

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter of the Application of Duke)
Energy Ohio, Inc. for a Waiver.) Case No. 16-1017-EL-WVR

**MEMORANDUM CONTRA DUKE ENERGY OHIO, INC.'S MOTION TO STRIKE
COMMENTS OF THE OHIO MANUFACTURERS' ASSOCIATION**

I. INTRODUCTION

On March 16, 2016, Duke Energy Ohio, Inc. (Duke) requested a limited waiver of Rule 4901:1-39-04(A), Ohio Administrative Code to allow it to delay filing its energy efficiency and peak demand reduction program (EE/PDR) program portfolio plan (POR Plan) until October 15, 2016, rather than by the April 15 deadline.¹ Ohio Manufacturers' Association (OMA) and several other parties, filed motions to intervene in that case, as well as comments in opposition to Duke's waiver request.² After considering the comments filed by the intervening parties, the Public Utilities Commission of Ohio (Commission) determined that Duke's request for a six-month extension was "excessive" and required Duke to file its POR Plan by June 15, 2016.³

¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Program Portfolio Plan, et.al.*, Case No. 16-576-EL-POR, et. al., (March 16, 2016).

² See e.g., *Motion to Intervene and Comments on Behalf of the Kroger Co.* (March 23, 2016); *Motion to Intervene and Comments of the Ohio Manufacturers' Association* (March 28, 2016); *Ohio Partners for Affordable Energy's Motion to Intervene and Memorandum in Support and Comments* (March 29, 2016); *Motion to Intervene and Comments by the Environmental Law & Policy Center* (April 4, 2016).

³ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Program Portfolio Plan, et.al.*, Case No. 16-576-EL-POR, et. al., Entry at 4 (April 7, 2016) (Duke's Previous Waiver Case).

Duke then filed this pending application in a new docket, seeking to waive and delay filing the market potential study portion of its POR Plan until October 15, 2016.⁴ In its application, Duke states that a waiver is necessary given the vendor it retained to perform a market assessment will not complete the market assessment study until August 2016, and once the assessment is complete, Duke will file an amendment to its POR Plan to reflect the findings of that study.⁵ OMA again requested intervention in this separate proceeding, and filed comments in opposition to Duke's second waiver request.⁶ Duke filed a motion to strike OMA's comments.⁷ Duke's motion should be denied as it lacks any basis in Ohio law. OMA was within its rights to file comments in opposition to Duke's waiver request and those comments were directly related to Duke's pending application before the Commission.

II. ARGUMENT

In its motion to strike, Duke argues that OMA has "ignored the procedural posture of this proceeding" by filing substantive comments regarding Duke's waiver application.⁸ This argument is without merit. OMA properly filed a motion to intervene in this pending proceeding in accordance with Rule 4901-1-11, Ohio Administrative Code and Section 4903.22, Ohio Revised Code.

Duke fails to cite to any case law that prohibits an intervening party from including comments in a motion to intervene. In fact, the opposite is true. The Commission has routinely permitted, and relied upon, comments submitted with a motion to intervene in issuing decisions.

⁴ Application for Waiver of Duke Energy Ohio, Inc. at 1 (May 9, 2016).

⁵ Id. at 1-2.

⁶ Motion to Intervene and Comments of The Ohio Manufacturers' Association (May 26, 2016).

⁷ Duke Energy Ohio, Inc.'s Motion to Strike Comments of the Ohio Manufacturers' Association (May 27, 2016) (Motion to Strike).

⁸ Id. at 2.

For example, in a tariff approval case involving Dayton Power and Light (DP&L), FirstEnergy Solutions filed comments regarding DP&L's application, absent any invitation by the Commission to do so.⁹ The Commission reviewed and considered these comments in its Finding and Order, specifically referencing FirstEnergy Solutions' arguments.¹⁰

Moreover, in Duke's Previous Waiver Case, the Commission considered comments submitted by several intervening parties, including OMA, the Ohio Partners for Affordable Energy (OPAE), the Environmental Law and Policy Center (ELPC), and the Kroger Co. (Kroger)¹¹ and found that Duke's waiver request was "excessive," limiting Duke's extension to file its POR Plan to June 15, 2016.¹² The Commission both considered and valued OMA's comments in that case, which were also filed by OMA prior to the establishment of a procedural schedule. Therefore, it is inconceivable that Duke now seeks to strike OMA's comments, which are similarly filed in this case.

