

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

**JOINT MEMORANDUM CONTRA
 APPELLANTS' MAY 23, 2014 JOINT MOTION TO STRIKE
 BY INTERVENING APPELLEES
 COLUMBIA GAS OF OHIO, INC.,
 THE EAST OHIO GAS COMPANY D/B/A DOMINION EAST OHIO, AND
 VECTREN ENERGY DELIVERY OF OHIO, INC.**

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
 Telephone: (614) 224-3911
 Facsimile: (614) 224-3960
 whitt@whitt-sturtevant.com
 campbell@whitt-sturtevant.com
 williams@whitt-sturtevant.com

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

Counsel for Intervening Appellee
 COLUMBIA GAS OF OHIO, INC.

Counsel for Intervening Appellees
 THE EAST OHIO GAS COMPANY D/B/A
 DOMINION EAST OHIO and
 VECTREN ENERGY DELIVERY OF OHIO,
 INC.

FILED
 MAY 28 2014
 CLERK OF COURT
 SUPREME COURT OF OHIO

William L. Wright (0018010)
Counsel of Record
Devin D. Parram (0082507)
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793
Telephone: (614) 466-4397
Facsimile: (614) 644-8767
william.wright@puc.state.oh.us
devin.parram@puc.state.oh.us

Counsel for Appellee
PUBLIC UTILITIES COMMISSION OF
OHIO

Amy B. Spiller (0047277)
Counsel of Record
Elizabeth H. Watts (0031092)
Associate General Counsel
139 East Fourth Street
Cincinnati, Ohio 45202
Telephone: (513) 287-4359
Facsimile: (513) 287-4386
amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com

Counsel for Intervening Appellee
DUKE ENERGY OHIO, INC.

Bruce J. Weston (0016973)
Ohio Consumers' Counsel
Larry S. Sauer (0039223)
Counsel of Record
Joseph P. Serio (0036959)
Office of the Ohio Consumer's Counsel
10 West Broad Street
Columbus, Ohio 43215
Telephone: (614) 466-1312
Facsimile: (614) 466-9475
larry.sauer@occ.state.oh.us
joe.serio@occ.state.oh.us

Counsel for Appellant
OFFICE OF OHIO CONSUMERS'
COUNSEL

Kimberly W. Bojko (0069402)
Counsel of Record
Mallory M. Mohler (0089508)
CARPENTER LIPPS & LELAND LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Facsimile: (614) 365-9145
bojko@carpenterlipps.com
mohler@carpenterlipps.com

Counsel for Appellant
THE KROGER COMPANY

Robert A. Brundrett (0086538)
33 North High Street
Columbus, Ohio 43215
Telephone: (614) 629-6814
Facsimile: (614) 224-1012
rbrundrett@ohiomfg.com

Counsel for Appellant
OHIO MANUFACTURERS' ASSOCIATION

Colleen L. Mooney (0015668)
231 West Lima Street
Findlay, Ohio 45839
Telephone: (614) 488-5739
Facsimile: (614) 425-8862
cmooney@ohiopartners.org

Counsel 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.)	
)	

JOINT MEMORANDUM CONTRA APPELLANTS' JOINT MOTION TO STRIKE

I. INTRODUCTION

On May 20, 2014, Columbia Gas of Ohio, Inc., The East Ohio Gas Company d/b/a Dominion East Ohio, and Vectren Energy Delivery of Ohio, Inc. (collectively, the Utilities) filed a motion to intervene as appellees in this appeal, and filed a memorandum in support of Duke Energy Ohio's "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." On May 23, 2014, the appellants (The Kroger Company, the Office of the Ohio Consumers' Counsel, the Ohio Manufacturers' Association, and Ohio Partners for Affordable Energy) filed a motion to strike Duke's motion. The Utilities now file a memorandum contra the appellants' joint motion to strike.

II. ARGUMENT

The sole basis for the appellants' motion to strike is that Duke's motion to lift stay "is a motion for reconsideration in disguise" and thus not properly before the Court. (Memo. in Supp. of Jt. Mot. to Strike at 2.) The appellants are incorrect. Duke's motion is permissible under the Court's rules, and it is not a motion for reconsideration. On the contrary, Duke's motion was filed by a different party than was the first motion, is supported by newly intervening parties, presents additional arguments and authorities, and seeks a form of relief not sought before. This is *not* a situation, like the one referenced in appellants' motion, where a party asked once, was denied, and then simply asked again for the same thing.

Even if there were merit to appellants' attempt to default Duke's motion for a procedural failing—and there is not—the issues presented by these filings are of immense public importance and should still be considered on the merits. For these reasons, the Court should deny the appellants' motion to strike.

A. Duke's motion to lift stay is permissible under the Court's rules.

Duke's motion to lift stay or require bond was permissible under S.Ct.Prac.R. 4.01(A)(1), which permits motions requesting "an order or other relief." Unless some other rule prohibited Duke's motion, it was plainly permitted by this rule. The burden, then, falls to the appellants to show that the filing should not have been permitted.

1. Duke did not file a motion for reconsideration in disguise.

The appellants' only theory for striking Duke's motion is that S.Ct.Prac.R. 18.02(B), limits motions for reconsideration to certain situations, and that Duke's motion is a *de facto* motion for reconsideration that does not fit the rule's permitted categories. But this is not true. Duke is not asking the court to reconsider the same decision twice.

