

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO PARTNERS FOR AFFORDABLE ENERGY'S
MEMORANDUM CONTRA THE MOTION TO STRIKE**

Ohio Partners for Affordable Energy ("OPAE") herein submits to the Public Utilities Commission of Ohio ("Commission") this memorandum contra the motion of the Office of the Ohio Consumers' Counsel ("OCC") to strike portions of OPAE's initial and reply briefs in this proceeding to consider the application of Duke Energy Ohio, Inc., ("Duke"). OCC moves to strike the following language in OPAE's initial and reply brief:

OPAE attended no other settlement meetings.

OPAE had one-on-one conversations with Duke in mid-January that led to OPAE's signature on the Amended Stipulation filed January 27, 2017.

OCC's participation in the settlement negotiations appears to be roughly equal to OPAE's participation and the participation of other parties.

otherwise the negotiations were conducted by email or through one-on-one conversations.

After the December 22, 2016 settlement was filed, OPAE continued to negotiate one-on-one with Duke, as did other parties, which led to the Amended Stipulation.

According to OCC's motion, OPAE's briefs "cite to allegations, assertions, and information that is not evidence in this proceeding and constitutes hearsay." Motion to Strike at 3. OCC describes its understanding of what parties can and cannot "cite" in their briefs. As is obvious from the language OCC seeks to strike, OCC has not moved to strike any citations made by OPAE. OCC's reference to Commission precedent on what may and may not be cited in briefs is irrelevant to OCC's motion to strike.

Given that OCC is not moving to strike any citation made by OPAE, OCC's memorandum in support of its motion quickly changes the subject. OCC switches from the verb "cite" to the verb "rely" and argues that OPAE's briefs "rely on information that is not part of the record in this case." Memorandum in Support of Motion at 2. OCC provides no Commission precedent on what parties may "rely" on in their briefs.

OCC pre-filed testimony of Colleen Shutrump as an expert witness on matters related to energy efficiency and energy resources. OCC Ex. 13 at 1-3. Ms. Shutrump testified that OCC was not given an opportunity to participate meaningfully in negotiations regarding the settlement in this case. Id. at 6. She testified that "other than the November 3, 2016 meeting," "OCC was not invited to any other settlement meetings/discussions between November 3, 2016" and the filing of the Settlement on December 22, 2016. Id. at 6-7. She also testified that Duke and OCC had several one-on-one conversations in mid-December. Id. at 6. Her conclusion is that the settlement was not the result of serious bargaining

among the parties, the first-part of the Commission's three-part test for the reasonableness of stipulations.

The Commission considers the first part of its test satisfied if no parties were purposely excluded from settlement negotiations. *Duke Energy Ohio*, Case No. 15-534-EL-RDR, Opinion and Order (October 26, 2016) at 31. By stating that "OCC was not invited to any other settlement meetings/discussions", OCC's pre-filed expert testimony introduces the issue of the exclusion of OCC from settlement negotiations.

On brief, OPAE addressed the issue raised by OCC by citing the record evidence, which citations OCC is not seeking to strike. OCC is not seeking to strike OPAE's citation to Duke Exhibit 10, which shows that OCC and OPAE both attended settlement negotiations. Duke Exhibit 10. OCC is not seeking to strike OPAE's citation to Joint Exhibit 2, which shows that OPAE signed the Amended Stipulation, as did other parties. OCC is not seeking to strike OPAE's citation to Joint Exhibit 1, which shows that OPAE did not sign the first stipulation and that other parties also did not. These three exhibits are evidence of record that OPAE attended the same settlement meeting as OCC, that OPAE continued to negotiate with Duke after the first settlement was filed on December 22, 2016, and that OPAE was able to sign the Amended Stipulation filed on January 27, 2017, as were other parties. Thus, OPAE cited to record evidence to support OPAE's statements, and OCC is not seeking to strike these or any other citations made by OPAE.

In spite of OPAE's citation to record evidence to support its statements on brief about OPAE and OCC participation in settlement meetings, OCC contends that OPAE cannot discuss OPAE's participation in settlement negotiations on brief unless OPAE produced a witness at the hearing to testify about OPAE's participation in settlement negotiations. OCC argues that OPAE's briefs are offering "evidence" that is not "admissible" because it is "hearsay". Memorandum in Support of Motion to Strike at 5.

OCC's motion to strike must be rejected. First, OCC only raised the issue of OCC not being "invited to any other settlement meetings/negotiations" in its expert testimony, which was due the day testimony against the Amended Stipulation was to be filed. It makes no sense that the Commission would find that OPAE needed to file expert testimony on OPAE's participation in settlement negotiations in order to respond to OCC's expert testimony that was due after testimony in support of the Amended Stipulation was due.

Most importantly, there is no requirement that all parties to a settlement must file expert testimony. Ohio Administrative Code ("OAC") Rule 4901-1-30(D) states that only one party to a stipulation must file testimony in its support.

Second, OPAE had no expert who could file testimony about OPAE's participation in the settlement meetings and negotiations. OPAE's counsel participated in the settlement meetings and negotiations. OPAE's counsel cannot file expert testimony. OPAE should not be required to do what is impossible for OPAE to do. Moreover, there is nothing productive to be gained by OCC cross examining an OPAE witness on OPAE's participation in settlement

negotiations. It is OCC's exclusion from settlement negotiations/meetings that has been raised as an issue by OCC.

Having raised the issue of its exclusion from settlement negotiations in its expert testimony, OCC is now seeking to prevent the Commission from considering information about another party's participation in settlement negotiations. OAC Rule 4901-1-31 provides for briefs on "one or more specific issues." In its briefs, OPAE gave a very brief account of OPAE's participation in the settlement negotiations, including a meeting that OCC also attended. Duke Ex. 10. OPAE's briefs contain information in response to the issue raised by OCC about OCC's exclusion from the settlement negotiations/meetings. If the Commission considers this "hearsay evidence", the Commission can give hearsay evidence the weight it deserves.

If one party raises an issue about its exclusion from settlement negotiations as part of expert testimony, other parties, including those whose counsel is the participant in settlement negotiations, should be allowed to address their participation in settlement negotiations on brief. OPAE's briefs are not evidence of record. They simply recount very briefly OPAE's participation in the settlement negotiations. Even if the Commission were to consider some part of OPAE's language as hearsay, there is still no reason to strike the language. The Commission is capable on giving the proper weight to hearsay. Therefore, OCC's motion to strike these sentences and words from OPAE's briefs should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum Contra will be served electronically by the Commission's Docketing Division on the parties listed below who are electronically subscribed on this 27th day of April 2017.

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Summary: Memorandum Contra the Motion to Strike electronically filed by Colleen L Mooney
on behalf of Ohio Partners for Affordable Energy