

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 MOTION OF COLUMBIA GAS, EAST OHIO GAS COMPANY AND VECTREN ENERGY DELIVERY TO INTERVENE AS APPELLEES

AND

JOINT MOTION TO STRIKE MEMORANDUM OF COLUMBIA GAS, EAST OHIO GAS COMPANY AND VECTREN ENERGY DELIVERY IN SUPPORT OF DUKE ENERGY OHIO'S MOTION TO LIFT STAY

BY

THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, KROGER COMPANY, OHIO MANUFACTURERS' ASSOCIATION, AND OHIO PARTNERS FOR AFFORDABLE ENERGY

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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, the Kroger Company, Ohio Manufacturers' Association, and Ohio Partners for Affordable Energy¹ respectfully move this Court to deny the Joint Motion for Leave to Intervene ("Motion to Intervene") as Appellees filed by Columbia Gas of Ohio, Inc., The East Ohio Gas Company d/b/a Dominion East Ohio, and Vectren Energy Delivery of Ohio, Inc. on May 20, 2014.²

¹ Collectively "Joint Movants."

² Collectively "Intervening Appellees."

Additionally, the Joint Movants move to strike Intervening Appellees' "Memorandum in Support of Duke Energy Ohio's Motion to Lift the Stay" ("Memo in Support of Duke").

As explained in the attached Joint Memorandum in Support, this Court has set an extremely high bar for non-party post-judgment intervention. Intervening Appellees do not qualify for intervention under even a traditional Civ. R. 24(A) analysis. They certainly have not shown exceptional circumstances that would make their post-judgment intervention imperative in this case. Thus, the Motion to Intervene must be denied.

Also, this Court should strike the Intervening Appellees' Memorandum in Support of Duke's motion to lift the stay. Intervening Appellees' posture in this proceeding is actually that of an amicus curiae. And their Memorandum in Support of Duke actually is a memorandum intended to support Duke Energy Ohio's ("Duke") improper request for reconsideration of the Court's May 14, 2014, order granting a stay. Duke's request for reconsideration of the Entry granting the stay should be stricken under S.Ct.Prac.R. 18.02(B) and (D), as requested in Joint Movants' companion motion to strike filed on May 23, 2014. Therefore, Intervening Appellees' Memorandum in Support of Duke's Motion to Lift Stay must be stricken as well.

Respectfully submitted,

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JOINT MEMORANDUM IN SUPPORT

I. INTRODUCTION

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’s 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 bond was required (Memorandum Contra at 3-6).³ Similarly, the Public Utilities Commission of Ohio filed a Memorandum Contra to Appellants' Joint Motion for Stay on the same date.

Intervening Appellees did not intervene in the proceeding before the PUCO.⁴ And they did not seek to intervene in this appeal to oppose Joint Movant's Motion for Stay.

By its order of May 14, 2014, after filings by the Joint Movants, Duke, and the PUCO, this Court granted the Motion for Stay and specifically did not require bond.

On May 20, 2014, Duke filed a Motion to Lift Stay. Duke once again argued in detail (1) why the Motion for Stay should not have been granted, and (2) why bond should have been required.

Also on May 20, 2014, Intervening Appellees filed their Motion to Intervene and Memorandum in Support of Duke's Motion to Lift Stay. Their memorandum details—on Duke's behalf—why a bond should have been required.

On May 23, 2014, Joint Movants filed a Motion to Strike Duke's Motion to Lift Stay. The Joint Movants explained in the motion that Duke's motion is barred by rule and precedent. Duke's motion violated S.Ct.Prac.R. 18.02(B) and (D), as well as this Court's precedent in *Mickey v. Rokakis*, 131 Ohio St.3d 1527, 2012-Ohio-1935.

³ Significantly, although the PUCO filed a memorandum contra the Motion for Stay claiming that the failure to provide bond was fatal to the motion, it has not attempted to overturn the Court's lawful order through an improper motion for reconsideration.

⁴ Columbia Gas of Ohio, Inc. filed, in the proceeding below an Amicus Curiae Initial and Reply Briefs.

