

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke )  
Energy Ohio, Inc., for an Increase in its ) Case No. 12-1685-GA-AIR  
Natural Gas Distribution Rates. )

In the Matter of the Application of Duke ) Case No. 12-1686-GA-ATA  
Energy Ohio, Inc., for Tariff Approval. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc. for Approval of an ) Case No. 12-1687-GA-ALT  
Alternative Rate Plan for Gas Distribution )  
Service. )

In the Matter of the Application of Duke )  
Energy Ohio, Inc., for Approval to Change ) Case No. 12-1688-GA-AAM  
Accounting Methods. )

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**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA  
THE JOINT MOTION TO STRIKE**

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**I. INTRODUCTION**

On April 8, 2014, the Joint Movants<sup>1</sup> filed yet another motion to strike (Motion to Strike), thereby adding further needless complexity to the already tortuous procedural history of these cases. The Public Utilities Commission of Ohio (Commission) should deny the motion.

The Commission's Opinion and Order (Order) was issued last November.<sup>2</sup> Three weeks later, the Joint Movants filed a motion for a stay,<sup>3</sup> to which Duke Energy Ohio, Inc. (Duke Energy Ohio), responded<sup>4</sup> and on which the Commission had to rule.<sup>5</sup> The Joint Movants then

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<sup>1</sup> The term "Joint Movants" collectively refers to the group of intervenors that has filed several joint procedural pleadings in these dockets; namely, the Office of the Ohio Consumers' Counsel (OCC), Kroger Company, Ohio Manufacturers' Association (OMA), and Ohio Partners for Affordable Energy (OPAE).

<sup>2</sup> *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.* (Gas Case), Opinion and Order (November 13, 2013).

<sup>3</sup> Gas Case, Motion for a Stay (December 2, 2013).

<sup>4</sup> Gas Case, Memorandum Contra Motion for Stay (December 13, 2013).

<sup>5</sup> Gas Case, Entry (February 19, 2014).

filed for rehearing of the Order.<sup>6</sup> The Commission denied that rehearing application.<sup>7</sup> The Joint Movants appealed to the Ohio Supreme Court,<sup>8</sup> also asking the Court to stay the Commission's order – although refusing to follow all of the requirements for obtaining such a stay. After the Commission denied their motion to stay, the Joint Movants' next step was to file another application for rehearing, this time seeking rehearing of the Commission's denial of their request for a stay and its approval of Duke Energy Ohio's proposed tariffs to effectuate the Order.<sup>9</sup> After miscalculating the deadline for opposing that application for rehearing, Duke Energy Ohio filed a motion asking for permission to file its memorandum contra, *instanter*, two days late (Motion Instanter), together with the memorandum contra rehearing (Memorandum Contra), itself.<sup>10</sup> Rather than simply opposing Duke Energy Ohio's Motion Instanter, the newest tactic being employed by the Joint Movants is to seek to strike it the Motion Instanter entirely, along with the underlying Memorandum Contra. The Joint Movants complain that Duke Energy Ohio's mistake amounted to a failure to follow the Commission's procedures; but in moving to strike the Motion Instanter that they disagree with, it is the Joint Movants who are ignoring procedural norms.

## **II. DISCUSSION**

The Joint Movants' request is for the Commission to strike Duke Energy Ohio's Motion Instanter because it is "misplaced" and to strike the Memorandum Contra because it was filed two days late.<sup>11</sup> Each of these requests must be considered separately.

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<sup>6</sup> Gas Case, Application for Rehearing (December 13, 2013).

<sup>7</sup> Gas Case, Entry on Rehearing (January 8, 2014).

<sup>8</sup> Gas Case, Notice of Appeal of OPAE (March 5, 2014); Gas Case, Notice of Appeal of OCC and OMA (March 10, 2014); Gas Case, Notice of Appeal of the Kroger Company (March 10, 2014).

<sup>9</sup> Gas Case, Second Joint Application for Rehearing (March 21, 2014).

<sup>10</sup> Gas Case, Motion to File Memorandum Contra Instanter (April 2, 2014); Gas Case, Memorandum Contra Second Joint Application for Rehearing (April 2, 2014).

<sup>11</sup> Gas Case, Motion to Strike, at pp. 1-2.

**A. Motion Instanter**

The Joint Movants' rationale for striking the Motion Instanter – and apparently also for continually referring to it as a “Motion” (in quotation marks) – is simply that it included an obvious typographical error. The error appeared in the first sentence of the document, but nowhere else. Nevertheless, the Joint Movants pretend to be confused and, indeed, even so far as to ignore the title of the document as it is clearly written and, instead, look only to the inadvertent typo. The title actually appears as “Duke Energy Ohio, Inc.’s Motion to File Memorandum Contra Instanter.” Other than the one sentence that was recognizably left over from another document, everything else in the Motion Instanter and its supporting memorandum is clear. The Joint Movants are not actually confused and there is most certainly no basis to strike the document from the record of these proceedings because of a simple typographical error. There is no legal principle on which to take such an action. Even the Joint Movants cite no law or rule that would allow a document to be stricken on account of a typo.

