

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Joint Application of)
The Dayton Power and Light Company)
and Airgas, Inc. for Approval of a) Case No. 09-702-EL-AEC
Reasonable Arrangement to Incorporate)
Customer Participation in PJM's Demand) Case No. 09-1700-EL-BEC
Response Programs into DP&L's Demand)
Reduction Programs.)

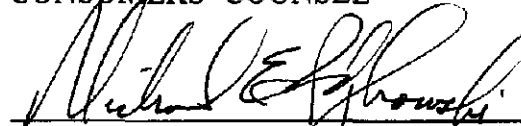
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PUCO

**MOTION TO STRIKE LETTER OF AIRGAS, INC.
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of all residential utility consumers of The Dayton Power and Light Company ("DP&L"), moves the Public Utilities Commission of Ohio ("PUCO" or "Commission"), pursuant to Ohio Adm. Code 4901-1-12, to strike the letter filed by Airgas, Inc. ("Airgas") on October 6, 2009. The reasons OCC's Motion should be granted are set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On September 14, 2009, the Office of the Ohio Consumers' Counsel ("OCC") filed a Motion to Intervene. In these cases, The Dayton Power and Light Company ("DP&L") and Airgas, Inc. ("Airgas"; collectively with DP&L, "Applicants") jointly seek approval of a special arrangement under R.C. 4928.66(A)(2) and 4905.31 and Ohio Adm. Code 4901:1-39-08(A). Approval of this arrangement would permit Airgas, in exchange for a payment of \$46,500.00, to commit its demand-response capabilities for integration into DP&L's demand-reduction program. Approval would also allow DP&L to attribute the peak-demand reductions associated with Airgas' demand-response capabilities to the peak-demand reduction requirements DP&L must comply with under R.C. 4928.66(A)(1)(b).

On October 2, 2009, DP&L filed "Comments" regarding OCC's Motion to Intervene. In its Comments DP&L informed the PUCO that "DP&L does not oppose OCC's motion to intervene."¹ DP&L then presented, apparently for informational

¹ The Dayton Power and Light Company's Comments on Motion to Intervene by the Office of the Ohio Consumers' Counsel at 2.

purposes, some concerns regarding OCC's authority to intervene under R.C. 4903.221(B).

On October 6, 2009, twenty-two days after OCC filed its Motion to Intervene, Airgas filed a letter expressing Airgas' agreement with certain of DP&L's perspectives regarding OCC's motion to intervene, as set forth in DP&L's Comments.² Airgas' letter is critical of OCC's motion to intervene, which Airgas explains in all of two sentences that are preceded by two sentences containing case history. Airgas' letter includes no legal or other support for its claims, other than the statement, "For the same reasons described by DP&L."³ Since Airgas makes reference to DP&L's positions, it especially should be remembered that DP&L emphasized that it does not oppose OCC's intervention. As demonstrated below, the Commission should strike Airgas' letter from the record.

II. ARGUMENT

A. Airgas' Letter Should Be Stricken Because It Is Not A Pleading Allowed By Ohio Adm. Code 4901-1-12(B)(1).

Under Ohio Adm. Code 4901-1-12(B)(1), "[a]ny party may file a memorandum contra within fifteen days after the service of a motion."⁴ In response to OCC's Motion to Intervene, Airgas, a party in this proceeding, filed a one-page letter. In its letter, Airgas makes no attempt to explain why it filed a letter in opposition to OCC's Motion to Intervene, rather than a memorandum contra, as called for by the Commission's rule, and no attempt to independently justify its positions in opposition to OCC's intervention.

² Airgas' October 6, 2009 letter.

³ Id.

⁴ Ohio Adm. Code 4901-1-12(B)(1).

Ohio Adm. Code 4901-1-12(B)(1) expressly authorizes a party to file a *memorandum contra* in response to a motion, not a letter. Where a PUCO procedural rule expressly calls for a specific form of response by a party, a letter does not conform to the rule and should be stricken.

