

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Power Company for Authority to Case) Case No. 13-2385-EL-SSO
Establish a Standard Service Offer)
Pursuant to §4928.143, Revised Code,)
in the Form of an Electric Security Plan.)

In the Matter of the Application of Ohio) Case No. 13-2386-EL-AAM
Power Company for Approval of Case)
Certain Accounting Authority.)

**MOTION TO STRIKE RESA’S MEMORANDUM IN RESPONSE TO THE
APPLICATION FOR REHEARING OF OHIO POWER COMPANY
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Office of the Ohio Consumers’ Counsel (“OCC”) moves¹ to strike the Retail Energy Supply Association’s (“RESA”) Response to the Application for Rehearing of Ohio Power Company. RESA’s pleading is an untimely application for rehearing. Additionally, there is no provision in the Ohio Administrative Code that permits the filing of a “Memorandum in Response” to an Application for Rehearing. The grounds for this motion are more fully set forth in the attached Memorandum in Support. And RESA did not seek permission from the PUCO to file its pleading.

¹ OCC’s Motion is made under Ohio Adm. Code 4901-1-12.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady

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MEMORANDUM IN SUPPORT

On June 29, 2015, OCC, Ohio Manufacturers' Association, and Ohio Power Company ("AEP Ohio") filed applications for rehearing on the Public Utilities Commission of Ohio Second Entry on Rehearing, issued May 28, 2015. Notably, the Retail Energy Supply Association ("RESA") chose not to seek rehearing.

Yet, on July 9, 2015, RESA filed a pleading entitled "Memorandum in Response" to Ohio Power's Rehearing. In its Memorandum in Response, RESA states that "AEP Ohio's request is reasonable" (as to AEP Ohio's third assignment of error).² RESA also states that it is joining AEP in seeking the relief it requested in its Application for Rehearing (greater flexibility to develop a purchase of receivables program in the working group).³ In other words RESA, through its responsive pleading, was supporting the Application for Rehearing. Indeed, RESA's support (its "joining") of AEP Ohio's application for rehearing can be construed as an application for rehearing by RESA

² RESA Memorandum in Response at 2 (July 9, 2015).

³ Id.

because it seeks the same remedy that AEP Ohio sought in its application. Additionally, RESA did not seek PUCO permission to file its pleading.

There are two problems with RESA's filing. First, RESA's filing is nothing less than an untimely application for rehearing. Second, there is no PUCO rule that permits the filing of a "Memorandum in Response," or pleadings that support other parties' pleadings. Additionally, RESA failed to seek leave of the PUCO for filing its pleading—something it must do if it seeks to inform the PUCO of its support for another party's rehearing position.

Under R.C. 4903.10 applications for rehearing must be filed within thirty days of when the PUCO issues an Order.⁴ Applications for rehearing on the PUCO's May 28, 2015 Order were due on or before June 29, 2015. RESA's pleading was filed on July 9, 2015, ten days after applications for rehearing were due. As discussed above, a review of RESA's pleading and its recommendations make it clear that it is seeking rehearing, like AEP Ohio. Thus, the PUCO has no jurisdiction to consider RESA's "Memorandum in Support" because RESA failed to comply with the statutory deadline. See *Greer v. Pub. Util.Comm.* (1961), 172 Ohio St. 361, 176 N.E.2d 416.

Second, there is no provision in the Ohio Administrative Code that permits a filing of a "Memorandum in Response" to an Application for Rehearing. Rather Ohio Adm. Code 4901-1-35(B) provides for a "Memorandum Contra" to be filed after the filing of an Application for Rehearing. This provision of the Code, like other provisions, does not present an opportunity to file a responsive pleading that supports another party's

⁴ R.C. 4903.10.

filing.⁵ RESA however, ignored the PUCO rules, and filed a pleading that is not permitted by rule.⁶

It is consistent with PUCO precedent to strike the Memorandum in Response and not consider it. The PUCO has ruled that Rule 4901-1-35, Ohio Adm. Code is limited in scope to the filing of memorandum contra applications for rehearing.⁷ The PUCO has specifically ruled that memorandum in support of another parties' application for rehearing is not permitted under PUCO rules.⁸ In that ruling, the PUCO appropriately struck portions of parties' "memorandum contra" that were in actuality "memorandum in support."⁹ It concluded that if a party believes that it is necessary to inform the Commission of its support for another party's rehearing position, it should file a motion for leave to file a memorandum in support.¹⁰ RESA failed to do so here.

Moreover, permitting RESA to add new arguments at this late stage in the process would be unfair because OCC has no opportunity to respond to such arguments. This is prejudicial to OCC. Had RESA followed the rules and filed a timely application for rehearing, OCC would have had the opportunity to respond to its arguments in a

⁵ See, e.g., *In the Matter of the Complaint of Westside Cellular Inc. v. GTE Mobilnet*, Case No. 93-1758-RC-CSS, Entry at ¶10 (Mar. 23, 1995), holding that there are no allowances for pleadings which support another parties' interlocutory appeal (refusing to consider a parties' response in support of interlocutory appeal).

⁶ See, e.g., *In the Matter of the Application of Numerous Subscribers of Lake Milton Exchange of United Telephone Company of Ohio*, Case No. 83-1624-TP-PEX, 1987 Ohio PUC LEXIS 1563, Opinion and Order at 8 (Apr. 28, 1997) (striking a responsive pleading that was not specifically authorized by PUCO rule); *In the Matter of the Commission's Investigation into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire*, Case No. 86-927-TP-COI, Entry on Rehearing at ¶4 (May 24, 1990) (striking a reply to a Memoranda Contra Application for Rehearing).

⁷ *In the Matter of the Establishment of Carrier-to Carrier Rules*, Case No. 06-1344-TP-ORD, Entry on Rehearing at ¶6 (Oct. 17, 2007).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

Memorandum Contra. But here, with its arguments presented for the first time in a Memorandum in Response, OCC is denied the ability to respond.

For these reasons, OCC urges the PUCO to strike from the record RESA's July 9, 2015 pleading.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL

/s/ Maureen R. Grady

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion to Strike** by the Office of the Ohio Consumers' Counsel was served via electronic transmission, to the persons listed below, on this 20th day of July, 2015.

/s/ Maureen R. Grady
Maureen R. Grady
Assistant Consumers' Counsel

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Summary: Motion Motion to Strike RESA's Memorandum in Response to the Application for Rehearing of Ohio Power Company by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.