The motion to strike the Motion Instanter must be denied.

**B. Memorandum Contra**

The Joint Movants also seek to strike the Memorandum Contra, arguing that they and the Commission are prejudiced by the two-day delay and that good cause has not been shown. Neither of these arguments are correct.

As even the Joint Movants point out, Duke Energy Ohio stated in the Motion Instanter that there would be no prejudice to “**parties in this proceeding.**” The Joint Movants first attack this statement by complaining that the Commission itself is prejudiced by the two-day delay. But the Commission is not a party in the proceedings. While Duke Energy Ohio certainly regrets hardship to the Commission that may have been caused by the error, this is not an example of prejudice to parties.

The Joint Movants attempt to argue, next, that there would be prejudice to parties if Duke Energy Ohio suffered no adverse consequences from the error. In other words, the Joint Movants contend that they are unfairly prejudiced where another party is permitted to file a responsive pleading outside the established time period for doing so. This is an astonishing statement. As the Joint Movants are fully aware, there are many instances of the Commission waiving a deadline that was missed due to oversight. For example, OCC, one of the Joint Movants, has filed a reply to a memorandum contra several days late, without a motion for permission, and yet the Commission considered the reply with only a comment that it was late.<sup>12</sup> The Commission has also granted permission for OMA, another of the Joint Movants, to file intervenor testimony one day late.<sup>13</sup> In another situation, OPAE, also a Joint Movant, filed its reply brief one day late. Although OPAE failed even to move for permission to file late, the Commission merely noted the lateness but did not refuse to consider the document, thus effectively waiving the deadline.<sup>14</sup> The Joint Movants, various of which have also missed filing deadlines and have not even sought permission for the late filings or attempted to explain the causes of those delays, are in no position to complain about Duke Energy Ohio's actions. While the Joint Movants have high expectations, it is the Commission's view of the two-day delay that matters. In light of that fact, Duke Energy Ohio sought approval to file out of time.

Furthermore, the Joint Movants cannot assert that they have been substantively prejudiced in any way; that they have suffered any identifiable harm. The Joint Movants have already appealed to the Ohio Supreme Court. The Commission's granting Duke Energy Ohio's

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<sup>12</sup> *In the Matter of the Application of Ohio Edison Company for Authority to Amend its Residential Tariff Nos. 10, 12 and 17*, Finding and Order, at finding 11 (August 30, 1990).

<sup>13</sup> *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Entry (April 13, 2012).

<sup>14</sup> *In the Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for The Dayton Power and Light Company*, Case No. 02-2779-EL-ATA, *et al.*, Opinion and Order (September 2, 2003).

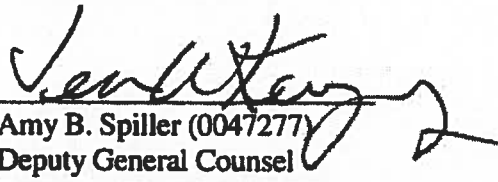
motion to allow the filing two days late will not change any rights of the Joint Movants. The Motion to Strike fails – for good reason – to identify any actual prejudice whatsoever.

It is also important to recognize that the Joint Movants' argument on this point would be a reason to deny the Motion Instantner, not a reason to strike either document. This is a substantive opposition to the Motion Instantner. Thus, the Motion to Strike should be deemed to be a memorandum contra the Motion Instantner, obviating the need for any further response. The Commission should instruct the Joint Movants not to file additional memorandum contra the Motion Instantner.

### **III. CONCLUSION**

WHEREFORE, Duke Energy Ohio respectfully requests that the Commission deny the joint motion to strike, filed by the Joint Movants on April 8, 2014. Furthermore, as the arguments made in the joint motion to strike are, in large part, substantive opposition to the Motion Instantner, no further memorandum contra should be allowed by the Joint Movants.

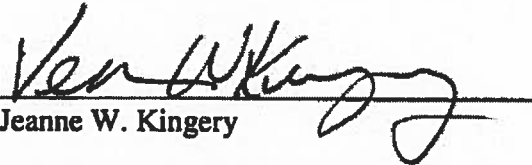
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail, on this 11th day of April, 2014, to the following parties.

  
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**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**4/11/2014 12:42:55 PM**

**in**

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

Summary: Memorandum Duke Energy Ohio's Memorandum Contra the Joint Motion to Strike electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Rocco D'Ascenzo and Watts, Elizabeth H. and Kingery, Jeanne W.