

ORIGINAL

IN THE SUPREME COURT OF OHIO

In the Matter of the Application of Duke Energy of Ohio, Inc., for an Increase in Its Natural Gas Distribution Rates. : Case No. 2014-0328
: :
: On Appeal from the Public Utilities Commission of Ohio
: :
In the Matter of the Application of Duke Energy of Ohio, Inc. for Tariff Approval. : Public Utilities Commission of Ohio
: Case Nos. 12-1685-GA-AIR
: 12-1686-GA-ATA
In the Matter of the Application of Duke Energy of Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service. : 12-1687-GA-ALT
: 12-1688-GA-AAM
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In the Matter of the Application of Duke Energy of Ohio, Inc., for Approval to Change Accounting Methods. :
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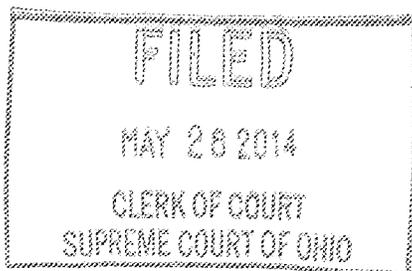
INTERVENING APPELLEE DUKE ENERGY OHIO, INC.'S
RESPONSE TO JOINT APPELLANTS' MOTION TO STRIKE

Amy. B. Spiller (0047277)
Counsel of Record
Elizabeth H. Watts (0031092)
Associate General Counsel
Duke Energy Ohio, Inc.
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

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

Mike DeWine (0009181)
Attorney General of Ohio
William L Wright (0018010)
Section Chief
Thomas W. McNamee (0017352)
Counsel of Record
Devin D. Parram (0082507)
Katie L. Johnson (0091064)
Assistant Attorney General
Public Utilities Section
180 East Broad Street, Sixth Floor
Columbus, Ohio 43215-3783
(614) 466-4397 - Telephone
(614) 644-8767 - Facsimile
Thomas.McNamee@puc.state.oh.us
Devin.Parram@puc.state.oh.us

*Attorneys for Appellee Public Utilities
Commission of Ohio*



Bruce J. Weston (0016973)

Ohio Consumers' Counsel

Larry S. Sauer (0039223)

Counsel of Record

Joseph P. Serio (0036959)

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

110 West Broad Street

Columbus, Ohio 45215

(614) 466-1312 - Telephone

(614) 466-9475 - Facsimile

Larry.Sauer@occ.state.oh.us

Joe.Serio@occ.state.oh.us

*Attorneys for Appellant Office of
the Ohio Consumers' Counsel*

Robert A. Brundrett (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*

Mark A. Whitt (0067996)

Counsel of Record

Andrew J. Campbell

Gregory L. Williams

WHITT STURTEVANT LLP

The Key Bank Building

88 East Broad Street, Suite 1590

Columbus, Ohio 43215

(614)224-3911 – Telephone

(614)224-3960 - Facsimile

whitt@whitt-sturtevant

campbell@whitt-sturtevant

Williams@whitt-sturtevant

*Counsel for Intervening Appellees
The East Ohio Gas Company D/B/A*

*Dominion East Ohio and Vectren Energy
Delivery of Ohio, Inc.*

Kimberly W. Bojko (0069402)

Counsel of Record

Mallory M. Mohler (0089508)

Carpenter Lipps & Leland LLP

280 North High Street

Suite 1300

Columbus, Ohio 43215

(614) 365-4100 – Telephone

(614) 365-9145 – Facsimile

Bojko@CarpenterLipps.com

Mohler@CarpenterLipps.com

*Attorneys for Appellant
The Kroger Company*

Colleen L. Mooney (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*

Stephen B. Seiple (0003809)

Counsel of Record

200 Civic Center Drive

P.O. Box 117

Columbus, Ohio 43216

(614) 460-4648

(614) 460-6986

sseiple@nisource.com

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

RESPONSE TO MOTION TO STRIKE

Pursuant to S.Ct.Prac.R. 4.01(B), Intervening Appellee Duke Energy Ohio, Inc., (Duke Energy Ohio) submits this Response to the Motion to Strike of the Office of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy, The Kroger Company, and Ohio Manufacturers' Association (Joint Appellants). In moving to strike, Joint Appellants attempt to mischaracterize Duke Energy Ohio's Motion to Lift Stay as a motion for reconsideration. Joint Appellants are incorrect. The Motion to Lift Stay should not be viewed as a motion for reconsideration but should, instead, be granted.

Pursuant to S.Ct.Prac.R. 4.01(A), Duke Energy Ohio sought, through its motion, to demonstrate that Joint Appellants' Motion for a Stay had misstated the facts on which the motion was based. As the Court is well aware, in determining whether to grant a stay, one element of critical significance is whether the stay could harm other parties.¹ Joint Appellants erroneously informed the Court that Duke Energy Ohio would collect carrying charges on its deferred costs, thus not being at any risk of harm from a stay. As stated in their Motion for a Stay, "Duke's loss of income will have been only temporary."² But this is untrue. The Order of the Public Utilities Commission of Ohio (Commission) specifically denied Duke Energy Ohio any ability to collect carrying charges. The harm to Duke Energy Ohio that will result from staying the order is therefore clear.

