

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. )  
 )  
 In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval. )  
 )  
 In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Alternative Rate Plan for Gas Distribution Service. )  
 )  
 In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods. )

Case No. 2014 - 0328

Appeal from the Public Utilities Commission of Ohio

Public Utilities Commission of Ohio

Case Nos. 12-1685-GA-AIR  
12-1686-GA-ATA  
12-1687-GA-ALT  
12-1688-GA-AAM

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MEMORANDUM CONTRA  
 JOINT MOTION TO EXPEDITE RULING ON APPEAL  
 BY DUKE ENERGY OHIO, INC.

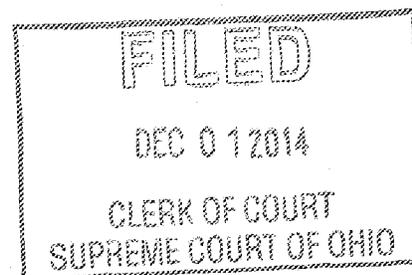
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**TABLE OF CONTENTS**

**I. INTRODUCTION..... 1**

**II. ARGUMENT ..... 1**

**A. No special circumstance demands expedited treatment of this case..... 1**

**B. The Appellants failed to exercise the remedy provided by law. .... 2**

**C. The reasons given by the Appellants provide no basis for expediting  
        this appeal. .... 3**

**III. CONCLUSION..... 4**

## I. INTRODUCTION

On November 20, 2014, the Kroger Company, the Office of the Ohio Consumers' Counsel, the Ohio Manufacturers' Association, and Ohio Partners for Affordable Energy (collectively, the Appellants) filed a Motion to Expedite Ruling on Appeal. The Appellants fail to support their request, however, and Duke Energy Ohio, Inc. (Duke Energy Ohio) requests that the Court deny the motion.

## II. ARGUMENT

The Appellants offer no reason to treat this appeal any differently than any other Commission appeal currently pending before the Court. On the contrary, the circumstances of this case affirmatively favor the denial of the Appellants' motion.

### A. **No special circumstance demands expedited treatment of this case.**

The facts that sometimes justify an expedited appellate process are simply not present here. No one's life, no community's election, no event of unique public importance, and no pending proceeding before another tribunal depends on the outcome of this appeal. The issues here are very narrow, concerning the regulatory treatment of a utility's necessary business expenses, in particular, those resulting from the environmental remediation of manufactured gas facilities. The recoverability of an expense is a routine issue, and however the Court may rule on the merits, there is nothing about the issue that suggests it should be moved to the front of the line. This is not the kind of case that warrants expedited treatment.

If anything, the procedural history of this case cuts against the need for expedited treatment. The alleged primary "benefit" that expedited treatment would provide the Appellants is the potential avoidance of the rates approved by the Commission. But the Appellants have already received this. On May 14, 2014, this Court stayed the Commission's Order. Accordingly, from June 13, 2014, to the present, Duke Energy Ohio's rates have not reflected the disputed

costs. (As of this writing, the stayed rates remain in effect.) Five-and-a-half months of stayed rates have given the Appellants the same benefit as would a five-and-a-half-month acceleration of this appeal.

**B. The Appellants failed to exercise the remedy provided by law.**

Further undercutting the Appellants' request for an extraordinary remedy is their failure to exercise the *ordinary* remedy. Ohio law gives "any person who feels aggrieved by [a Commission] order a right to secure a stay of the collection of the new rates after posting a bond." *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶ 17.

The Appellants were unwilling to exercise this remedy. On November 5, 2014, the Court conditioned the continuation of the stay then in place on the posting of a \$2.5 million bond. This amount, the Appellants recognize, was "significantly less" than the level requested by Duke Energy Ohio. (Jt. Mot. to Exped. at 3.) Nevertheless, they *elected* not to post a bond. Notwithstanding their assertions, the fees on a \$2.5 million bond are assuredly not "outside the reach" of the Appellants (*see id.*), that include a consortium of "more than 1,600 Ohio manufacturing companies"<sup>1</sup> and one of the world's largest grocery retailers, with "2,500 stores in 31 states . . . and annual sales of more than \$70 billion."<sup>2</sup>

The Appellants were not left without a remedy. They were simply unwilling to satisfy the reasonable conditions attached to that remedy. Having declined the ordinary remedy, the Appellants' request for extraordinary treatment should be denied.