Intervening Appellees' post-judgment Motion to Intervene offers no exceptional circumstances that make their intervention imperative. *Everhome Mortg. Co. v. Baker*, 2011-Ohio-3303. Their intervention should be denied. Also, the Intervening Appellees' Memorandum in Support of Duke's Motion to Lift Stay should be stricken. Intervening Appellees' Memorandum in Support of Duke's Motion to Lift Stay actually is in support of Duke's improper request for reconsideration of this Court's decision of May 14, 2014 granting the stay. Because Duke's request for reconsideration should be stricken under S.Ct.Prac.R. 18.02(B) and (D), as requested in Joint Movants' May 23, 2014 Motion to Strike, Intervening Appellees' Memorandum in Support of Duke's Motion should be stricken as well.

II. ARGUMENT

A. **Intervening Appellees' Motion to Intervene Should Be Denied Because it Presents No Exceptional Circumstances that Make Their Intervention Imperative.** *State ex rel First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 696 N.E.2d 1058 (1998).

Duke initiated the underlying PUCO case as an application for an increase in rates pursuant to R.C. 4909.18. The resulting PUCO Order obviously affects Duke's property interests and this Court customarily permits the applicant utility—upon appeal of a PUCO rate order—to intervene as an appellee to protect that interest, and rightly so. The Court has granted Duke's motion to intervene in this proceeding.

However, this Court sets an extremely high bar for a non-party to intervene after final judgment has been taken. *State ex rel First New Shiloh Baptist Church v. Meagher*, 82 Ohio St.3d 501, 503-504, 696 N.E.2d 1058 (1998) ("*Shiloh Church*") ("Intervention after final judgment has been entered is unusual and ordinarily will not be granted."); see, also, *State ex rel Portune v. National Football League*, 155 Ohio App.3d 314, 2003-

Ohio-6195, 800 N.E.2d 1188, ¶ 13, citing *Shiloh Church* (“[W]hen a post-judgment motion to intervene is filed by a nonparty, after jurisdiction has been transferred to the appellate court by the filing of a notice of appeal, it will ordinarily be granted only in an exceptional case, for reasons that are deemed imperative”). See, e.g., *Everhome Mortg. Co. v. Baker*, 2011-Ohio-3303 (intervention permitted in appeal of foreclosure action by non-party property purchaser at sheriff’s auction).

Intervening Appellees assert that they have two interests in this proceeding (1) “the interpretation of certain provisions of R.C. Chapter 4909,” and (2) to respond to the Court’s decision of May 14, 2014, which stayed the PUCO Order without requiring bond. Motion to Intervene, at (unnumbered) 1. Neither interest presents exceptional circumstances. Joint Movants will address each alleged interest, using Civ. R. 24(A)⁵ as a guide, as in *Shiloh Church*.

1. Intervening Appellees’ Interest in the Court’s Interpretation of Certain Provisions of R.C. Chapter 4909 Does Not Warrant Intervention Under a Traditional Analysis and Certainly Presents No Exceptional Circumstance That Would Make Intervention Imperative.

Intervening Appellees’ do not identify the “certain provisions of R.C. Chapter 4909” that affect their interests, making it difficult to respond to their allegation.

⁵ Civ. R. 24(A) provides:

Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant’s ability to protect that interest, unless the applicant’s interest is adequately protected by existing parties.

Certainly, they have no property interests at stake in the appeal, which involves only the revenues that Duke can recover from its customers for providing utility service. Indeed, Intervening Appellees' actions admit the lack of a real and substantial interest, considering they failed to intervene in the underlying PUCO case, which was initiated on June 7, 2012. Even under a traditional Civ. R. 24(B) analysis, Intervening Appellees' intervention would most likely be denied because setting rates for Duke pursuant to R.C. Chapter 4909 has no effect on Intervening Appellees' property interests.

Moreover, even if a tangential property interest did exist, Intervening Appellees' attempt to intervene, coming nearly two years after the underlying PUCO case was initiated, is woefully untimely. Intervening Appellees clearly have failed to show that their interests under R.C. Chapter 4909 are so exceptional as to make their intervention at this stage of the appeal imperative.

