

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of its) Case No. 16-576-EL-POR
Energy Efficiency & Peak Demand)
Reduction Program Portfolio Plan.)

**MOTION TO STRIKE PORTIONS OF DUKE ENERGY OHIO, INC.'S AND THE
OHIO PARTNERS FOR AFFORDABLE ENERGY'S POST-HEARING BRIEFS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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In their post-hearing briefs, Duke Energy Ohio, Inc. ("Duke") and the Ohio Partners for Affordable Energy ("OPAE") rely on allegations, assertions, and information that was not part of the record in this case. Public Utilities Commission of Ohio ("PUCO") precedent on this issue is straightforward:

- Parties can cite record evidence.
- Parties can cite PUCO Orders and Entries.
- Parties cannot cite facts not in evidence.
- Parties cannot cite documents filed in PUCO proceedings (applications, stipulations, briefs, etc.) unless those documents are either admitted into the record or administratively noticed.

This precedent is reasonable and fair to all parties. The PUCO gives parties ample opportunity to present evidence and allows other parties to test that evidence. This is done by permitting all parties to (i) file testimony, (ii) attend a hearing before an Attorney Examiner, (iii) present documents and request that they be admitted into the record, (iv) request administrative notice of documents, and (v) cross-examine witnesses at the hearing.

To protect the integrity of the PUCO's administrative process—which in this case will affect over 600,000 million consumers—the Office of the Ohio Consumers' Counsel ("OCC") respectfully moves to strike the portions of Duke's and OPAE's briefs that rely on allegations, assertions, and information not in evidence. It is unfair for parties, on brief and after the fact, to rely on allegations, assertions, and information that was not subject to scrutiny by other parties and was not subject to the PUCO's administrative process.

The PUCO should strike the following portions of Duke's March 31 initial brief,¹ OPAE's March 31 initial brief,² and OPAE's April 7 reply brief:³

Duke's Initial Brief:

- a) Page 8, the last sentence in the first partial paragraph beginning with "It should be noted" and ending with "state," plus the corresponding footnote 14.

OPAE's Initial Brief:

- b) Page 8, the second sentence in the second full paragraph, beginning with "OPAE attended" and ending with "meetings."
- c) Page 8, the fifth sentence in the second full paragraph, beginning with "OPAE had one-on-one" and ending with "January 27, 2017."
- d) Page 8, the third sentence in the last partial paragraph, beginning with "OCC's participation" and ending with "other parties."
- e) Page 8, the last line, starting with "otherwise the negotiations" and continuing through the end of the sentence on page 9 with the word "conversations."

¹ <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=c77bdf20-2107-417b-b66e-5f4ec414a0cb>

² <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=7fa29289-488e-415f-b0de-a0c3294e8454>

³ <http://dis.puc.state.oh.us/DocumentRecord.aspx?DocID=c4fd5dee-d7c1-454a-8bdd-c56cc6ead6fa>

- f) Page 9, the second to last sentence in the first partial paragraph, beginning with “OPAE continued” and ending with “Amended Stipulation.”

OPAE’s Reply Brief:

- g) Page 4, the second sentence in the last full paragraph, beginning with “OPAE attended” and ending with “settlement meetings.”
- h) Page 4, on the last line starting with “OPAE had” and continuing through the end of that sentence on page 5 with the words “January 27, 2017.”
- i) Page 5, in the third sentence in the first full paragraph, starting with the words “otherwise the negotiations” and through the end of that sentence ending with the word “conversations.”
- j) Page 5, the fifth sentence in the first full paragraph, beginning with the words “After the” and ending with the words “Amended Stipulation.”

As described in the attached memorandum in support, the PUCO should strike these portions of the briefs because they cite to allegations, assertions, and information that is not evidence in this proceeding and constitutes hearsay. Allowing off-record, untested information is prejudicial to OCC and consumer interests. It is inappropriate for the PUCO to rely on such information in deciding how much Duke can charge its customers for energy efficiency.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

The PUCO has developed a process for resolving its proceedings. All parties in this case were permitted to file testimony.⁴ Duke, the PUCO Staff, and OCC took advantage of that opportunity and filed testimony in January 2017.⁵ OPAE chose not to file any testimony. The Attorney Examiner held hearings on February 27, 2017 and March 15, 2017.⁶ All parties were allowed to appear at the hearing, to cross-examine witnesses, and to otherwise present evidence to the Attorney Examiner.⁷ The Attorney Examiner then provided all parties an opportunity to file post-hearing briefs and reply briefs.⁸

The record in this case was closed on March 15, 2017.⁹ But now, in their briefs and after the fact, OPAE and Duke make assertions based on opinions and information that were not admitted into the record. This should not be permitted, consistent with PUCO precedent. The PUCO's precedent regarding post-hearing briefs is fair, reasonable,

⁴ Entry ¶ 4 (Dec. 27, 2016).

