ORIGINAL

IN THE SUPREME COURT OF OHIO

In re the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan.	)	Supreme Court Case No. 14-1505
In re the Application of The Dayton Power and Light Company for Approval of Revised Tariffs.	)	Second Appeal from the Public Utilities Commission of Ohio
In re the Application of The Dayton Power and Light Company for Approval of Certain Accounting Authority.	)	Case Nos. 12-426-EL-SSO, 12-427-EL-ATA, 12-428-EL-AAM, 12-429-EL-WVR, 12-672-EL-RDR
In re the Application of The Dayton Power and Light Company for Waiver of Certain Commission Rules.	)	
In re the Application of The Dayton Power and Light Company to Establish Tariff Riders.	)	

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RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF
BY
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RESPONSE TO MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF
BY
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Under S. Ct. Prac. R. 4.01(B)(1), Appellant, the Office of the Ohio Consumers' Counsel ("OCC"), files its Response to the Motion for Leave to File Supplemental Brief ("Motion") docketed in this case on May 13, 2016 by Appellee, the Public Utilities Commission of Ohio and Appellee/Cross-Appellant The Dayton Power and Light Company ("DP&L") (collectively, "Movants"). Movants have asked the Court for leave to file a supplemental brief concerning the Court's recent decision in *In re Application of Columbus S. Power Co.*, Case No. 2013-0521, Slip Opinion No. 2016-Ohio-1608 (Sup. Ct. Ohio Apr. 21, 2016) ("*AEP Case*"). Movants docketed their joint supplemental brief with the Motion. (Motion, Exhibit A.)

The Motion and joint Supplemental Brief violate the Court's Rules of Practice 16.08. The Court should deny the Motion, and strike the Motion and the joint Supplemental Brief attached to it.

S.Ct.Prac.R. 16.08 states: "Except as provided in S.Ct.Prac.R. 3.13 and S.Ct.Prac.R. 17.08 and 17.09, merit briefs shall not be supplemented. If a relevant authority is issued after the deadline has passed for filing a party's merit brief, that party may file a citation to the relevant authority but shall not file additional argument." The exceptions in S.Ct.Prac.R. 16.08 do not apply to the Motion here.

The exception for S.Ct.Prac.R. 3.13 is to allow additional filings to make corrections or additions to a previously filed document. Movants do not claim that they are making corrections or additions to their previously filed briefs, and thus this exception does not apply.

The exception for S.Ct.Prac.R. 17.08 is for a party who, during oral argument, intends to rely on authorities not cited in the merit briefs. Under this exception, the party must file with the Court a list of citations to those authorities. OCC followed this rule in alerting the Court that OCC would rely on the decision in the AEP case at oral argument. (*See* Motion, Exhibit B.) Here, however, Movants have filed more than a list of citations. Instead, Movants have inappropriately presented arguments to the Court.

The exception for S.Ct.Prac.R. 17.09 is for post-oral argument supplemental briefs that have been requested by the Court. This exception is inapplicable because oral argument has not yet occurred in this case and the Court has not sought supplemental briefs.

In support of their Motion, Movants cite *State ex rel. The Cincinnati Enquirer v. Jones-Kelley*, Case No. 2006-2239. Movants state that the Court in *State ex rel. Enquirer* allowed supplemental briefing "to address a newly-enacted statute." (Motion at 2.) That statute was

enacted after the oral argument in that case. But *State ex rel. Enquirer* is inapposite for several reasons.

First, there is no newly enacted statute at issue here. The two statutes discussed in the Motion (at 6-9) were enacted in 1999 and 2008. Indeed, Movants acknowledge that the very issue discussed in their supplemental brief was raised in their merit briefs filed more than a year ago. (*Id.* at 4.)

Second, in *State ex rel Enquirer* the premise for allowing supplemental briefing was that parties could not possibly have had the opportunity to address the issue because of the timing of the legislation. In that case, the statute was enacted after oral argument was held. (*See State ex rel. Enquirer*, Motion for Leave to File Supplemental Brief (February 19, 2008) (attached as Exhibit A to this Response).) That is not the case here. The action that is the premise of the supplemental briefing, the Court's decision in *In re Columbus S. Power*, was issued April 21, 2016. Oral argument in this case is scheduled for June 14, 2016, nearly a month from now.

