

IN THE SUPREME COURT OF OHIO

Duke Energy Ohio, Inc.)	Case No. 08-0367
)	
Appellant,)	
)	Appeal from the Public
v.)	Utilities Commission of Ohio
)	Case Nos. 03-93-EL-ATA, 03-2079-
The Public Utilities Commission)	EL-AAM, 03-2081-EL-AAM,
of Ohio,)	03-2080-EL-ATA
)	
Appellee.)	

**MOTION TO DISMISS APPEAL
FILED BY APPELLANT DUKE ENERGY OHIO, INC.
AND
MOTION TO STRIKE NOTICE OF APPEAL
FILED BY APPELLANT DUKE ENERGY OHIO, INC.
BY APPELLANT,
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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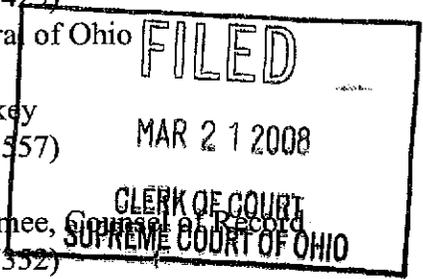
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I. INTRODUCTION

Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), moves this Court for an order dismissing the appeal of Duke Energy, Inc. ("Duke Energy" or the "Company," formerly known as the Cincinnati Gas and Electric Company) as the result of its failure to include a certificate of filing in the Notice of Appeal ("Notice") filed by Duke Energy. A certificate of filing is required in all appeals from the Public Utilities Commission of Ohio ("Appellee" or "PUCO").

The OCC also moves this Court for an order striking the Notice filed by Duke Energy for failure of the Company to properly serve its Notice.

II. HISTORY OF THESE CASES ON APPEAL

The PUCO action that is the subject of appeal in this case was an Order on Remand and Entry on Rehearing that resulted from an earlier appeal of a PUCO order by the OCC. *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789. On February 15, 2008, Duke Energy filed with this Court its Notice regarding the PUCO cases stated in the above-stated caption ("*PUCO Case Nos. 03-93-EL-ATA, et al.*"). Duke Energy did not include a certificate of filing in its Notice. Furthermore, the Company did not serve its Notice on the OCC, a party in the cases before the PUCO, and apparently did not serve its Notice on any other party to the underlying cases before the PUCO.

On February 19, 2008, the OCC gave notice of its appeal from the PUCO cases stated in the above-stated caption.

In part, the notices filed by Duke Energy and the OCC are related. Duke Energy's Notice states that the Infrastructure Maintenance Fund ("IMF") charge should not be avoidable for any

customer. Notice at 3, Proposition (1). The OCC's notice of appeal states that the "Remand Order fails to eliminate capacity charges that are simply surcharges . . . without any evidentiary basis." OCC Notice of Appeal at 2, Proposition A.1. (February 19, 2008). Duke Energy states that the treatment of avoidable generation charges in the Remand Order "requires DE-Ohio to subsidize the competitive retail electric service market" (Notice at 3, Proposition (3)), while the OCC states that "the Remand Order fails to consider the needs of the competitive market for the bypassability [i.e. avoidability] of all standard service offer components." OCC Notice of Appeal at 2, Proposition A.2. (February 19, 2008).

On March 19, 2008, the PUCO filed a Motion to Strike and Motion to Dismiss, basing its argument on Duke Energy's failure to include a certificate of filing in its Notice of Appeal.

III. LAW AND ARGUMENT

A. Duke Energy's Notice Did Not Contain the Required Certificate of Filing and Should be Stricken.

This Court should strike Duke Energy's Notice because it failed to abide by S.Ct.Prac.R.

XIV(2)(C)(2). That rule states:

In an appeal from the Public Utilities Commission . . . , the notice of appeal shall also contain a certificate of filing to evidence that the appellant filed a notice of appeal with docketing division of the Public Utilities Commission in accordance with sections 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

The Notice does not contain such a certificate of filing. Accordingly, Duke Energy's Notice is defective.

Recent Court precedent provides that failure to include a certificate of filing results in the dismissal of the associated appeal. *Ohio Consumers' Counsel v. Public Util. Comm.*, 105 Ohio St.3d 1211, 2005-Ohio-1023 ("*Consumers' Counsel 2005*"). Failure of the appellant to include a

certificate of filing in its notice of appeal in that case, even where such filing was actually made, was fatal to the appeal in *Consumers' Counsel 2005*. As a matter of consistent application of its rules, the Court should dismiss Duke Energy's appeal.

