflattering approach of disowning its own responsibility and looking for others to blame, which is an approach not countenanced in the rules or the Entry of the Public Utilities Commission of Ohio.

DEO cannot sustain its argument that "DEO's compliance with the general response time has not prejudiced the Joint Advocates."¹⁰ In this case the true prejudice to be experienced by the Joint Advocates would occur if the Commission decides to disregard the requirements of its own Entry, and consider DEO's untimely pleading.

III. CONCLUSION


DEO's Memo Contra Joint Motion to Reopen was not timely filed. DEO's Memo Contra was filed in contravention of the timelines established for all parties in the PUCO's Entry. Therefore, DEO's Memo Contra Joint Motion to Reopen should be stricken and ignored.

⁹ Memo Contra Motion to Strike at 4.

¹⁰ Memo Contra Motion to Strike at 4-5.

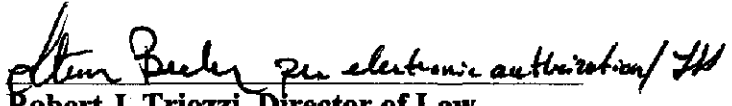
Respectfully submitted,

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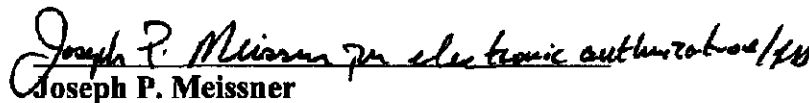
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Joint Reply* has been served upon the below-named counsel via Electronic Mail this 23rd day of February 2009.


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