

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)	
Energy Ohio, Inc., for an Increase in Gas)	Case No. 12-1685-GA-AIR
Rates.)	
In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Tariff Approval)	Case No. 12-1686-GA-ATA
In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Approval of an)	
Alternative Rate Plan for Gas Distribution)	Case No. 12-1687-GA-ALT
Service.)	
In the Matter of the Application of Duke)	
Energy Ohio, Inc., for Approval to)	Case No. 12-1688-GA-AAM
Change Accounting Methods.)	

**JOINT MOTION TO STRIKE
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
KROGER COMPANY,
OHIO MANUFACTURERS' ASSOCIATION, AND
OHIO PARTNERS FOR AFFORDABLE ENERGY
AND
REQUEST FOR EXPEDITED RULING**

On February 19, 2014, the Public Utilities Commission of Ohio (“PUCO”) issued its Entry authorizing Duke to collect from customers \$55.5 million in environmental investigation and remediation costs for two manufactured gas plant (“MGP”) sites that have not been used and useful in providing utility service in over 50 years.¹ The Office of

¹ The West End site is located on the west side of downtown Cincinnati and it was constructed by the Cincinnati Gas Light and Coke Company in 1841. Gas for lighting was first produced at the plant in 1843, and the manufacture of gas ceased in 1928. The East End site is located about four miles east of downtown Cincinnati. Construction of the East End site began in 1882 and commercial operations began in 1884, with the manufacture of gas ceasing in 1963. Duke Ex. No. 20(A) (Supplemental Testimony of Andrew Middleton at 25 (February 25, 2013); See also Tr. Vol. I at 183 (April 29, 2013).

the Ohio Consumers' Counsel ("OCC"), Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA") and Ohio Partners for Affordable Energy ("OPAE") (collectively, "Joint Consumer Advocates") on behalf of utility consumers of Duke Energy Ohio, Inc. ("Duke" or "Utility"), file this Joint Motion to Strike² Duke's Memorandum Contra Second Joint Application for Rehearing in the above-captioned cases. Additionally, Joint Consumer Advocates move the PUCO to strike Duke's Motion for leave to file its "Memorandum Contra Motion to Consolidate of Ohio Power Company, Instantly."³

This Joint Motion should be granted because Duke's Memorandum Contra was filed after the ten-day time period mandated by the PUCO's Rule for responding to applications for rehearing.⁴ And Duke's April 2, 2014 Motion is misplaced in this proceeding.

Furthermore, the Joint Consumer Advocates seek an expedited ruling in regard to this Joint Motion.⁵ The reasons supporting this Joint Motion to Strike, along with an explanation of the need to decide it on an expedited basis, are set forth in the attached Memorandum in Support.

² Ohio Adm. Code 4901-1-12.

³ Duke's Motion (April 2, 2014).

⁴ Ohio Adm. Code 4901-1-35.

⁵ Ohio Adm. Code 4901-1-12(C).

Respectfully submitted,

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OHIO PARTNERS FOR AFFORDABLE ENERGY

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On February 19, 2014, an Entry was issued that approved the Utility’s proposed tariffs that were filed on November 27, 2013, which included the manufactured gas plant (“MGP”) Rider intended for the collection of MGP-related investigation and remediation costs from customers. In that Entry, the Public Utilities Commission of Ohio (“PUCO”) also denied the Joint Consumer Advocates’ Motion for Stay and request to require Duke to collect revenues through the MGP Rider subject to refund.

On March 21, 2014, the Joint Consumer Advocates filed a Second Application for Rehearing. The PUCO’s Rules of Practice and Procedure establish a ten-day time limit for an interested party to file a memorandum contra an application for rehearing.⁶ Duke

⁶ Ohio Adm. Code 4901-1-35.

missed the filing deadline by multiple days and filed its Memorandum Contra anyways. Additionally, that same day—April 2, 2014—Duke filed a Motion seeking PUCO approval to file its Memorandum Contra Motion to Consolidate of Ohio Power Company, Instanter. That misplaced Motion should not be a basis for granting Duke leave to file its untimely Memorandum Contra in this proceeding. Accordingly, Duke’s April 2, 2014 Memorandum Contra and “Motion” should be stricken for the reasons below.