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<sup>1</sup> See P.U.C.O. Case No. 12-1685-EL-AIR, Ohio Manufacturers' Assn. Mot. to Intervene at 3 (Sept. 14, 2012).

<sup>2</sup> See "About Kroger," [http://www.thekrogerco.com/corpnews/corpnewsinfo\\_history.htm](http://www.thekrogerco.com/corpnews/corpnewsinfo_history.htm) (last visited November 25, 2014).

**C. The reasons given by the Appellants provide no basis for expediting this appeal.**

Finally, the Appellants offer a pair of arguments in support of expediting the appeal, but neither persuades.

First, they cite R.C. 4903.20, but it provides no guidance here. (Jt. Mot. to Exped. at 2.) That statute directs that all Commission appeals “shall be taken up and disposed of by the court out of their order on the docket.” R.C. 4903.20. But this law speaks to Commission appeals with respect to *all other appeals*. It provides no guidance regarding the order in which Commission appeals should be heard. This statute does not support the Appellants’ request.

The Appellants’ other basis is that “granting the Motion . . . could mitigate the potential harm to consumers if the Court overturns the PUCO’s decision.” (Jt. Mot. to Exped. at 3.) This, of course, is true of virtually every Commission decision that comes before the Court. In fact, the financial stakes in this appeal are actually low relative to other pending appeals from the Commission. *See In re Commission Review of the Capacity Charges of Ohio Power Co. and Columbus Southern Power Co.*, Case No. 2013-0228 (total sum at issue \$508 million, *see, e.g.*, 1st Merit Br. of Indus. Energy Users-Ohio at 18 (July 15, 2013)); *In re Appl. of Ohio Power for Approval of a Mechanism to Recover Deferred Fuel Costs*, Case No. 2012-2008 (total sum at issue \$130 million, *see, e.g.*, 1st Merit Br. of Ohio Power at 1 (Feb. 8, 2013)).

Indeed, less than two months ago, in a case with much greater financial impact, the Court denied a motion for an expedited ruling. *See In re Appl. of Ohio Edison Co.*, Case No. 2013-0513, Entry (Oct. 8, 2014). The revenue approved for recovery in the *Ohio Edison* order appears to have been at least \$400 million. (*See, e.g., id.*, NOPEC Br. at 25 (July 1, 2013); *see also* P.U.C.O. Case No. 12-1230-EL-SSO, Opin. & Order at 55–57 (July 18, 2012).) Not only was more money at issue in that appeal, but the *Ohio Edison* movant had also asserted that issues in

related proceedings depended on the outcome of the pending appeal. (*Id.*, NOPEC Mot. to Exped. at 3 (Aug. 28, 2014).) Nevertheless, the Court denied the motion.

The showing in this case is much less than compelling than the one made in *Ohio Edison*. The Court should deny this request, too.

### III. CONCLUSION

For the foregoing reasons, Duke Energy Ohio respectfully requests that the Court deny the Appellants' Motion to Expedite Ruling on Appeal.

Dated: December 1, 2014

Respectfully submitted,



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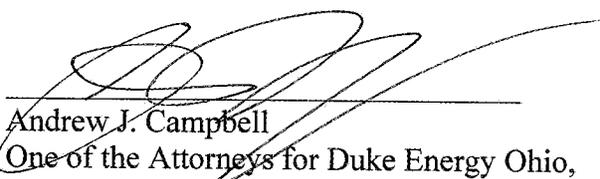
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading was served by electronic mail this

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