

In the Matter of the Application of)
Duke Energy Ohio, Inc., for a Waiver.) Case No. 16-1096-EL-WVR

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Pursuant to Ohio Administrative Code Rule 4901-1-12(A)(1) and (A)(2), OPAE moves to strike the “Reply” improperly filed by Duke Energy Ohio, Inc., (“Duke”) after OPAE filed a motion to intervene and motion to dismiss this application. Under the Commission’s rules, after a motion has been filed pursuant to O.A.C. Rule 4901-1-12(A)(1), if a party objects to the motion, a memorandum contra the motion is to be filed. After a memorandum contra is filed, a reply memorandum is filed pursuant to O.A.C. Rule 4901-1-12(A)(2). Duke’s “Reply” in response to a motion is improper under the Commission’s rules and should be stricken.

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If the Commission chooses to treat Duke's "Reply" as a memorandum contra OPAE's motion to intervene and to dismiss, OPAE herein files this Reply to Duke's improper "Reply." If Duke's strategy in referring to its pleading as a "reply" instead of a memorandum contra is to foreclose OPAE's opportunity to file a reply memorandum, the Commission should not deny OPAE its right to file a reply memorandum to a memorandum contra.

In its “Reply” Duke complains that OPAE should have elaborated on the doctrines of res judicata and collateral estoppel. Duke Reply at 4. Duke claims that the Commission’s denial of one waiver request does not forever bar every subsequent waiver request and that the Commission left open the potential for subsequent requests to waive O.A. C. Rule 4901:1-18-05(A).

OPAE did not argue that the denial of one waiver request forever bars subsequent waiver requests. OPAE argued that **this** application is barred by the doctrines of res judicata and collateral estoppel because it is the **same** waiver already denied by the Commission in Case No. 10-249-EL-WVR (“2010 Waiver Case”). The Commission’s Entry filed on June 2, 2010 in Case No. 10-249-EL-WVR makes clear that concerns for the protection of customers are critical:

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paid their utility bill may not have immediate access to text or electronic messaging, despite their selection of such means of notification at an earlier date.

Case No. 10-249-EL-WVR, Entry (June 2, 2010) at 8.

OPAE also stated that the Commission's Entry left the door open for future consideration under certain conditions:

Therefore, while the Commission may be willing to discuss alternative notice processes in the future, at this time, the Commission finds that the processes set forth in this rule should remain in force. Id.

The Commission directed Duke to commence discussions with the Staff regarding **alternative notice processes**. However, as OPAE argued in its memorandum in support of its motion to dismiss, Duke's new application is the same as the old application. Duke does not state that such discussions on alternative notice processes have occurred as required by the Commission. Duke failed to provide any substantive justification for filing essentially the same application. This is why the application should be dismissed.

Duke also claims that OPAE agreed in a stipulation that Duke would not renew its waiver request for a certain period of time, so that OPAE knew that Duke could renew its waiver request. Duke Reply at 6. Yes, it is obvious that OPAE knew that Duke would try again for a waiver of O.A. C. Rule 4901:1-18-05(A). In Case No. 10-2326-GE-RDR, Duke agreed in a stipulation also signed by OPAE not to seek a waiver of what is now Rule 4901:1-18-06(A)(2) – the personal visit requirement – through 2015. The Commission directed Duke to discuss alternative processes. The Commission identified steps that Duke might take to have a reconsideration of the waiver request.

Duke took none of those steps. Duke simply filed the same waiver request that had already been denied.

OPAE's motion to dismiss also cited Case No. 13-1938-EL-WVR, in which the Commission approved a waiver of Rule 4901:1-18-06(A)(2) as a pilot program for AEP Ohio. The AEP Ohio waiver established a series of metrics that will be analyzed, and Duke proposes the same analysis. In its motion to dismiss, OPAE argued that one pilot on the waiver of O.A. C. Rule 4901:1-18-05(A) is enough. There is no need for Duke customers to be subjected to a reduction in critical consumer protections, especially when the issue is being studied in another utility service territory. Duke provided no compelling reasons why the AEP Ohio pilot is inadequate for the Commission to determine whether Rule 4901:1-18-06(A)(2) should be rewritten, nor did Duke provide any justification for an additional pilot.

Duke argues that one pilot is not enough, because a pilot program that yields benefits for one utility's customers could not afford benefits to the customers of other utilities. Duke Reply at 6. Duke also argues that the data collected under its pilot would "reduce residential disconnections for nonpayment and, ultimately, the financial burden imposed upon all customers via uncollectible expense riders." Reply at 7.

Duke does not explain how collecting data from a pilot program could reduce disconnections, especially when the purpose of the waiver is to make disconnections easier by eliminating a personal visit to the premises prior to disconnection. As for reducing uncollectible expense riders, the waiver will not necessarily reduce uncollectible expense; it will simply deny customers the opportunity to maintain service and enter into payment arrangements.

Because Duke has previously requested and been denied the same waiver requested in the instant application, and Duke has done nothing to address the Commission's directives when the same waiver was denied, the doctrines of res judicata and collateral estoppel should be followed and the application should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Strike and Memorandum in Support or, in the alternative, Reply will be served by the Commission's Docketing Division electronically upon the following parties who are electronically subscribed on this 16th day of June 2016.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/16/2016 3:06:01 PM

in

Case No(s). 16-1096-EL-WVR

Summary: Motion to Strike and Memorandum in Support or, in the Alternative, Reply
electronically filed by Colleen L Mooney on behalf of Ohio Partners for Affordable Energy