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 JOINT MOTION OF COLUMBIA GAS, EAST OHIO GAS COMPANY AND VECTREN ENERGY DELIVERY FOR LEAVE TO FILE A TABLE OF AUTHORITIES BY THE KROGER COMPANY, OHIO MANUFACTURERS' ASSOCIATION, OHIO PARTNERS FOR AFFORDABLE ENERGY, AND THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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CLERK OF COURT
SUPREME COURT OF OHIO

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I. INTRODUCTION

Columbia Gas of Ohio, Inc. ("Columbia Gas"), Dominion East Ohio, and Vectren Energy Delivery of Ohio, Inc. (collectively, the "Utilities") have filed a Motion, on July 8, 2014, to cure their July 3rd Brief that is non-conforming to the Court's rules. The Brief lacks the required table of authorities. The Utilities' Motion should be denied and their Brief should be disallowed.

As background, each of the Joint Appellants[1] appealed to this Court from the underlying order and entries on rehearing issued by the Public Utilities Commission of Ohio ("PUCO") on November 13, 2013 and January 8, 2014, respectively (collectively "PUCO Order"). On May 20, 2014, the Utilities filed their Motion to Intervene and Memorandum in Support of Duke's Motion to Lift Stay. On May 30, 2014, Joint Appellants filed in opposition to the Intervening Appellees' (the Utilities') Motion to Intervene. The Court has not yet ruled on the pending Motion to Intervene. However, the Utilities did not intervene in the proceeding before the PUCO.[2]

II. ARGUMENT

The Utilities' Motion Should Be Denied And Their Brief Should Be Disallowed Because It Was Mandatory That The Missing Table Of Authorities Be Filed With The Brief Under The Supreme Court of Ohio's Rules of Practice.

The Joint Appellants respectfully request that this Court deny the Joint Motion for Leave to File a Table of Authorities ("Motion") filed by the Utilities on July 8, 2014. The Utilities' failed to include a table of authorities in their Merit Brief, despite it being required by S.Ct.Prac.R. 16.02(B). The Utilities' Brief should be disallowed.

The Supreme Court of Ohio's rule of construction makes clear that the word "shall" is mandatory. S.Ct.Prac.R. 1.06(A) states:

> **(A) Shall, may, and should**
>
> "*Shall" is mandatory*. "May" is permissive. "Should" is suggested or recommended. (Emphasis added.)

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[1] The Joint Appellants are the Kroger Company, Ohio Manufacturers' Association and Ohio Partners for Affordable Energy and the Office of the Ohio Consumers' Counsel.

[2] Columbia Gas of Ohio, Inc. filed, in the proceeding below, Amicus Curiae Initial and Reply Briefs.

The Supreme Court of Ohio's Rules of Practice specifically identify the required contents of briefs filed at the Court. S.Ct. Prac.R. 16.02(B) states:

> The appellant's brief ***shall*** contain all of the following:
>
> * * *
>
> (2) *A table of the authorities* cited, listing the citations for all cases or other authorities, arranged alphabetically; constitutional provisions; statutes; ordinances; and administrative rules or regulations upon which appellant relies, with references to the pages of the brief where each citation appears; (Emphasis added).
>
> * * *

In addition, S.Ct. Prac.R. 16.03(B) (1) states:

> *The appellee's brief shall comply with the provisions in S.Ct.Prac.R. 16.02(B),* * * *. (Emphasis added).

The Court's rules mandate the inclusion of a table of authorities in the briefs filed by both Appellants and Appellees. The rule is mandatory. The table of authorities should have been filed with the Utilities' Brief on July 3, 2014, but it was not. The Utilities failed to comply with the Court's rule. Their omission should result in the denial of their Motion. Therefore, the Court should disallow their Brief for failing to comply with the Court's filing requirements.

