

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Its Natural Gas Distribution Rates.)) Case No. 2014-0328

In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.) Appeal from the Public Utilities Commission of Ohio

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service.) Public Utilities Commission of Ohio Case Nos. 12-1685-GA-AIR 12-1686-GA-ATA 12-1687-GA-ALT

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.) 12-1688-GA-AAM

FILED MAY 23 2014 CLERK OF THE SUPREME COURT OF OHIO

JOINT MOTION TO STRIKE DUKE ENERGY OHIO INC.'S MAY 20, 2014 MOTION BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, KROGER COMPANY, OHIO MANUFACTURERS' ASSOCIATION, AND OHIO PARTNERS FOR AFFORDABLE ENERGY

Bruce J. Weston (Reg. No. 0016973) Ohio Consumers' Counsel

Mike DeWine (Reg. No. 0009181) Attorney General of Ohio

Larry S. Sauer (Reg. No. 0039223) Counsel of Record Joseph P. Serio (Reg. No. 0036959) Assistant Consumers' Counsel Office of the Ohio Consumers' Counsel 10 West Broad Street, Suite 1800 Columbus, Ohio 43215-3485 (614) 466-1312 - Telephone (614) 466-9475 - Facsimile larry.sauer@occ.ohio.gov joseph.serio@occ.ohio.gov

William L. Wright (Reg. No. 0018010) Counsel of Record Section Chief, Public Utilities Section Devin D. Parram (Reg. No. 0082507) Public Utilities Commission of Ohio 180 East Broad Street, 6th Floor Columbus, Ohio 43215-3793 (614) 466-4397 - Telephone (614) 644-8767 - Facsimile william.wright@puc.state.oh.us devin.parram@puc.state.oh.us

Attorneys for Appellant Office of the Ohio Consumers' Counsel

Attorneys for Appellee Public Utilities Commission of Ohio

Kimberly W. Bojko (Reg. No. 0069402)
Counsel of Record
Mallory M. Mohler (Reg. No. 0089508)
Carpenter Lipps & Leland LLP
280 North High Street
Suite 1300
Columbus, Ohio 43215
(614) 365-4124 – Telephone
(614) 365-9145 – Facsimile
Bojko@CarpenterLipps.com
Mohler@CarpenterLipps.com

*Attorneys for Appellant
The Kroger Company*

Robert A. Brundrett (Reg. No. 0086538)
Counsel of Record
Ohio Manufacturers' Association
33 North High Street
Columbus, Ohio 43215
(614) 629-6814 - Telephone
(614) 224-1012 - Facsimile
rbrundrett@ohiomfg.com

*Attorney for Appellant
Ohio Manufacturers' Association*

Colleen L. Mooney (Reg. No. 0015668)
Counsel of Record
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839
(614) 488-5739 – Telephone
(419) 425-8862 – Facsimile
cmooney@ohiopartners.org

*Attorney for Appellant
Ohio Partners for Affordable Energy*

Mark A. Whitt (Reg. No. 0067996)
Counsel of Record
Andrew J. Campbell (Reg. No. 0081485)
Gregory L. Williams (Reg. No. 0088758)
WHITT STURTEVANT LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, Ohio 43215
(614) 224-3911 – Telephone
(614) 224-3960 – Facsimile
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
williams@whitt-sturtevant.com

*Counsel for Intervening Appellees
The East Ohio Gas Company D/B/A
Dominion East Ohio and Vectren Energy
Delivery of Ohio, Inc.*

Stephen B. Seiple (Reg. No. 0003809)
Counsel of Record
200 Civic Center Drive
P.O. Box 117
Columbus, Ohio 43216
(614) 460-4648 – Telephone
(614) 460-6986 – Facsimile
sseiple@nisource.com

*Counsel for Intervening Appellee
Columbia Gas of Ohio, Inc.*

Amy B. Spiller (Reg. No. 0047277)
Counsel of Record
Elizabeth H. Watts (Reg. No. 0031092)
Associate General Counsel
139 East Fourth Street
Cincinnati, Ohio 45202
(513) 287-4359 – Telephone
(513) 287-4386 – Facsimile
amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com