The Court's initial action concerned appellants' motion to impose a stay. The Court granted appellants' motion. The present situation is *not* identical to the first: the second motion is by a different party (Duke), supported by several altogether new parties (the Utilities, as intervening appellees), presenting additional arguments and authorities, and requesting different forms of relief for the first time (Duke requests lifting of the stay; the intervening appellees also request additional explanation by the Court). Moreover, Duke also faced a circumstance that demanded clarification: the appellants' motion contained a plain misrepresentation of certain facts, and that misrepresentation may well have underlain the Court's decision.

If Duke's *present* motion were denied, and Duke then filed a follow-up motion to lift the stay, *that motion* could conceivably be barred by S.Ct.Prac.R. 18.02 (assuming there had been no underlying change in circumstances). But here, where the first and second motions requested different forms of relief and were filed and supported by different parties, the Court should step over the appellants' procedural roadblock and reach the merits.

2. The case cited by the appellants is not on point.

The appellants cite a single authority supporting their interpretation of the Court's rules. Review of that citation shows that they have failed to support their position.

The appellants cite this Court's decision in *Mickey v. Rokakis*, 131 Ohio St.3d 1527, 2012-Ohio-1935. In *Mickey*, the Court denied a *pro se* appellant's motion to stay. One week later, the appellant filed a motion titled (in part) "Motion to Court [for] Reconsideration." The Court appropriately enough denied the motion, which fell under the express ban of the rule.

Mickey is not on point. To begin with, it does not support the appellants' reconsideration-in-disguise theory; the appellant in that case expressly asked the Court to "reconsider" an identical substantive decision in an identical procedural posture. And the facts here are patently different. Duke (unlike *Mickey*) has obviously not captioned its motion as one seeking

“reconsideration.” Moreover, Duke (unlike *Mickey*) is not a party who asked once, was denied, and is now asking for the same thing again. Again, this is the first time Duke and the Utilities have sought the requested relief (and explanation) from the Court.

In short, this situation is not governed by S.Ct.Prac.R. 18.02. The motion should not be stricken.

B. Even if S.Ct.Prac.R. 18.02 applied, the issues presented by Duke’s motion are of immense public importance and should be considered on the merits by the Court.

Finally, even if the rules did apply as appellants argue, the Court should still reach the merits. The Court plainly has jurisdiction and discretion to consider Duke’s motion to lift the stay or to require an appropriate bond; the appellants do not argue to the contrary. *See, e.g., State v. Hochhausler*, 76 Ohio St.3d 455, 464 (1996) (“[i]nherent within a court’s jurisdiction, and essential to the orderly and efficient administration of justice, is the power to grant or deny stays”). Moreover, for the reasons discussed in Duke’s and the Utilities’ filings, Duke will not only suffer irreparable harm if the Court does not grant its motion, but the issues involved here are of immense public importance and deserve the Court’s attention.

The appellants’ “reconsideration-in-disguise” theory is unsupported and is not applicable here. But even if it were, the Court should still reach the merits and either grant Duke’s motion or provide an explanation that will allow the General Assembly, the Commission, and the utility industry to take appropriate next steps to resolve this situation.

III. CONCLUSION

For the foregoing reasons, the Utilities respectfully request that the Court deny the appellants’ motion to strike.

Dated: May 28, 2014

Respectfully submitted,

/s/ Andrew J. Campbell (Per Authorization
GWH:)

Mark A. Whitt (0067996)

Counsel of Record

Andrew J. Campbell (0081485)

Gregory L. Williams (0088758)

WHITT STURTEVANT LLP

The KeyBank Building, Suite 1590

88 East Broad Street

Columbus, Ohio 43215

Telephone: (614) 224-3911

Facsimile: (614) 224-3960

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.

/s/ Stephen B. Seiple (Per Authorization
GWH:)

Stephen B. Seiple (0003809)

Counsel of Record

200 Civic Center Drive

P.O. Box 117

Columbus, Ohio 43216

Telephone: (614) 460-4648

Facsimile: (614) 460-6986

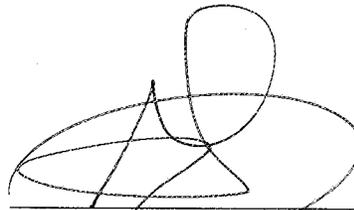
sseiple@nisource.com

Counsel for Intervening Appellee
COLUMBIA GAS OF OHIO, INC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra the Appellants' Motion to Strike was served by electronic mail this 28th day of May 2014 to the following:

william.wright@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us
devin.parram@puc.state.oh.us
sseiple@nisource.com
amy.spiller@duke-energy.com
elizabeth.watts@duke-energy.com
bojko@carpenterlipps.com
mohler@carpenterlipps.com
larry.sauer@occ.state.oh.us
joe.serio@occ.state.oh.us
rbrundrett@ohiomfg.com
cmooney@ohiopartners.org

A handwritten signature in black ink, appearing to read 'Gregory L. Williams', is written over a horizontal line. The signature is stylized and somewhat abstract, with overlapping loops and a prominent vertical stroke.

Gregory L. Williams
One of the Attorneys for the Utilities