Denial of the Utilities' Motion would be consistent with what Columbia Gas argued to the Court—and with what the Court ruled—on a technical non-conformity in a Consumers' Counsel Notice of Appeal in 2004. In 2004, OCC filed an appeal of a PUCO decision involving Columbia Gas. *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 105 Ohio St. 3d 1211, 2005-Ohio-1023 ("2004 Appeal"). OCC filed its notice of appeal and inadvertently omitted a certificate of filing as required by S.Ct.Prac.R. XIV(2)(C)(2),[3]

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[3] S.Ct.Prac.R. 3.11(C)(2).

just as Columbia Gas, et al., have now claimed an inadvertent omission. OCC had properly filed its Notice of Appeal with the PUCO. It just omitted to include a certificate of filing certifying that the filing had taken place. Columbia Gas and the PUCO argued then that the failure to include the certificate of filing should result in the dismissal of the appeal. OCC argued the rule requirements were technical and there was no prejudice to the parties. Nonetheless, the Court granted Columbia's Motion to Dismiss on this highly technical ground. Columbia Gas was successful in using the technicality to prevent the Court from hearing an appeal involving tens of millions of dollars of Ohioans' money.[4]

In the 2004 Appeal, Columbia Gas made the following argument to the Court in seeking to use OCC's inadvertent omission to invalidate OCC's filing (Notice of Appeal):

> Appellant attempts to trivialize and justify its errors, but continues to ignore the larger issue - *that being the importance of the Court's rules of Practice and the serious consequences attendant with failure to comply with those rules.* The Appellant's Notice of Appeal was defective, and the Court properly struck the defective Notice of Appeal.

Ohio Consumers' Counsel v. Pub. Util. Comm., 105 Ohio St. 3d 1211, 2005-Ohio-1023, Columbia Gas's Memorandum Opposing Motion for Reconsideration at 2 (Apr.8, 2005) (Emphasis added) (Attached hereto as Exhibit A). Columbia Gas's (and the PUCO's) arguments were successful, and OCC's appeal was dismissed.

In Ohio's courts there should be equal treatment under the law. For justice, Columbia Gas cannot have it both ways. An Ohio Appellate Court held: "Courts must not give special treatment to any party on appeal." *Brown v. Grauman*, 2013-Ohio-4814.

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[4] *Ohio Consumers' Counsel v. Pub. Util. Comm.,* 105 Ohio St. 3d 1211, 2005-Ohio-1023 Decision (January 18, 2005).

Columbia Gas' use of OCC's inadvertent omission in 2004 of a certificate of filing exacted a high price for consumers (a dismissed appeal). The rationale of Columbia Gas for dismissing OCC's appeal in 2004 should hold equally true for the Utilities' defective merit brief now. The Utilities' Motion should be denied and their brief disallowed.

The Ohio Supreme Court has denied motions to strike briefs for failure to comply with the Court's Rules of Practice in circumstances where striking the briefs would have been dispositive to the outcome of the appeals. *State ex. Rel. Physicians Comm. for Responsible Medicine v. Bd. Of Trs. Of Ohio State Univ.,* 108 Ohio St. 3d 288 (Mar. 15, 2006), see also *State ex. Rel. Samples v. Heath,* 135 Ohio St. 3d 180 (Jan. 9, 2013). In this case, however, the Utilities have not been granted intervention. At this time, the Court would not be disallowing the brief of a party to this appeal, and thus, the striking of the brief would not be dispositive to the outcome of the appeal. The Utilities' interest is already represented by Duke Energy and others.

The Utilities admitted in their Brief that their motion to intervene has not been ruled upon. As such, the Utilities stated: "[t]he Utilities submit this brief as intervening appellees, but in the event the Court denies their motion to intervene, they submit it as amici curiae." Merit Brief of Intervening Appellees at 5 (Jul. 3, 2014). Having failed to comply with the Court's filing requirements for their Brief, the Utilities' Motion should be denied, and their Brief should be disallowed whether it is the Brief of a party or of amici curiae.