2. Intervening Appellees' Interest in Responding to this Court's Order of May 14, 2014, Does Not Warrant Intervention Under a Traditional Analysis and Certainly Presents No Exceptional Circumstance Making Intervention Imperative.

Intervening Appellees' participation in the underlying PUCO proceeding was not of an intervenor, but rather, was limited to Columbia Gas of Ohio, Inc. filing an initial and reply brief Amicus Curiae. It is apparent that the Intervening Appellees' only concern is in responding to the Court's decision of May 14, 2014, and attempting to influence the Court to grant Duke's improper Motion to Lift Stay. However, under a traditional Civ. R. 24(A) analysis, Intervening Appellees would not be granted intervention because they have no property interests at stake if the PUCO Order is stayed. The stay applies only to Duke and none of Intervening Appellees.

Moreover, if Intervening Appellees are interested in the precedential value of the Court's decision of May 14, 2014, Duke has represented, and continues to represent, those interests by raising the nearly identical arguments in its Motion to Lift Stay that Intervening Appellees make in their supporting memorandum. Intervening Appellees simply have failed to show extraordinary circumstances that make their intervention imperative at this stage of the case.

Having failed to meet the extremely high standards for non-party post-judgment intervention, Intervening Appellees' Motion to Intervene should be denied.

B. The Intervening Appellees' Memorandum in Support of Duke's Motion Should be Stricken.

As stated previously, it is apparent that Intervening Appellees' main, if not sole, interest in this proceeding is to respond to the legal issues presented by, and the alleged effect of, the Court's order granting the stay on May 14, 2014. Their curious decision to undertake the task of seeking non-party post-judgment intervention, when their position is better suited to that of an amicus curiae, can be explained by the Court's rules of practice.

S.Ct.Prac.R. 18.02(C) provides:

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.

Filing as an amicus under S.Ct.Prac.R. 18.02(C) would expose Duke's Motion to Lift Stay for what it is – an improper motion for reconsideration of the Court's decision of May 14, 2014. Intervening Appellees' Motion to Intervene merely attempts to disguise that their Memorandum in Support of Duke actually is a memorandum supporting Duke's improper motion for reconsideration. As Joint Movants explained in their Motion to

Strike of May 23, 2014, motions for reconsideration cannot be made from the Court's May 14, 2014 decision granting a stay. 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.

Emphasis added. The Court's decision to stay the PUCO's Order (memorialized in its May 14, 2014 Entry) is not a decision allowed to be reargued with the filing of a motion for reconsideration by the above four categories. Therefore, Duke's Motion to Lift Stay should be stricken because it violates S.Ct.Prac.R. 18.02(D), which 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. See, also, *Mickey v. Rokakis*, 131 Ohio St.3d 1527, 2012-Ohio-1935 (reconsideration of a Court order that rules on a motion for stay is prohibited and must be stricken as prohibited by what is now S.Ct.Prac.R. 18.02(D) [formerly S.Ct.Prac.R. 11.02(D)]⁶).

It is settled. Reconsideration cannot be sought of the Court's decision to grant a motion seeking to stay a lower tribunal's decision. Such a motion for reconsideration should be stricken. Because Duke's Motion to Lift Stay should be stricken, Intervening Appellees' memorandum supporting reconsideration also should be stricken.

⁶ See Attachment A.

III. CONCLUSION

Intervening Appellees have failed to meet the extremely high bar required for non-party post-judgment intervention. Their Motion to Intervene should be denied. In addition, if Intervening Appellees are granted intervention, their Memorandum in Support of Duke must be stricken because it supports Duke's improper motion for reconsideration, which, as Joint Movants' request in their May 23, 2014 Motion to Strike, should be stricken as prohibited by S.Ct.Prac.R. 18.02(B) and (D).

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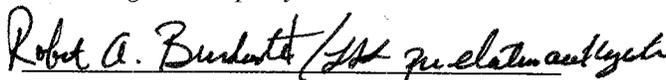
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CERTIFICATE OF SERVICE

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 30th day of May 2014.



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ATTACHMENT A

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

SUPREME COURT PRACTICE RULES

Rule 11.6

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