II. LAW AND ARGUMENT

A. Duke’s April 2, 2014 “Motion” is Misplaced and Should be Stricken.

Duke’s April 2, 2014 Motion is an attempt by the Utility to be excused by the PUCO for its inexcusable failure to follow the PUCO’s Rules on Practice and Procedure. The Rule in question is Ohio Adm. Code 4901-1-35(B) which states:

Any party may file a memorandum contra within ten days after the filing of an application for rehearing.

This is a simple Rule that requires an interested party to file a memorandum contra within ten-days after the filing of an application for rehearing. This Rule has been in place for many years, and was successfully followed by Duke on December 23, 2013⁷ in these very same cases subsequent to the Joint Consumer Advocates filing their First Application for Rehearing on December 13, 2013.

A closer review of Duke’s April 2, 2014 filing explains the justification for Joint Consumer Advocates’ request to strike Duke’s “Motion.” That “Motion” seeks PUCO approval to file a pleading in another case out of time. The Motion states in its entirety:

⁷ *In re Duke Natural Gas Rate Case*, Case No. 12-1685-GA-AIR, et al., Duke Memorandum Contra Joint Consumer Advocates Application for Rehearing (December 23, 2013).

Now comes Duke Energy Ohio, Inc. and hereby respectfully moves for leave to file its **Memorandum Contra Motion to Consolidate of Ohio Power Company**, Instanter.⁸

Other than correctly identifying itself as the Utility, everything else in the Motion is irrelevant to the Duke Rate Cases wherein the Joint Consumer Advocates filed the Second Application for Rehearing on March 21, 2014. That misplaced Motion should not be a basis for granting Duke leave to file its untimely Memorandum Contra in this proceeding. Accordingly, Duke's April 2, 2014 "Motion" should be stricken.

B. Duke's Late-Filed Memorandum Contra should be Stricken.

Duke's late-filed Memorandum Contra should be stricken because the PUCO and other parties are prejudiced by Duke's failure to follow the Rules of Practice and Procedure. In addition, this Joint Motion to Strike should be granted because Duke has not shown "good cause" for the PUCO to waive its rule⁹ on the deadline for filing a memorandum contra.¹⁰

Duke unreasonably argues that "permitting the late filing of this Memorandum will not prejudice any of these parties in this proceeding * * *."¹¹ Duke is wrong for two reasons. First, the PUCO is prejudiced by Duke's late filing. Under Ohio law, the PUCO has only 30 days to grant or deny an application for rehearing or it is denied by operation of law.¹² By failing to adhere to the deadline in the PUCO's Rule, Duke has taken it upon itself to shorten the amount of time the PUCO has between the filing of a memorandum

⁸ Motion at 1 (April 2, 2014).

⁹ Ohio Adm. Code 4901-1-38(B).

¹⁰ Ohio Adm. Code 4901-1-35(B).

¹¹ Motion at Memorandum in Support pg. 2 (April 2, 2014).

¹² R.C. 4903.10.

contra and the issuance of an order granting or denying the application for rehearing. For this reason, requests to extend the time to file memorandum contra applications for rehearing have been routinely denied.¹³

Second, parties who follow the PUCO rules are prejudiced by another party (Duke) that ignores the rules and suffers no adverse consequences from its actions. The PUCO's rules are in place to establish administrative efficiency, and consistency in the administrative process. Joint Consumer Advocates rightfully expect other parties to file responsive pleadings in accordance with the PUCO's established rules in order to promote this administrative efficiency. Moving the prescribed deadlines to accommodate late-filed pleadings without good cause will prejudice the PUCO and other parties to the proceeding and could lengthen the adjudicated process.