III. CONCLUSION

The Utilities have failed to comply with the Court's mandatory filing requirements in S.Ct.Prac.R. 16.03(B) pertaining to their Brief filed on July 3, 2014. The

rule is mandatory, and the table of authorities should have been filed with the Brief on July 3, 2014, not later under a separate Motion. Therefore, and consistent with Columbia Gas' arguments to the Court on a similar technical issue in 2004, the Utilities' Motion for Leave to File the Table of Authorities should be denied and their Brief should be disallowed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Joint Memorandum Contra* has been served upon the below-named persons via electronic transmittal this 18th day of July 2014.

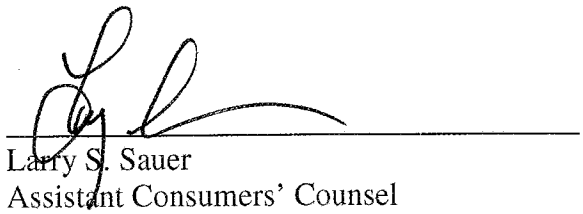

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EXHIBIT A

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel, Appellant, v. The Public Utilities Commission of Ohio, Appellee.	: : : : : : : : : : : :	**Case No. 04-1227** Appeal from the Public Utilities Commission of Ohio Public Utilities Commission of Ohio Case Nos. 94-987-GA-AIR, 96-1113-GA-ATA, 98-222-GA-GCR, and 03-1459-GA-ATA

MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION
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MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION

STATEMENT OF FACTS

This Court's Rules of Practice require that in an appeal from the Public Utilities Commission of Ohio ("Commission"), "the notice of appeal shall also contain a certificate of filing to evidence that the appellant filed a notice of appeal with the 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 Appellant's Notice of Appeal failed to include the Certificate of Filing required by S.Ct.Prac.R. XIV(2)(C)(2).

This Court's Rules of Practice also require the filing of a Case Information Statement at the time of the filing of every Notice of Appeal. S.Ct.Prac.R. II(6). The purpose of the Case Information Statement is to "identify the issues and applicable law presented for review and shall be on a form prescribed by the clerk." *Id.* The Appellant did not file a Case Information Statement at the time it filed its Notice of Appeal.

On December 8, 2004, Intervening Appellee Columbia Gas of Ohio, Inc. ("Columbia") and Appellee the Public Utilities Commission of Ohio ("Commission") filed Motions to Dismiss the Appellant's Notice of Appeal in the instant case, based upon the Appellant's failure to comply with the Court's Rules, and requested that the Court dismiss the defective Notice of Appeal.

By Judgment Entry issued March 23, 2005, the Court granted the Motions to Dismiss and struck the Notice of Appeal. *Ohio Consumers' Counsel v. Public Util. Comm.* (2005), 105 Ohio St.3d 1211, 2005-Ohio-1023, 823 N.E.2d 872. The Appellant filed a Motion for Reconsideration on April 1, 2005, in which the Appellant argues that the Court's decision was inconsistent with precedent, and also constituted an abuse of discretion. Columbia opposes the Motion for Reconsideration

because the Court's decision is consistent with its earlier rulings and the Court did not abuse its discretion. As more fully discussed below, the Motion for Reconsideration should be denied.

ARGUMENT

Proposition of Law No. 1:

> **The Appellant's Notice of Appeal was defective and the Court properly struck the Notice of Appeal, consistent with the Court's prior decisions.**

In response to the Motions to Dismiss filed by Columbia and the Commission, the Appellant argued that its failure to comply with the Court's Rules of Practice was a mere technical oversight that did not warrant dismissal of its Notice of Appeal. (Appellant's Memorandum in Opposition to the Motions to Dismiss at 10.) The Appellant's Motion for Reconsideration makes the same argument, although it uses a series of different adjectives to describe its failure to comply with the Court's Rules of Practice – e.g., the error is described variously as a "technical violation," as being "insubstantial, inconsequential and non-prejudicial," "hyper-technical," "harmless error," "minor error" and "inadvertent." (See Appellant's Motion for Reconsideration at 5, 7, 10, 12, 18 and 24.) Despite the new string of adjectives, the arguments that the Appellant makes in its Motion for Reconsideration are essentially the same as those made in its earlier Memorandum in Opposition to the Motions to Dismiss – arguments that the Court presumably has already considered and rejected.