*Counsel for Intervening Appellee
Duke Energy Ohio, Inc.*

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Its Natural Gas Distribution Rates.))) Case No. 2014-0328
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)) Appeal from the Public Utilities Commission of Ohio)
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service.)) Public Utilities Commission of Ohio) Case Nos. 12-1685-GA-AIR 12-1686-GA-ATA 12-1687-GA-ALT
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.))) 12-1688-GA-AAM

**JOINT MOTION TO STRIKE
DUKE ENERGY OHIO, INC.'S
MAY 20, 2014 MOTION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL,
KROGER COMPANY,
OHIO MANUFACTURERS' ASSOCIATION,
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY**

The Office of the Ohio Consumers' Counsel ("OCC"), the Kroger Company ("Kroger"), Ohio Manufacturers' Association ("OMA"), and Ohio Partners for Affordable Energy ("OPAE")¹ respectfully move this Court to strike Intervening Appellee Duke Energy Ohio, Inc.'s ("Duke") "Motion to Lift Stay or in the Alternative, Motion to Require a Bond Conditioned for the Prompt Payment by the Appellants of all Damages Caused by the Delay in the Enforcement of the Order" ("Motion to Lift Stay"). As explained in the attached Memorandum in Support, Duke's Motion to Lift Stay, filed

¹ Collectively "Joint Movants."

May 20, 2014, is a motion for reconsideration in disguise. Specifically, through its Motion to Lift Stay, Duke is asking this Court to reconsider its decision to grant Joint Movants' motion for stay without posting bond. A motion for reconsideration of that Court decision is not permitted under S.Ct.Prac.R. 18.02(B) and (D). Indeed, had Duke's motion been properly captioned as a "Motion for Reconsideration," then the Clerk would have rejected its filing under S.Ct.Prac.R. 18.02(D).

For the reasons set forth in the following Memorandum in Support, Duke's May 20, 2014, Motion should be stricken.

Respectfully submitted,

BRUCE J. WESTON (Reg. No. 0016973)
OHIO CONSUMERS' COUNSEL



Larry S. Sauer (Reg. No. 0039223)
Counsel of Record
Joseph P. Serio (Reg. No. 0036959)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: Sauer (614) 466-1312
Telephone: Serio (614) 466-9565
larry.sauer@occ.ohio.gov
joseph.serio@occ.ohio.gov

Kimberly W. Bojko / Yes by electronic authorization

Kimberly W. Bojko (Reg. No. 0069402)

Counsel of Record

Mallory M. Mohler (Reg. No. 0089508)

Carpenter Lipps & Leland LLP

280 North High Street

Suite 1300

Columbus, Ohio 43215

(614) 365-4124 – Telephone

(614) 365-9145

Bojko@CarpenterLipps.com

Mohler@CarpenterLipps.com

Attorneys for Appellant

The Kroger Company

Robert A. Brundrett / Yes by electronic authorization

Robert A. Brundrett (Reg. No. 0086538)

Counsel of Record

Ohio Manufacturers' Association

33 North High Street

Columbus, Ohio 43215

(614) 629-6814 - Telephone

(614) 224-1012 - Facsimile

rbrundrett@ohiomfg.com

Attorney for Appellant

Ohio Manufacturers' Association

Colleen L. Mooney / Yes by electronic authorization

Colleen L. Mooney (Reg. No. 0015668)

Counsel of Record

Ohio Partners for Affordable Energy

231 West Lima Street

Findlay, Ohio 45839

(614) 488-5739 – Telephone

(419) 425-8862 – Facsimile

cmooney@ohiopartners.org

Attorney for Appellant

Ohio Partners for Affordable Energy

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Its Natural Gas Distribution Rates.))) Case No. 2014-0328
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)) Appeal from the Public Utilities Commission of Ohio)
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service.)) Public Utilities Commission of Ohio) Case Nos. 12-1685-GA-AIR 12-1686-GA-ATA 12-1687-GA-ALT 12-1688-GA-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.)))