In its Motion to Lift Stay, filed pursuant to S.Ct.Prac.R. 4.01(A), Duke Energy Ohio explained the error and corrected the facts so that the Court would have accurate information

¹ *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 31 Ohio St. 3d 604, 606, 510 N.E.2d 806 (1987) (Douglas, J., dissenting).

² Joint Motion for Stay, Memorandum in Support at p. 23.

upon which to determine the proper course of action. Duke Energy Ohio urged the Court to issue a new Order that either lifts the stay altogether, or requires a bond that is conditioned for the prompt payment of all damages caused by the delay in the enforcement of the Commission's Order, which Order lawfully approved recovery of costs for environmental investigation and remediation.

In their newest effort, Joint Appellants try to recast Duke Energy Ohio's Motion to Lift Stay as a motion for reconsideration, citing to S.Ct.Prac.R. 18.02 and *Mickey v. Rokakis*, 2012-Ohio-1935, 131 Ohio St.3d 1527. Neither argument suffices. S.Ct.Prac.R. 18.02 limits motions for reconsideration of Supreme Court judgment entries to certain identified circumstances, none of which would apply here. But the existence of this rule is inapposite. The Motion to Lift Stay is not seeking reconsideration of the judgment entry. Rather, it seeks a new decision, on the basis of new facts and circumstances.

The *Mickey* case cited by Joint Appellants for their recharacterization of the Motion to Lift Stay, similarly provides no support. In that case, the movant actually filed a motion for reconsideration. The motion was stricken on the basis of S.Ct.Prac.R. 18.02. All that is proved by *Mickey* is that the rule has been applied to prohibit motions for reconsideration that do not fall within the permitted categories. The case proves nothing with regard to whether a motion to lift a stay should be deemed to be asking for reconsideration.

As explained above, Duke Energy Ohio did not submit a Motion for Reconsideration. Rather, the Company submitted a motion pursuant to S.Ct.R.Prac. 4.01(A), which allows "an application for an order or other relief." The rule continues, requiring that such an application "shall be made by filing a motion for the order or relief." The motion was supported by the explanation of the Joint Appellants' erroneous assertion that Duke Energy Ohio would collect

interest during any delay. Indisputably, a motion under S.Ct.Prac.R. 4.01 is an appropriate procedure to request that a stay be lifted. Duke Energy Ohio is not seeking a reconsideration of a previous decision, but rather, is asking the Court to look at facts not previously made clear, in a new and different set of circumstances. This motion seeks a different form of relief than was addressed by the prior motion for a stay.

Joint Appellants compounded the complexity by filing their own motion – a motion to strike Duke Energy Ohio’s motion - rather than responding in the ordinary course, as permitted by S.Ct.Pract.R. 4.01(B). It appears that Joint Appellants chose not to respond on the merits of Duke Energy Ohio’s Motion to Lift Stay because they cannot dispute the substance thereof. As discussed above, Joint Appellants can point to nothing in the Commission’s order that would allow collection of carrying costs. The stay’s harm to Duke Energy Ohio is indisputable.

Joint Appellants’ Motion to Strike should be denied.

Respectfully submitted,



Amy B. Spiller (0047277)

Counsel of Record

Elizabeth H. Watts (0031092)

Associate General Counsel

Duke Energy Ohio, Inc.

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

Attorneys for Intervening Appellee

Duke Energy Ohio, Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that, on this 28th day of May, 2014, a copy of the foregoing Response to Motion to Strike was served by ordinary mail, on the following:

Bruce J. Weston (0016973)
Larry S. Sauer (0039223)
Joseph P. Serio (0036959)
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
110 West Broad Street
Columbus, Ohio 45215
*Attorneys for Appellant Office of
the Ohio Consumers' Counsel*

Robert A. Brundrett (0086538)
Counsel of Record
Ohio Manufacturers' Association
33 North High Street
Columbus, Ohio 43215
*Attorney for Appellant Ohio
Manufacturers' Association*

Colleen L. Mooney (0015668)
Counsel of Record
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839
*Attorney for Appellant Ohio
Partners for Affordable Energy*

Mark A. Whitt (0067996)
Counsel of Record
Andrew J. Campbell
Gregory L. Williams
WHITT STURTEVANT LLP
The Key Bank Building
88 East Broad Street, Suite 1590
Columbus, Ohio 43215

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

Kimberly W. Bojko (0069402)
Counsel of Record
Mallory M. Mohler (0089508)
Carpenter Lipps & Leland LLP
280 North High Street
Suite 1300
Columbus, Ohio 43215
*Attorneys for Appellant
The Kroger Company*

Mike DeWine (0009181)
William L Wright (0018010)
Thomas W. McNamee (0017352)
Devin D. Parram (0082507)
Katie L. Johnson (0091064)
Assistant Attorney General
Public Utilities Section
180 East Broad Street, Sixth Floor
Columbus, Ohio 43215-3783
*Attorneys for Appellee Public Utilities
Commission of Ohio*

Stephen B. Seiple (0003809)
Counsel of Record
200 Civic Center Drive
P.O. Box 117
Columbus, Ohio 43216
(614) 460-4648
(614) 460-6986
sseiple@nisource.com

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