The Appellant attempts to trivialize and justify its errors, but it continues to ignore the larger issue – that being the importance of the Court's Rules of Practice and the serious consequences attendant with failure to comply with those Rules. The Appellant's Notice of Appeal was defective, and the Court properly struck the defective Notice of Appeal.

The Motion for Reconsideration notes that there have been a limited number of instances in which the Court has elected not to dismiss appeals for technical violations not deemed sufficiently important to require dismissal. (Appellant's Motion for Reconsideration at 5-8.) One of the cases cited by the Appellant is *Consolidated Rail Corp. v. Pub. Util. Comm.* (1988), 40 Ohio St.3d 252, 533 N.E.2d 317, a case in which the caption on a Notice of Appeal failed to properly list the Commission as the Appellee. The Court held, "[w]here, as here, there has been no showing of a lack of diligence, disregard for court proceedings, or prejudice resulting from the alleged tardy filing, dismissal would be disproportionate to any error the appellant may have made." *Id.* at 255. Unlike the appellant in *Consolidated Rail*, the Appellant here has demonstrated a lack of diligence and a disregard of the Court's Rules.

In the instant case, the Court has already considered the Appellant's arguments and has determined that the Appellant's failure to comply with the Court's Rules of Practice is sufficiently important to require the striking of the Notice of Appeal. The Court's decision is consistent with its prior decisions with respect to adherence to the Court's Rules of Practice.

In *Drake v. Bucher* (1966), 5 Ohio St.2d. 37, 213 N.E.2d 182, this Court dismissed an appeal where the appellant had failed to comply with a number of the Court's Rules of Practice, and the Court's action was premised solely upon failure to comply with the Court's Rules of Practice. This Court explained,

> There is no excuse for the failure of any member of the bar to understand or to comply with the rules of this court. They are promulgated so that causes coming before the court will be presented in a clear and logical manner, and any litigant availing himself of the jurisdiction of the court is subjected thereto. Not to be minimized is the necessity of compliance as an accommodation to the correct dispatch of the court's business. But our over-arching concern is that the legitimate interests of litigants be protected to the utmost.

> To this end, our profession is committed, and adherence to our rules should be dedicated.

Id. at 39-40.

Similarly, this Court has held that, "the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment." *Miller v. Lint* (1980), 62 Ohio St.2d 209, 215, 404 N.E.2d 752; see also, *Davis v. Immediate Med. Serv., Inc.* (1997), 80 Ohio St.3d 10, 12, 684 N.E.2d 292.

Consistent with the cases cited above, this Court has recently dismissed several appeals, or stricken other pleadings, in which the appellants failed to comply with this Court's Rules of Practice.

failure to prosecute

Zak v. Ohio State Dental Bd. (2004), 103 Ohio St.3d 1412, 2004-Ohio-4167, 813 N.E.2d 684 (appeal dismissed for failure to file a memorandum in support of jurisdiction); *State ex rel. Gen. Elec. Co. v. Indus. Comm.* (2004), 101 Ohio St.3d 1409, 2004-Ohio-11, 800 N.E.2d 1176 (appeal dismissed for failure to file a merit brief); *State v. Fisher* (2004), 101 Ohio St.3d 1409, 2004-Ohio-11, 800 N.E.2d 1177 (appeal dismissed for failure to file a memorandum in support of jurisdiction); *State v. Mollick* (2001), 92 Ohio St.3d 1402, 748 N.E.2d 77 (notice of court of appeals' determination of no conflict stricken for failure to include a certificate of service); *State v. Underwood* (1999), 86 Ohio St.3d 1483, 716 N.E.2d 215 (notice of appeal and motion for delayed appeal stricken for failure to include proper certificate of service); *State ex rel. Israfil v. Montgomery Cty. Common Pleas Court Judge Gowdown* (1999), 86 Ohio St.3d 1429, 713 N.E.2d 430 (motion stricken for failure to include a certificate of service).