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Between March 5 and March 10, 2014, each of the Joint Movants appealed to this Court from the underlying order and entry on rehearing issued by the Public Utilities Commission of Ohio (“PUCO”) on November 13, 2013 and January 8, 2014, respectively (collectively, “PUCO Order”). On March 17, 2014, Joint Movants filed a motion to stay the PUCO Order (“Motion for Stay”). In their memorandum in support, Joint Movants explained in detail (1) why the motion should be granted (Motion for Stay at 14-23), and (2) why no bond should be required (Motion for Stay at 3-14).

Duke filed a motion to intervene as an appellee in this proceeding on March 25, 2014, and on the same date filed its memorandum contra the Motion for Stay (“Memorandum Contra”). In its Memorandum Contra, Duke opposed the Motion for

Stay, addressing in detail (1) why the motion should not be granted (Memorandum Contra at 6-13), and (2) why a bond was required (Memorandum Contra at 3-6).²

By its May 14, 2014 Entry, after fully considering the pleadings, this Court granted the Motion for Stay and specifically did not require the posting of a bond.

Dissatisfied with the Court's decision to grant the Motion for Stay,, Duke filed its Motion to Lift Stay, once again arguing (1) why the Motion for Stay should not be granted, and (2) why a bond should be required.

Duke's Motion to Lift Stay is a motion for reconsideration in disguise. That improper motion should be stricken pursuant to S.Ct.Prac.R. 18.02(B) and (D), and the Court's recent precedent in *Mickey v. Rokakis*, 131 Ohio St.3d 1527, 2012-Ohio-1935.

II. ARGUMENT

A. A Motion that Asks the Court to Reconsider Its Decision to Grant a Stay of a PUCO Order is Prohibited by S.Ct.Prac.R. 18.02(B) and (D).

Reasonable minds cannot differ that Duke's Motion to Lift Stay asks the Court to reconsider its decision to stay the PUCO Order without requiring a bond. Motions for reconsideration are governed by S.Ct.Prac.R. 18.02, which severely restricts their availability. S.Ct.Prac.R. 18.02(B) provides:

A motion for reconsideration shall not constitute a reargument of the case and may be filed *only* with respect to the following Supreme Court decisions:

- (1) Refusal to accept a jurisdictional appeal;
- (2) The sua sponte dismissal of a case;
- (3) The granting of a motion to dismiss;
- (4) A decision on the merits of a case.

² Significantly, although the PUCO filed a memorandum contra the Motion for Stay, the PUCO has not attempted to challenge the Court's decision to grant the stay through an improper motion for reconsideration like Duke.

Emphasis added. The Court's decision to stay the PUCO's Order (memorialized in its May 14, 2014 Entry) is not a decision included within the above four categories, and, thus, cannot be challenged with a motion for reconsideration. Indeed, had the Motion to Lift Stay been properly captioned as a motion for reconsideration, it would have been rejected by the Court's Clerk for filing. S.Ct.Prac.R. 18.02(D) provides:

The Clerk *shall* refuse to file a motion for reconsideration that is not *expressly* permitted by this rule or is not timely.

Emphasis added.

Such a violation of the Court's Rules of Practice hardly is a matter of first impression. Recently, the Court was faced with a similar violation in which an appellant asked the Court to reconsider its denial of a request to stay a lower court's decision. In *Mickey v. Rokakis*, 131 Ohio St.3d 1527, 2012-Ohio-1935 ("*Mickey*"), the Court held:

Upon review of appellant's motion for reconsideration of this court's April 18, 2012 stay denial, it is ordered by the court that the motion is stricken as prohibited by S.Ct.Prac.R. 11.2(D)³ [now S.Ct.Prac.R. 18.02(D)].