⁵ See <http://dis.puc.state.oh.us/CaseRecord.aspx?Caseno=16-0576&link=DIVA> (showing Duke, OCC, and PUCO Staff testimony only).

⁶ See id. (showing hearing transcripts for these dates).

⁷ See Feb. 27, 2017 Transcript; Mar. 15, 2017 Transcript.

⁸ Tr. at 222:2-5.

⁹ Tr. at 222:5-8.

and importantly, very easy to comply with. Parties can cite record evidence in their briefs. Parties can cite documents that have been administratively noticed.¹⁰ Parties can cite PUCO orders and entries.¹¹ Parties cannot cite facts not in evidence.¹² Parties cannot cite documents filed in PUCO proceedings (applications, stipulations, briefs, etc.) unless those documents are either admitted into the record or administratively noticed.¹³

Despite this precedent, OPAE's and Duke's post-hearing briefs rely on information that is not part of the record in this case. In both of its briefs, OPAE makes statements regarding its purported participation in settlement negotiations, none of which are part of the record. This evidence purports to show that OPAE's participation in settlement discussions was comparable to OCC's, from which OPAE concludes that serious bargaining occurred.¹⁴ Duke's arguments rely on information regarding Duke's electric rates that was not admitted into evidence and was not subject to cross-examination. The purpose of this was to argue that Duke's electric rates are already low, which, according to Duke, makes a cap on energy efficiency costs unnecessary.

¹⁰ *Canton Storage & Transfer Co. v. PUCO*, 72 Ohio St. 3d 1, 8 (1995).

¹¹ Opinion & Order ¶ 31, *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Mgmt. Programs for its Residential & Commercial Customers*, Case No. 16-1309-GA-UNC (Dec. 31, 2016).

¹² Order on Remand at 9-10, *In re Application of Columbus S. Power Co. for Approval of an Elec. Sec. Plan*, Case No. 08-917-EL-SSO (granting a motion to strike portions of AEP's initial post-hearing brief that included non-record information); 5th Entry on Rehearing at 169-72, *In re Application of [FirstEnergy] for Authority to Provide for a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO (Oct. 12, 2016) (granting motions to strike portions of rehearing briefs that included information and statements that were not part of the evidentiary record).

¹³ Opinion & Order at 37, *In re Application of [FirstEnergy] for Authority to Provide a Standard Serv. Offer in the Form of an Elec. Sec. Plan*, Case No. 14-1297-EL-SSO (Mar. 31, 2016) (granting motions to strike portions of reply briefs that cited to documents filed in other PUCO proceedings); *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Mgmt. Programs for its Residential & Commercial Customers*, Case No. 16-1309-GA-UNC (Dec. 31, 2016) (striking portion of a post-hearing brief that cited a motion filed in the same case because the motion was not admitted into the evidentiary record).

¹⁴ See OPAE Initial Brief at 8; OPAE Reply Brief at 5.

The PUCO should strike the portions of OPAE's and Duke's briefs that improperly rely on information that has not been admitted as evidence in this proceeding and that constitutes hearsay. The PUCO should not consider or rely on that information, which is outside a fair hearing process, in deciding the merits of this case affecting over 600,000 consumers.

I. RECOMMENDATIONS

A. The PUCO should strike all portions of OPAE's briefs that rely on OPAE's unsupported description of its participation in settlement negotiations.

OPAE argues in both its initial brief and reply brief that the settlement in this case was the product of serious bargaining because OCC's participation in settlement negotiations was allegedly the same as OPAE's participation.¹⁵ In making this claim, OPAE makes various statements about the timing and nature of its negotiations with Duke.¹⁶

The problem with OPAE's argument (other than its irrelevance¹⁷) is that the extent of OPAE's participation in settlement negotiations was not admitted into the record. OPAE offered no testimony about its negotiations with Duke. Yet now, when there is no opportunity for OCC or anyone else to cross-examine OPAE regarding its claims, it relies on this non-record information in its arguments to the PUCO. This is unfair and should not be permitted, consistent with PUCO practice.

¹⁵ OPAE Initial Brief at 8; OPAE Reply Brief at 5.

¹⁶ OPAE Initial Brief at 8-9; OPAE Reply Brief at 4-5.

¹⁷ See OCC Reply Brief at 17-18.

The PUCO has continuously rejected efforts by parties to include information in a brief that is not part of the record.¹⁸ Because OPAE did not seek admission of this information into the record, OCC had no opportunity to test OPAE's extra-record information. This prejudices OCC and the consumers it represents. The portions of OPAE's briefs that reference this information¹⁹ should be stricken, consistent with PUCO precedent.