In the case at bar, the Appellant's failure to include in its Notice of Appeal a Certificate of Filing, as required by S.Ct.Prac.R. XIV(2)(C)(2), is equally significant as a failure to file a certificate

of service, and as indicated in the preceding paragraph, this Court has stricken Notices of Appeal and other pleadings for a failure to file a certificate of service. A certificate of service evidences that service of a pleading was made upon other parties. A Certificate of Filing serves a similar purpose. As explained in the Staff Commentary to the Court's Rules of Practice:

> **Section 2(C)(2)**
> This amendment is related to amendments in S. Ct. Prac. R. II, Section 3(B)(1). The amendment requires that a "certificate of filing" be included on a notice of appeal from either a Public Utilities Commission or a Power Siting Board decision. The certificate of filing will evidence that the appellant has filed the notice of appeal with the docketing division of the commission, satisfying the new jurisdictional requirement under S. Ct. Prac. R. II, Section 3(B)(1).

S.Ct.Prac.R. XIV(2)(C)(2), Staff Commentary to Rule XIV (2004 Amendments).

This Court's Rules of Practice contain no provisions for exception to S.Ct.Prac.R. XIV (2)(C)(2). Without the required Certificate of Filing, this Court, the parties, and any intervenors are not able to review the Notice of Appeal filed with the Court and determine if it was properly filed. Without the Certificate of Filing, neither the Court nor the parties can rely on the defective Notice of Appeal. Such a failure is just as significant as a party's failure to certify that it has served other parties with notices or pleadings, and justifies dismissal of the instant Notice of Appeal just as a failure to include a certificate of service has justified the striking of other Notices of Appeal and pleadings. See *State v. Mollick; State v. Underwood; State ex rel. Israfil v. Montgomery Cty. Common Pleas Court Judge Gowdown.*

The Appellant compounded its error by also failing to include the Case Information Statement required by S.Ct.Prac.R. II(6), which is intended to "assist the Court in case management and issues tracking." S.Ct.Prac.R. II(6), Staff Commentary to Rule II (2004 Amendment). The purpose of

the Case Information Statement is identify issues and the applicable law. By requiring the filing of the Case Information Statement with the Notice of Appeal, the Court, the parties, and potential intervenors are informed of the issues and applicable law associated with the appeal. The Case Information Statement is thus intended to further increase the Court's procedural efficiency, and the Appellant's failure to file the Case Information Statement frustrated this Court's case management and issue tracking efforts.

The Appellant also argues that the Court's decision in the case at bar is inconsistent with the Court's recent decision in *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (2005), 105 Ohio St.3d 177, 2005-Ohio-1150. (Appellant's Motion for Reconsideration at 10-12.) However, the Appellant's reliance on the *Cincinnati Bell* case is misplaced.

In the *Cincinnati Bell* case, one of the issues was whether the relator properly served a copy of its Notice of Appeal under R.C. 4903.13. The Appellant claims that in the *Cincinnati Bell* case the relator "did not follow the technical requirements for service of the notice of appeal." (Appellant's Motion for Reconsideration at 11.) This characterization is inaccurate. In the *Cincinnati Bell* case, the relator and the Commission disagreed about the relator's compliance with the statute, and the Court held that the relator had, in fact, complied with the statute. Thus, unlike the case at bar, in the *Cincinnati Bell* case the Court found no failure to comply with a legal requirement associated with the filing of a Notice of Appeal. In the instant case the Appellant admittedly failed to comply with two legal requirements applicable to the filing of its Notice of Appeal. Contrary to the Appellant's representations, the *Cincinnati Bell* case is not one in which there existed a technical violation or error that the Court was being asked to overlook. Nothing in the *Cincinnati Bell* case is inconsistent with the Court's action to strike the defective Notice of Appeal filed in the instant case.

Proposition of Law No. 2:

The Court did not abuse its discretion by striking the Appellant's defective Notice of Appeal.