It is common practice for the Commission to not only welcome, but review and consider comments and objections from intervening parties in order to appropriately address any concerns related to applications filed by public utilities.¹³ This practice aids in efficiently and effectively managing the Commission's docket as it permits parties to provide comments on a particular utility company's application without the Commission issuing a full procedural schedule in every

⁹ *In the Matter of the Application of The Dayton Power and Light Company for Approval of Revisions to its Existing G8, D4 and D5 Tariff*, Case No. 11-4505-El-ATA, Comments of FirstEnergy Solutions Corp. (January 1, 2012).

¹⁰ *In the Matter of the Application of The Dayton Power and Light Company for Approval of Revisions to its Existing G8, D4 and D5 Tariff*, Case No. 11-4505-El-ATA, Finding and Order at 2-3 (February 14, 2012).

¹¹ Duke's Previous Waiver Case, OMA Comments at 5-6 (March 28, 2016); Duke's Previous Waiver Case, OPAE Comments at 3-4 (March 29, 2016); Duke's Previous Waiver Case, ELPC Comments at 6-8 (April 4, 2016); Duke's Previous Waiver Case, Kroger Comments at 5 (March 23, 2016).

¹² Duke's Previous Waiver Case, Finding and Order at 4.

¹³ See e.g., *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of Tariff for Rate PTR 2.0* Case No. 11-2798-EL, ATA (May 2, 2011).

instance. To require such would be administratively burdensome and provides no value. Therefore, Duke's argument lacks merit and is inconsistent with Commission practice.

As mentioned, Duke previously filed a waiver requesting the Commission extend the deadline for filing its POR Plans to October 15, 2016, noting a large number of pending energy-efficiency cases before the Commission that could impact its own POR Plans.¹⁴ The Commission considered Duke's request, as well as comments filed by several intervening parties, and instructed Duke to file its POR Plans by June 15, 2016.¹⁵ In complete disregard for the Commission's Order, Duke now files another request to extend the deadline for filing the market potential study portion of its POR Plans to October 15, 2016, stating that its vendor will not have the market assessment complete until August.¹⁶ The fact that this waiver relates only to the market potential study does not excuse the fact that Duke has ignored the Commission's ruling and is now seeking the same waiver through a different Commission docket. Importantly, Duke made no mention of its vendor being unable to complete the market assessment until August in its initial waiver request. Moreover, Duke could have filed an application for rehearing of the Commission's Finding and Order in the Previous Waiver Case. Instead, Duke chose to circumvent procedural process and file another waiver request in a separate docket. These actions clearly ignore the Commission's ruling and established process.

Further, Duke's claim that its due process rights have been violated is without merit. OMA cannot, as a matter of law, violate Duke's due process rights as it is not a state actor.¹⁷ Additionally, Duke has suffered no prejudice from OMA's comments as Duke had the

¹⁴ Duke's Previous Waiver Case, Application of Duke Energy Ohio Inc., for a Waiver and Request for Expedited Ruling at 1 (March 16, 2016).

¹⁵ Duke's Previous Waiver Case, Finding and Order at 4.

¹⁶ Application for Waiver of Duke Energy Ohio, Inc. at 1 (May 9, 2016).

¹⁷ *NCAA v. Tarkanian*, 488 U.S. 179, 191-192 (1988).

opportunity to respond to OMA's comments and chose not to do so. Duke has provided no substantive basis to support its burden to show that good cause exists to grant this waiver request. Now Duke seeks to change the focus of the proceeding by filing a meritless motion to strike. This too should be denied by the Commission.

III. Conclusion.

For the aforementioned reasons, the Commission should deny Duke's motion to strike as OMA properly filed comments in conjunction with its motion to intervene, which is both lawful and consistent with Commission practice.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on June 13, 2016.

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Summary: Memorandum Memo Contra Duke's Motion to Strike Comments of OMA
electronically filed by Ms. Danielle G Walter on behalf of OMA