In addition to the authority of the PUCO's rule, the authority for striking Airgas' letter includes a ruling where the PUCO granted the utility's motion to strike a letter filed by consumers.⁵ In another PUCO case, the importance of filing pleadings as contemplated by law and rule was underscored where the Commission denied an OCC motion based on the utility's claim that it should have been filed as an application for rehearing.⁶

Because Ohio Adm. Code 4901-1-12(B)(1) limits the scope of authorized responses to a memorandum contra, and Airgas' letter is not a memorandum contra, Airgas' letter should be stricken.

B. Even If the PUCO Accepts The Airgas Letter As A Memorandum Contra, It Should Be Stricken Because It Was Filed After The Deadline For A Memorandum Contra Set Forth In Ohio Adm. Code 4901-1-12(B)(1) And Without the Motion For Extension Required By Ohio Adm. Code 4901-1-13.

⁵ See *In the Matter of the Petition of Mrs. Fran Bowman and Numerous Other Subscribers of the Frazeyburg Exchange of United Telephone Company of Ohio, Complainants, v. ALLTELL Ohio, Inc., and United Telephone Company of Ohio, Respondents, Relative to a Request for Two-Way, Nonoptional Extended Area Service between the Frazeyburg Exchange of United Telephone Company of Ohio and the Newark and Hanover/Marne Exchanges of ALLTEL Ohio, Inc.*, PUCO Case No. 85-1279-TP-PEX (May 19, 1987), 1987 Ohio PUC LEXIS 1235 (Based on United Telephone's argument that complainants' letter was not authorized by the Commission's rules, the Attorney Examiner granted United Telephone's motion to strike complainants' letter filed in response to the Attorney Examiner's recommendations and subsequent replies.).

⁶ *In Re Dominion East Ohio*, Case No. 07-829-GA-AIR et al., Entry at paras. 7 and 9 (July 29, 2009).

As stated above, Ohio Adm. Code 4901-1-12(B)(1) provides that a party “may file a memorandum contra within fifteen days after service of a motion.”⁷ Under Ohio Adm. Code, 4901-1-07(B), three days shall be added to the prescribed period of time if a pleading or other paper is served by mail.⁸

Because OCC served its Motion to Intervene by mail, Airgas had eighteen days to file a memorandum contra. Thus, Airgas was required to file its response to OCC’s Motion to Intervene by October 2, 2009.

But despite the clear dictates of the PUCO’s rule, Airgas filed on October 6, 2009, twenty-two days after OCC’s motion was filed and four days beyond its deadline of October 2. Thus, Airgas’ filing is too late to be considered a timely memorandum contra under Ohio Adm. Code 4901-1-12(B)(1).

Airgas makes no attempt to explain or justify why it filed its letter beyond the filing deadline under Ohio Adm. Code 4901-1-12(B)(1). Moreover, Airgas was obligated by Ohio Adm. Code 4901-1-13 to file a motion for extension of time. Airgas also violated that rule. Thus, the Commission should strike Airgas’ letter as untimely filed.

III. CONCLUSION

For the reasons stated above, Airgas’ October 6, 2009 letter should be stricken. Further, as set forth in its Motion to Intervene, OCC has demonstrated that it has the authority, jurisdiction, and interest under Ohio law, PUCO rule, and Supreme Court precedent to warrant its intervention in this proceeding. Residential customers should be represented and protected under Ohio law. OCC is uniquely situated to represent

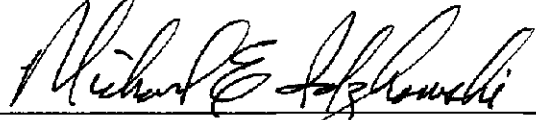
⁷ Ohio Adm. Code 4901-1-12(B)(1).

⁸ Ohio Adm. Code 4901-1-07(B).

DP&L's residential consumers as their statutory representative in this case. Therefore, the Commission should grant OCC's Motion to Intervene in this proceeding.

Respectfully submitted,

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CONSUMERS' COUNSEL

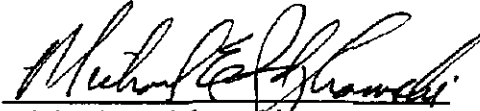
A handwritten signature in black ink, appearing to read "Michael E. Idzkowski", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Motion to Strike* was served on the persons stated below via first class U.S. Mail, postage prepaid, this 16th day of October 2009.



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