B. The PUCO should strike Duke's statements regarding its electric rates because it is not based on record evidence.

In its initial brief, Duke makes a claim regarding its electric rates as compared to other utilities in Ohio.²⁰ In support of this claim, Duke cites a document called the "Ohio Utility Rate Survey."²¹

This document was not admitted into the evidentiary record. Duke did not offer this document as evidence. Duke offered no testimony supporting the information in this document. Yet now, when there is no opportunity to test Duke's assertions, it relies on this non-record information in its arguments to the PUCO. This is unfair and should not be permitted, consistent with PUCO practice.

Duke's reliance on non-record information is improper and violates PUCO precedent. The PUCO has continuously rejected efforts by parties to include information in a brief that is based on documents that were not admitted into the record. In doing so, the PUCO has defended fairness in its processes by noting: "If we were to allow evidence to be admitted in such a manner, any document in question would not be supported by

¹⁸ See footnotes 10-13 above.

¹⁹ See items (b) through (j) above.

²⁰ See item (a) above.

²¹ Duke Initial Brief at footnote 14.

testimony and the opposing party would have no opportunity to conduct cross-examination concerning the document or to refute statements contained in the document."²²

Because Duke did not seek admission of this document into the record, OCC had no opportunity to cross-examine Duke on the relevance or reliability of this document or to present any evidence rebutting this document. This prejudices OCC and the consumers it represents. The portions of Duke's initial brief that references this document²³ should be stricken, consistent with PUCO precedent.

C. OPAE's and Duke's non-record statements should be struck because they are hearsay.

OPAE's statements regarding its alleged role in settlement communications and Duke's citation to documents that purportedly compare Duke's electric rates to other utilities are also inadmissible hearsay. Under the Ohio Rules of Evidence, hearsay is any statement that (i) is offered to prove the truth of the matter asserted and (ii) is not made by a declarant while testifying at a hearing.²⁴ Because there is no opportunity to cross-examine a witness regarding hearsay, it is not admissible.²⁵ The PUCO has applied this rule to strike statements in post-hearing briefs that are not based on facts that were subject to cross-examination.²⁶

²² In the Matter of FAF, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture, PUCO Case No. 06-786-TR-CVF, Opinion and Order at 3 (November 21, 2006).

²³ See item (a) above.

²⁴ Ohio R. Evid. 801(C).

²⁵ Ohio R. Evid. 802. See also *State v. Wesson*, 137 Ohio St. 3d 309, 323 (2013) (hearsay excluded from evidence because party seeking to introduce the hearsay was not subjected to cross-examination).

²⁶ See, e.g., Opinion & Order ¶ 8, *In re Complaint of Daniel B. Adkins*, Case No. 16-1543-EL-CSS (Mar. 28, 2017) (striking post-hearing filings that relied on hearsay); Fifth Entry on Rehearing ¶¶ 373-77, *In re Application of [FirstEnergy] for Authority to Provide for a Standard Serv. Offer*, Case No. 14-1297-EL-SSO (Oct. 12, 2016) (striking portion of post-hearing brief that relied on hearsay).

OPAE's and Duke's statements are hearsay because they are offered to prove the truth of the matter asserted: OPAE claims that it did in fact participate in certain settlement communications, and Duke claims that its electric rates are in fact lower than some other Ohio utilities. And they were not made by a declarant at the hearing in this case. Neither OCC nor any other party had an opportunity to cross-examine OPAE regarding OPAE's alleged settlement communications with Duke or other parties. Likewise, neither OCC nor any other party had an opportunity to cross-examine Duke regarding Duke's comparison of its rates to other utilities. Thus, the PUCO should strike these portions of OPAE's and Duke's briefs.

II. CONCLUSION

For reasons of fairness to parties and to its own decision-making, the PUCO does not allow parties to cite information in their briefs that they (or others) did not enter into the evidentiary record in the proceeding. OPAE's and Duke's briefs rely on hearsay that is not evidence. OCC has not been provided the opportunity to test, via cross-examination or otherwise, the information now appearing for the first time in OPAE's and Duke's briefs. The use of this information is unfair and highly prejudicial to OCC and the consumers it represents. The PUCO should grant OCC's motion to strike.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion to Strike was served on the persons stated below via electronic transmission this 14th day of April 2017.

/s/ Christopher Healey _____

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Summary: Motion Motion to Strike Portions of Duke Energy Ohio, Inc.'s and the Ohio Partners for Affordable Energy's Post-Hearing Briefs by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.