

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Power Company for a Limited Waiver of) Case No. 17-1380-EL-WVR
Ohio Adm. Code 4901:1-18-06(A)(2).)

**MOTION TO STRIKE AEP OHIO’S JUNE 22, 2017 REPLY
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL
AND OHIO PARTNERS FOR AFFORDABLE ENERGY**

In this case involving the rights of consumers facing disconnection of their electric service, the Office of the Ohio Consumers’ Counsel (“OCC”) and Ohio Partners for Affordable Energy (“OPAE”) move to strike the “Reply Comments” filed by Ohio Power Company (“AEP Ohio”) in this case on June 22, 2017. AEP Ohio’s reply is prohibited by Ohio Adm. Code 4901-1-12(C) and was untimely filed under Ohio Adm. Code 4901-1-12(B)(2). The reasons the Public Utilities Commission of Ohio (“PUCO”) should grant this Motion to Strike are set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On June 1, 2017, AEP Ohio filed a “Motion for Extension of a Limited Waiver” in this case. On page 4 of the Motion, AEP Ohio specifically asked the PUCO for an expedited ruling on the motion: “AEP Ohio requests an expedited ruling on this waiver request because the current waiver expires on August 1, 2017.” Requests for expedited rulings are permissible under Ohio Adm. Code 4901-1-12(C). In such cases, the rule gives parties opposing the motion a shortened timeframe for filing a memorandum contra. Instead of the 15 days allowed for a memorandum contra other motions,¹ a party opposing a motion in which an expedited ruling is requested has only seven days to file a memorandum contra.² Rule 12(C) prohibits replies to a memorandum contra a motion seeking an expedited ruling unless the PUCO requests them.

On June 8, 2017 – seven days after the motion was filed – OCC and OPAE filed a memorandum contra AEP Ohio’s motion. The memorandum contra noted that it was unclear whether AEP Ohio was formally seeking an expedited ruling.³ This is primarily

¹ Ohio Adm. Code 4901-1-12(B)(1).

² Ohio Adm. Code 4901-1-12(C).

³ Memorandum Contra (June 8, 2017) at 2, n. 10.

because the request was not included in the title of the document, even though AEP Ohio specifically made the request for an expedited ruling in the motion itself. Nevertheless, the memorandum contra stated that AEP Ohio should not be allowed to file a reply to the memorandum contra because of Rule 12(C)'s prohibition on replies.⁴

On June 22, 2017 AEP Ohio docketed in this case a document titled "Reply Comments of Ohio Power Company in Support of Its Waiver Request." AEP Ohio's document specifically references the memorandum contra filed by OCC and OPAE, and states "AEP Ohio submits the following reply comments to both these parties' comments."⁵ Hence, no matter what AEP Ohio calls its June 22 pleading, it is clear that AEP Ohio's pleading is a reply to the June 8 memorandum contra.

The PUCO did not request that AEP Ohio file a reply to the memorandum contra. And AEP Ohio did not seek leave of the PUCO to file its pleading. Thus, AEP Ohio's reply is not allowed under Rule 12(C). In addition, the reply was untimely filed under Rule 12(B)(2), which states that any replies to a memorandum contra must be filed within seven days after service of the memorandum contra. AEP Ohio's reply is improper and the PUCO should strike it.

II. RECOMMENDATIONS

A. AEP Ohio's Reply Is Prohibited by Rule 12(C) and Should Be Stricken.

Rule 12(C) provides, in relevant part: "*Any motion may include a specific request for an expedited ruling. ... If any party objects to the issuance of such a ruling, or if the moving party fails to certify that no party has any objection, any party may file a*

⁴ *Id.*

⁵ AEP Ohio's Reply at 1.

memorandum contra within seven days after the service of the motion, or such other period as the commission, the legal director, the deputy legal director, or the attorney examiner requires. *No reply memoranda shall be filed in such cases unless specifically requested by the commission, the legal director, the deputy legal director, or the attorney examiner.*” (Emphasis added.)

Although AEP Ohio did not specifically mention Rule 12(C) in its June 1, 2017 motion in this case, it did make a specific request for an expedited ruling on the motion. In its motion, AEP Ohio stated: “AEP Ohio requests an expedited ruling on this waiver request because the current waiver expires on August 1, 2017.”⁶ Hence, Rule 12(C)’s prohibition against filing a reply applies to AEP Ohio in this case.

There are very few instances where the PUCO has had to enforce Rule 12(C)’s prohibition on a movant filing a reply memorandum after asking for an expedited ruling. Most recently, the PUCO struck portions of a utility’s reply memorandum that addressed arguments raised in opposition to waiver requests for which the utility had sought expedited consideration.⁷ The PUCO determined that those portions of the reply memorandum “are not permitted and are hereby stricken.”⁸ The utility in that case, however, specifically asked for an expedited ruling under Rule 12(C).⁹

⁶ AEP Ohio’s Motion at 4.

⁷ *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Entry (April 25, 2012), ¶ 10.

⁸ *Id.*

⁹ *See* Case No. 12-1230-EL-SSO, Motion for Waiver of Rules, Request for Expedited Treatment and Memorandum in Support Thereof (April 13, 2012) at 2.