The Appellant also argues at length that the Court abused its discretion by striking the Notice of Appeal, based upon a five-part test set forth in *Dehart v. Aetna Life Ins. Co.* (1982), 69 Ohio St.2d 189, 431 N.E.2d 644. (Appellant's Motion for Reconsideration at 13-24.) However, the *Dehart* decision dealt with a court of appeals' application of local rules, and the Court has never explicitly adopted the five-part *Dehart* test for purposes of evaluating an appellant's failure to comply with the Court's Rules of Practice.

The Appellant makes a serious accusation when it accuses the Court of an abuse of discretion. An abuse of discretion "is found in the rare instance when a decision is grossly violative of fact and logic so as to demonstrate perversity of will, defiance of judgment, undue passion, or extreme bias." *Humphrey v. Ohio Water Parks* (1994), 97 Ohio App. 3d 403, 405 (citing *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264, 313.)·Abuse of discretion "implies an unreasonable, arbitrary or unconscionable attitude on the part of the court." *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 47, 684 N.E.2d 319. While the Appellant is understandably dismayed by the Court's decision, the Appellant has failed to demonstrate that the Court's decision was motivated by any unreasonable, arbitrary or unconscionable attitude.

Even if the Court were inclined to apply the five-part *Dehart* abuse of discretion test to an appellant's failure to comply with the Court's Rules of Practice, the *Dehart* test is not applicable to Appellant's situation in this case. In *Dehart* the Court noted that a flagrant, substantial disregard for court rules can justify a dismissal on procedural grounds. *Dehart*, 69 Ohio St.2d at 193, 431 N.E.2d

at 647. The Court in *Dehart* distinguished its earlier opinion in *Vorisek v. North Randall* (1980), 64 Ohio St.2d 62, 413 N.E.2d 793, a case in which an appellant failed to file a civil appeal statement required by local rule. The Court noted that the local rule violation was serious enough to justify a sua sponte dismissal by the Court of Appeals. *Dehart*, 69 Ohio St.2d at 190, 431 N.E.2d at 645. In the instant case, the Appellant's failure to file the Case Information Statement is comparable to the failure of the appellant in *Vorisek* to file a civil appeal statement.

The *Dehart* factors are simply not applicable to a substantial disregard of court rules. *Quonset Hut* (dismissal of case upheld despite lack of trial court notice of intention to dismiss); *Humphrey* (affidavit signed but not notarized). As this Court noted last year in reference to the *Dehart* factors, "[s]till, there are plenty of instances where a case can, and should, be decided on purely procedural grounds. Where procedural deficiencies arise out of the neglect of a party, the party can blame only himself for the failure of his case." *In Re Holmes et al.* (2004), 104 Ohio St.3d 664, 2004-Ohio-7109, 821 N.E.2d 568, at ¶11. In the case at bar, it is the Appellant's neglect that has resulted in the dismissal of its Notice of Appeal.

In discussing the *Dehart* factors, the Appellant attempts to justify its neglect by explaining that the Appellant's attorney relied upon the then most recent available version of the *2003-2004 Anderson's Rules Governing the Courts of Ohio*. (Appellant's Motion for Reconsideration at 14.) That publication contained rules effective as of July 1, 2003. The Appellant filed its Notice of Appeal more than one year beyond the effective date of the rules contained within the publication upon which it relied, and it should have been incumbent upon Appellant to utilize other sources to determine whether the Court's rules had been revised subsequent to July 1, 2003.

Had the Appellant not neglected to verify that it was relying upon the most current version of the Court's Rules of Practice, the Appellant would have readily been able to ascertain that there were revisions to the Court's Rules of Practice that had become effective July 1, 2004. The Court's own web site includes the current version of the Court's Rules of Practice (see http://www.sconet.state.oh.us/Rules/) and could easily have been checked by the Appellant to determine if there existed recent amendments to the Court's rules. Presumably, a similar check could have been performed using commonly available electronic research services such as LEXIS or Westlaw.