Third, the movant in *State ex rel. Enquirer* did not file a supplemental brief with its motion. Instead, the movant merely asked the Court to order the parties to submit supplemental briefs regarding the effect of the new law on specific issues in the case. (*See* Exhibit A.) Unlike the Motion here, the motion in *State ex rel. Enquirer* did not include any arguments on the merits of the case.

Movants claim that the proposed supplemental brief is needed to distinguish this case from the *AEP case*. (Motion at 2.) Specifically, Movants wish to address two arguments that were not raised in the AEP case – (1) the "[n]otwithstanding" clause of R.C. 4928.143(B), and (2) that R.C. 4928.143 is the later-enacted statute. (*Id.*) Movants claim that "the effect of the

Court's AEP decision on this appeal involves statutory interpretation arguments that would be difficult to discuss thoroughly at oral argument." (Motion at 3.)

Both arguments, however, were fully briefed by all parties in their merit briefs. (*See* DP&L's Second Merit Brief at 17-20; OCC's Third Merit Brief at 7-10; Industrial Energy Users-Ohio's Third Merit Brief at 23-29.[1]) Supplemental briefing therefore is not necessary at this time. Nor has the Court requested supplemental briefs on these issues. The Motion should be denied and the Supplemental Brief stricken.

Movants also assert that a supplemental brief is needed to address a new development regarding DP&L's blending schedule that was approved by the PUCO. (Motion at 2.) In its merit briefs, DP&L argued that the blending schedule approved by the PUCO was unreasonable. (DP&L Second Merit Brief at 48-49.) Movants now assert that because DP&L has implemented 100% competitive bidding in its service territory, the blending argument is now moot. (*See* Motion at 2.) Movants state that DP&L withdraws that portion of its Proposition of Law 6 dealing with the blending issue. (*See id.*, Exhibit A at 9.)

A supplemental brief, however, is not needed for DP&L to withdraw this argument. As discussed above, a supplemental brief is inappropriate under the Court's rules. Rather, DP&L should file a motion under S.Ct.Prac.R. 17.03 to waive oral argument on the issue or withdraw the argument. In the interest of judicial economy, however, the Court should treat the Motion as if it were asking to withdraw the blending issue from this case. OCC has no objection to such an interpretation of the Motion.

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[1] The PUCO made only a one-paragraph reference to the "notwithstanding" issue in its Second Merit Brief (at 20), and did not raise the "later-enacted statute" argument in either of its briefs. The arguments submitted in the Motion and the joint Supplemental Brief go beyond the arguments the PUCO made in its merit briefs.

The Court should deny the Motion, and strike both the Motion and the joint Supplemental Brief filed with it. If the Court believes the issue warrants further exploration after oral argument, the Court can request supplemental brief briefing, consistent with S.Ct.Prac.R. 17.09(A). If however, the Court grants the Motion and allows the joint Supplemental Brief, the Court should permit OCC to file a reply to the joint Supplemental Brief. The PUCO and DP&L have indicated they do not oppose the filing of any reply to the joint Supplemental Brief by other parties.[2]

Respectfully submitted,

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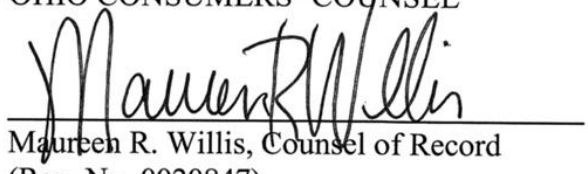

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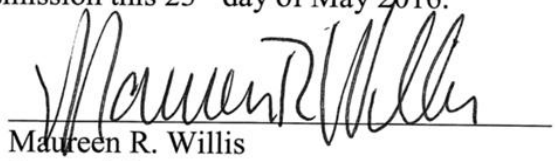
[2] Motion at 3.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response To Motion For Leave To File Supplemental Brief by Appellant, the Office of the Ohio Consumers' Counsel was served upon the following counsel by via electronic transmission this 23rd day of May 2016.



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