On point, however, is a case where the PUCO granted a motion to strike a reply even where the movant did not specifically invoke Rule 12(C). In Case No. 04-1503-GE-UNC, OPAE sought an expedited ruling on a motion for clarification.¹⁰ Shortly thereafter, OCC filed a motion in support of OPAE's motion in which, among other things, OCC urged the PUCO to grant OPAE's request for an expedited ruling.¹¹ Neither motion mentioned Rule 12(C). Nevertheless, AEP Ohio filed a memorandum contra OPAE's motion within the timeframe required by Rule 12(C).¹²

OCC then filed a reply to AEP Ohio's memorandum contra.¹³ Subsequently, AEP Ohio filed a motion to strike OCC's reply. In its motion to strike, AEP Ohio noted that OCC's motion had specifically supported OPAE's request for an expedited ruling.¹⁴ AEP Ohio argued, "Having asked for expedited consideration, OCC is not entitled to submit a reply memorandum."¹⁵ AEP Ohio then stated that when a party seeks an expedited ruling, Rule 12(C) allows a reply memorandum only at the PUCO's request.¹⁶ "No such request has been made."¹⁷ Although neither OPAE nor OCC had invoked Rule

¹⁰ *In the Matter of the Investigation into Long Term Solutions Concerning Disconnection of Gas and Electric Service Winter Emergencies*, Case No. 04-1503-GE-UNC, OPAE Motion for Clarification and Request for Expedited Ruling (October 26, 2004).

¹¹ Case No. 04-1503-GE-UNC, OCC Motion in Support of Motion for Clarification and Request for Expedited Ruling of the Ohio Partners for Affordable Energy (October 28, 2004) at 4.

¹² Case No. 04-1503-GE-UNC, AEP Ohio's Memorandum Contra (November 2, 2004). AEP Ohio also referenced OCC's motion in a footnote. *Id.* at 2, n. 1.

¹³ Case No. 04-1503-GE-UNC, OCC's Reply to Memoranda Contra (November 9, 2004).

¹⁴ Case No. 04-1503-GE-UNC, AEP Ohio's Motion to Strike (November 12, 2004) at 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

12(C) in their motions, the PUCO agreed with AEP Ohio and granted the motion to strike OCC's reply.¹⁸

The circumstances in this case are similar to those in Case No. 04-1503. Here, AEP Ohio filed a motion on June 1, 2017 in which it specifically requested an expedited ruling. Under Rule 12(C), AEP Ohio forfeited its right to reply to any memorandum contra the motion. OCC and OPAE filed a memorandum contra seven days later, as provided in Rule 12(C). Then, AEP Ohio improperly filed a reply to the memorandum contra. The PUCO should follow the precedent set in Case No. 04-1503 and strike AEP Ohio's reply in this case.

B. Even if the PUCO finds that AEP Ohio's motion did not seek an expedited ruling, AEP Ohio's reply was untimely filed and should be stricken.

As discussed above, AEP Ohio sought an expedited ruling of its motion and hence its reply was not allowed under Rule 12(C). For that reason, AEP Ohio's reply should be stricken. But if the PUCO does not agree, it should nevertheless strike AEP Ohio's reply because it violates Rule 12(B)(2).

Rule 12(B)(2) provides that, except under two circumstances, "[a]ny party may file a reply memorandum within seven days after the service of a memorandum contra, or such other period as the commission, the legal director, the deputy legal director, or the attorney examiner requires." The two circumstances are where an expedited ruling is sought under Rule 12(C) – which prohibits the filing of a reply, as discussed above – or where an expedited ruling on a motion *without the filing of memoranda* "will not

¹⁸ Case No. 04-1503-GE-UNC, Entry (November 23, 2004) at 10.

adversely affect a substantial right of any party.”¹⁹ The latter circumstance does not apply here.

AEP Ohio did not timely file its reply under Rule 12(B)(2). OCC and OPAE timely filed the memorandum contra AEP Ohio’s motion and properly served it on June 8, 2017. Hence, under Rule 12(B)(2) AEP Ohio should have filed its reply no later than seven days later, i.e., June 15, 2017. Instead, AEP Ohio did not file its reply to the memorandum contra until June 22, 2017 – 14 days after the memorandum contra was filed. The PUCO did not alter the timeframe for AEP Ohio to file its reply, and AEP Ohio did not file a motion to accept a late-filed pleading with the reply. Hence, AEP Ohio’s reply (if allowed at all) was filed seven days past the time allowed under Rule 12(B)(2).

AEP Ohio’s reply violates Rule 12(B)(2). If the PUCO does not follow the recommendation of OCC and OPAE to strike AEP Ohio’s reply under Rule 12(C), it should strike the reply under Rule 12(B)(2).

III. CONCLUSION

Rule 12(C) prohibits the filing of a reply memorandum by a party seeking an expedited ruling on a motion, unless the PUCO asks for a reply. The PUCO has made no such request in this case. The PUCO has applied Rule 12(C) even where the movant has not invoked it. This case aligns squarely with the PUCO’s precedent in striking inappropriate replies. In addition, AEP Ohio’s reply was not timely filed under Rule 12(B)(2). The PUCO should grant this motion and strike the reply AEP Ohio filed in this case on June 22, 2017.

¹⁹ Ohio Adm. Code 4901-1-12(F).

Respectfully submitted,

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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 electronic transmission this 30th day of June 2017.

/s/ Terry L Etter

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Summary: Motion Motion to Strike AEP Ohio's June 22, 2017 Reply by the Office of the Ohio Consumers' Counsel and Ohio Partners for Affordable Energy electronically filed by Ms. Deb J. Bingham on behalf of Etter, Terry L.