Thus, it is settled. Reconsideration cannot be sought of the Court's decision to grant or deny a motion seeking to stay a lower tribunal's decision, and if such motion for reconsideration is filed, it should be stricken.

III. CONCLUSION

Duke's Motion to Lift Stay is a disguised motion for reconsideration of the Court's decision to grant the stay sought. Under the authority of S.Ct.Prac.R. 18.02(B)

³ See Appendix. S.Ct.Prac.R 11.2(D), effective January 1, 2010, was renumbered as S.Ct.Prac.R. 18.02(D), effective January 1, 2013.

and (D), and the Court's precedent in *Mickey*, Joint Movants respectfully request that Duke's Motion to Lift Stay be stricken.

Respectfully submitted,

BRUCE J. WESTON
OHIO CONSUMERS' COUNSEL



Larry S. Sauer (Reg. No. 0039223)
Counsel of Record

Joseph P. Serio (Reg. No. 0036959)

Assistant Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

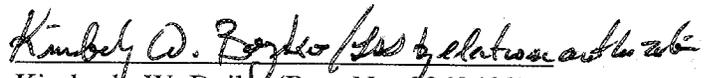
Telephone: Sauer (614) 466-1312

Telephone: Serio (614) 466-9565

larry.sauer@occ.ohio.gov

joseph.serio@occ.ohio.gov

Office of the Ohio Consumers' Counsel



Kimberly W. Bojko (Reg. No. 0069402)

Counsel of Record

Mallory M. Mohler (Reg. No. 0089508)

Carpenter Lipps & Leland LLP

280 North High Street

Suite 1300

Columbus, Ohio 43215

(614) 365-4124 – Telephone

(614) 365-9145

Bojko@CarpenterLipps.com

Mohler@CarpenterLipps.com

Attorneys for Appellant

The Kroger Company

Robert A. Brundrett / All by electronic authentication

Robert A. Brundrett (Reg. No. 0086538)
Counsel of Record
33 N. High Street
Columbus, Ohio 43215
(614) 629-6814 - Telephone
(614) 224-1012 - Facsimile
rbrundrett@ohiomfg.com

*Attorney for Appellant
Ohio Manufacturers' Association*

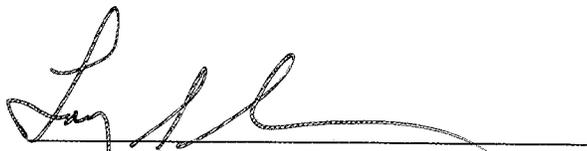
Colleen L. Mooney / All by electronic authentication

Colleen L. Mooney (Reg. No. 0015668)
Counsel of Record
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839
(614) 488-5739 – Telephone
(419) 425-8862 – Facsimile
cmooney@ohiopartners.org

*Attorney for Appellant
Ohio Partners for Affordable Energy*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Joint Motion* has been served upon the below-named persons via electronic transmittal this 23rd day of May 2014.



Larry S. Sauer
Assistant Consumers' Counsel

SERVICE LIST

William L. Wright
Counsel of Record
Section Chief, Public Utilities Section
Devin D. Parram
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
william.wright@puc.state.oh.us
devin.parram@puc.state.oh.us

*Attorneys for Appellee
Public Utilities Commission of Ohio*

Mark. A. Whitt (0067996)
Counsel of Record
Andrew J. Campbell (0081485)
Gregory L. Williams (0088758)
WHITT STURTEVANT LLP
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, Ohio 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
williams@whitt-sturtevant.com

*Counsel for Intervening Appellees
The East Ohio Gas Company D/B/A Dominion
East Ohio and Vectren Energy Delivery of Ohio,
Inc.*

Stephen B. Seiple (0003809)
Counsel of Record
200 Civic Center Drive
P.O. Box 117
Columbus, Ohio 43216
sseiple@nisource.com

*Counsel for Intervening Appellee
Columbia Gas of Ohio, Inc.*

Amy B. Spiller (0047277)
Counsel of Record
Elizabeth H. Watts (0031092)
Associate General Counsel
139 East Fourth Street
Cincinnati, Ohio 45202
amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com