This Court's decision in *Consumers' Counsel 2005* dismissed an appeal by the OCC upon motions by the PUCO and the utility (Columbia Gas). The Court dismissed OCC's appeal in spite of the fact that neither the PUCO nor the utility in that case alleged prejudice to their cases. *Consumers' Counsel 2005* at ¶9 (dissent by Justices Pfeifer and Resnick). The OCC filed its notice of appeal with the PUCO, but failed to state this fact in a certificate of filing. The OCC's notice of appeal was filed less than a month after the Court's rules changed to require such a certificate. *Id.* at ¶6. The OCC moved for reconsideration of the dismissal to assert that the rule violation was technical and not determinative. The Court denied reconsideration. *Ohio Consumers' Counsel v. Public Util. Comm.*, 105 Ohio St.3d 1565, 2005-Ohio-2447.

Writing in dissent in the Court's original decision, Justice Pfeifer wrote that, "[a]t most, we should rule that S.Ct.Prac.R. XIV(2)(C)(2) will be strictly enforced from this date forward." *Id.* at ¶9. The equities involved in the instant case do not, therefore, favor Duke Energy. The Company had the advantage of three and one-half years (July 2004 to February 2008) since the time when the Court first required a certificate of filing as well as the advantage of the Court's earlier decision that stated the consequences for failure to include a certificate of filing in any notice of appeal. Despite these advantages, Duke Energy failed to include in its Notice the required certificate of filing.

The Court has held that enforcement of its rules should be consistent. *Miller v. Lint* (1980), 62 Ohio St.2d 209, 215. As a matter of consistent application of the Court's rules, as

stated in *Miller v. Lint*, Duke Energy's appeal should be dismissed as the result of the Company's failure to include a certificate of filing in its Notice.

B. Duke Energy's Notice Was Not Properly Served and Should be Stricken.

Pursuant to S.Ct.Prac.R. II(3)(B)(1), an appeal of a final order by the PUCO is initiated by the filing of a notice of appeal with the Supreme Court and with the PUCO. Furthermore, a copy of the notice of appeal must be served upon parties to the underlying case before the PUCO. Specifically, S.Ct.Prac.R. XIV(2)(A)(2) states:

In an appeal or a cross-appeal from the Public Utilities Commission . . . , a copy of the notice of appeal or cross-appeal shall . . . be served upon all parties to the proceeding before the Public Utilities Commission . . . that is the subject of the appeal or cross-appeal.

The Certificate of Service that is included in the Notice lists only service upon the Section Chief for the Office of the Attorney General who is assigned to the PUCO. Notice at 4 (February 15, 2007). The OCC -- a party to the proceeding before the PUCO -- was not served as required by the Court's rule.¹ There have been other occasions in the cases below where Duke Energy and its affiliates failed to properly serve the OCC.

Pursuant to S.Ct.Prac.R. XIV(2)(D)(2), the Supreme Court "may strike the document" if the document has not been properly served. Such an action would terminate Duke Energy's appeal. The Court should strike the Company's Notice for its failure to comply with the Court's rule on service.

¹ From the contents of the Company's Certificate of Service, other parties were apparently not served.

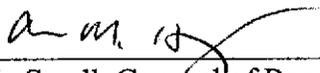
IV. CONCLUSION

In violation of this Court's rules, the Notice filed by Duke Energy is deficient because the Notice was filed without the required certificate of filing and because parties to the underlying cases before the PUCO were not properly served. Duke Energy's appeal was not properly perfected.

WHEREFORE, the OCC respectfully submits that Duke Energy's portion of the above-captioned appeal should be dismissed and Duke Energy's Notice should be stricken. The remaining portion of this appeal, consisting of the appeal properly noticed by the OCC, should remain and should constitute the entirety of Sup. Case No. 08-0367.

Respectfully submitted,

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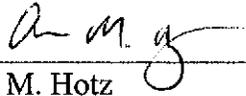
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motions of the Office of the Ohio Consumers' Counsel was served upon the below-listed counsel by regular U.S. Mail, prepaid, this 21st day of March 2008.



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