Indeed, the PUCO has previously expressed concern with Duke and its noncompliance (which the PUCO called "disdain") with the PUCO's rules. In an Entry the PUCO stated:

Turning now to Duke's waiver request, the Commission is mindful of its initial directive to Duke. Specifically, we directed Duke to file a memorandum supporting any waiver request that explained, in detail, why the application, as filed, despite the proposed stipulation, warrants a waiver. Instead, **Duke spent a significant amount of time attempting to justify its noncompliance with the rules** contained in Chapter 4901:1-39, O.A.C, and then generically asked for a waiver of Rules 4901:1-39-04 and 4901:1-39-05, O.A.C. **Duke's continued refusal to comply with the dictates of the rules is inexplicable.** Duke's noncompliance contravenes the purpose of the statute, especially in light of the fact that the rules specifically mandate certain review criteria, such as that found in Rule 4901:1-39-03(B), O.A.C, which requires that, from programs that have technical, economic, and market potential, the utility is to design a portfolio of programs considering the criteria listed therein. Regardless of Duke's

¹³ Entry (February 21, 2014) at paragraph 4. PUCO Case No. 12-2050-EL-ORD.

continued disdain for the established rules and processes, in the interest of moving forward with our consideration of this case, the Commission finds that Duke's request for a waiver should be granted, conditioned upon Duke providing the necessary detailed information at the hearing * * *.¹⁴

This circumstance of Duke's noncompliance with the PUCO's rules should once again cause the PUCO concern. There is no good cause that would warrant the PUCO allowing Duke's late-filed Memorandum Contra.

Furthermore, in the Memorandum in Support of its "Motion," Duke fails to cite to any law, PUCO Rule, or precedent to support the PUCO considering its late-filed memorandum contra. Although Duke did state that "good cause exists for the Commission to consider *** [its] Memorandum Contra as timely filed,"¹⁵ Duke neglected to state what the alleged "good cause shown" is. This is not an insignificant over-sight, as that is what Ohio Adm. Code 4901-1-38(B) requires in order for the PUCO to waive one of its rules.

What Duke did admit to was that there was "inadvertent error"¹⁶ and that it had "mistakenly neglected to file within the required time set forth in Rule 4901-1-35."¹⁷ Missing the deadline by two days is not an inadvertent error that should so easily be excused.¹⁸ The fact that Duke forgot to file its pleading within the time limits required by

¹⁴ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Energy Efficiency Cost Recovery Mechanism and for Approval of Additional Programs for Inclusion in its Existing Portfolio*, Case No. 11-4393-EL-RDR, Entry at 3 (May 9, 2012) (emphasis added).

¹⁵ Motion at Memorandum in Support pg. 2 (April 2, 2014).

¹⁶ Motion at Memorandum in Support pg. 2 (April 2, 2014).

¹⁷ Motion at Memorandum in Support pg. 2 (April 2, 2014).

¹⁸ Filing after the 5:30 pm PUCO deadline on the due date or immediately the next morning due to a technical glitch is one thing. Blatantly missing the deadline by two days is something completely different.

the PUCO does not constitute good cause. Duke's Memorandum Contra should be stricken.

Finally, the Joint Consumer Advocates request an expedited ruling on this Joint Motion to Strike.¹⁹ An expedited ruling is needed because a memorandum contra to Duke's April 2, 2014 "Motion" is due on April 17, 2014.

III. CONCLUSION

Joint Consumer Advocates have moved the PUCO to strike Duke's Memorandum Contra filed out of time and its "Motion" filed on April 2, 2014. It is without question that Duke's filing of the Memorandum Contra in these cases was late.²⁰ Duke admitted its failure to comply with the requirements of Ohio Adm. Code 4901-1-35(B).²¹ In this event, the PUCO should grant this Joint Motion to Strike (on an expedited basis) and not consider Duke's untimely Memorandum Contra when ruling on the Joint Consumer Advocates Second Application for Rehearing.

¹⁹ Ohio Adm. Code 4901-1-12(C).

²⁰ See Generally Duke Motion (April 2, 2014).

²¹ Motion at Memorandum in Support pg. 2 (April 2, 2014).

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Joint Motion to Strike* was served on the persons stated below via electronic service, this 8th day of April 2014.

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This foregoing document was electronically filed with the Public Utilities

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4/8/2014 5:17:45 PM

in

Case No(s). 12-1685-GA-AIR, 12-1686-GA-ATA, 12-1687-GA-ALT, 12-1688-GA-AAM

Summary: Motion Joint Motion to Strike by the Office of the Ohio Consumers' Counsel, Kroger Company, Ohio Manufacturers' Association, and Ohio Partners for Affordable Energy and Request for Expedited Ruling electronically filed by Patti Mallarnee on behalf of Sauer, Larry S.