*Counsel for Intervening Appellee
Duke Energy Ohio, Inc.*

APPENDIX

S.Ct.Prac.R. 11.2(D), effective January 1, 2010

it is filed with the Clerk. In every case involving termination of parental rights or adoption of a minor child, or both, the Supreme Court will expedite the filing of the judgment entry or other orders for journalization.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 7-1-04, 1-1-08, 1-1-10)

S.Ct. Prac. R. 11.2. Motion for reconsideration

(A) Except as provided in S.Ct. Prac. R. 10.9(B), any motion for reconsideration must be filed within ten days after the Supreme Court's judgment entry or order is filed with the Clerk.

(B) A motion for reconsideration shall not constitute a reargument of the case and may be filed only with respect to the following:

(1) The Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal or the dismissal of a claimed appeal of right as not involving a substantial constitutional question;

(2) The sua sponte dismissal of a case;

(3) The granting of a motion to dismiss;

(4) A decision on the merits of a case.

(C) An amicus curiae may not file a motion for reconsideration. An amicus curiae may file a memorandum in support of a motion for reconsideration within the time permitted for filing a motion for reconsideration.

(D) The Clerk shall refuse to file a motion for reconsideration that is not expressly permitted by this rule or that is not timely.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 7-1-04, 1-1-08, 1-1-10)

Staff Notes

2010:

The provision regarding the filing of a motion for reconsideration in an expedited election case was moved to Rule 10.9.

S.Ct. Prac. R. 11.3. Memorandum opposing motion for reconsideration

(A) Except as provided in S.Ct. Prac. R. 10.9(B), a party opposing reconsideration may file a memorandum opposing a motion for reconsideration within ten days of the filing of the motion.

(B) An amicus curiae may file a memorandum opposing a motion for reconsideration within ten days of the filing of the motion.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 7-1-04, 1-1-08, 1-1-10)

Staff Notes

2010:

The provision regarding the filing of a memorandum opposing a motion for reconsideration in an expedited election case was moved to Rule 10.9.

S.Ct. Prac. R. 11.4. Issuance of mandate

(A) After the Supreme Court has decided an appeal on the merits, the Clerk shall issue a mandate. The mandate shall be issued ten days after entry of the judgment, unless a motion for reconsideration is filed within that time in accordance with S.Ct. Prac. R. 10.9(B) or 11.2.

(1) If a motion for reconsideration is denied, the mandate shall be issued when the order denying the motion for reconsideration is filed with the Clerk.

(2) If a motion for reconsideration is granted, the mandate shall be issued ten days after the entry of the judgment is filed with the Clerk.

(B) No mandate shall be issued on the Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal or the dismissal of a claimed appeal of right as not involving a substantial constitutional question.

(C) A certified copy of the judgment entry shall constitute the mandate.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 7-1-04, 1-1-08, 1-1-10)

S.Ct. Prac. R. 11.5. Assessment of costs

(A) Unless otherwise ordered by the Supreme Court, costs in an appeal shall be assessed as follows at the conclusion of the case:

(1) If an appeal is dismissed, to the appellant;

(2) If the judgment or order being appealed is affirmed, to the appellant;

(3) If the judgment or order being appealed is reversed, to the appellee;

(4) If the judgment or order being appealed is affirmed or reversed in part or is vacated, the parties shall bear their respective costs.

(B) As used in this rule, "costs" includes only the filing fee paid to initiate the appeal with the Supreme Court, unless the Court, sua sponte or upon motion, assesses additional costs.

(Adopted eff. 6-1-94; amended eff. 4-1-96, 4-1-00, 7-1-04, 1-1-08, 1-1-10)

S.Ct. Prac. R. 11.6. Application for reopening

(A) An appellant in a death penalty case involving an offense committed on or after January 1, 1995, may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel in the Supreme Court. An application for reopening shall be filed