Furthermore, the proposed revisions to the Court's Rules of Practice were noticed months in advance of their effective date. The changes to S.Ct.Prac.R. II(6) and S.Ct.Prac.R. XIV(2)(C)(2) were published[1] for comment on November 24, 2003, with comments due by December 24, 2003. (See Supreme Court of Ohio Rule Amendment Information, http://www.sconet.state.oh.us/rod/Rule/Display.asp?ID=241.) Final adoption of the rules occurred on February 3, 2004; the final publication was on March 22, 2004, with the rules to become effective on July 1, 2004. (See Supreme Court of Ohio Rule Amendment Information, http://www.sconet.state.oh.us/rod/Rule/Display.asp?ID=250.) Thus, by March 22, 2004, at the very latest – more than four months prior to the filing of the Appellant's Notice of Appeal in this case – the Appellant should have been on notice of the revisions to the Court's Rules of Practice that were to become effective July 1, 2004.

Appellant also notes that the Ohio State Bar Association's Public Utilities Committee distributed *Highlights of the Amendments to the Ohio Supreme Court's Rules of Practice Impacting PUCO Practitioners, Effective July 1, 2004*, and claims that the *Highlights* did not mention the new

[1] The publications can be found in the *Ohio State Bar Association Report*.

certificate of filing requirement. (Appellant's Motion for Reconsideration at 19.) In so doing, the Appellant relied upon and included in its Appendix only page 1 of the document distributed at the bar committee meeting, which is a summary sheet for the full 11-page document. Had Appellant reviewed the entire bar committee document it would have discovered that the new certificate of filing requirement is set forth on page 7 of the document. (Intervening Appellee's Appendix at 22.)

The *Dehart* case upon which the Appellant relies so heavily contains a dissenting opinion that cited this Court's decision in *Drake*. Justice Krupansky explained, in pertinent part:

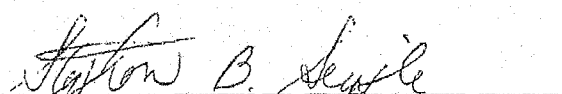
> It is without doubt the *duty of appellant's counsel when he initiates an appeal* to comply with all the rules and regulations incident to perfecting that appeal. (Emphasis sic.)
> * * *
> We should not carve out exceptions to these local rules for "minor, technical, correctable, inadvertent" violations, for a rule with a myriad of exceptions is as effective as no rule at all.
> * * *
> I, too, am sympathetic with the "fundamental tenet of judicial review in Ohio that courts should decide cases on the merits." However, if we allow the rules and *stare decisis* to be ignored the entire concept of equal justice under law is undermined.
> * * *
> May I suggest that anyone attempting the noble practice of law first arm himself with the knowledge of how to read, to understand that which he reads, then read the rules and cases which pertain to his problem before he embarks upon his voyage. These few simple requirements are not too much to expect of an individual who designates himself as an attorney at law and who is ready, willing and able to accept retainers for his services.

Dehart, 69 Ohio St.2d at 199-201 (Krupansky, J., dissenting).

The Appellant is a frequent participant in proceedings before this Court, and "there is no excuse for the failure of any member of the bar to understand or to comply with the rules of this court." *Drake* at 39. The integrity of this Court's Rules of Practice is dependent upon consistent enforcement (see *Miller* at 215), and the Appellant's Notice of Appeal was properly stricken because of its failure

to adhere to the Court's Rules of Practice. The Court, therefore, should deny the Appellant's Motion for Reconsideration.

Respectfully submitted,

By: 

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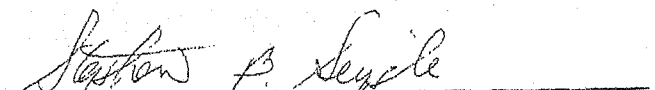
CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Opposing Motion for Reconsideration of Intervening Appellee Columbia Gas of Ohio, Inc., was sent by regular U.S. Mail to all parties of record on April 8, 2005.



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