

**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.)

**REPLY IN SUPPORT OF THE 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**

The Public Utilities Commission of Ohio ("PUCO" or "Commission") should grant the Office of the Ohio Consumers' Counsel's ("OCC") motion to strike certain parts of Duke Energy's and the Ohio Partners for Affordable Energy's ("OPAE") post-hearing briefs. The parts that OCC moves to strike are based on facts that were not admitted into the record in this case and were not administratively noticed. In their memoranda contra, neither Duke nor OPAE denies this. Instead, they argue that the PUCO should, despite this flaw, consider the evidence that they have introduced for the first time during briefing. The PUCO should not allow this.

I. REPLY

A. The PUCO should not rely on Duke's non-record hearsay.

Duke argues that the PUCO should consider its non-record hearsay because the information is found on the PUCO's website.¹ Duke effectively proposes a new rule that any and all information found on the PUCO's website can be cited on brief, whether or

¹ Duke Energy Ohio, Inc.'s Memo Contra The Office of the Ohio Consumers' Counsel Motion to Strike (the "Duke Memo Contra") at 1-2 (Apr. 28, 2017).

not that information was admitted into the record or administratively noticed. Tellingly, Duke cites no authority for this purported rule because there is none.

In support of its argument, Duke claims that "the Commission is the source of the information" in question.² But this is untrue. The link that Duke cites is to periodic Ohio Utility Rate Surveys that are posted on the PUCO's website by the PUCO Staff, not by the Commission itself. Indeed, every page of each of the PUCO Staff's surveys states: "This document was created by the staff of the Rates and Analysis Department. It is for staff discussion purposes only and does not reflect the view of the Commission."³

Duke also claims that the information in these surveys "is easily 'fact checked' by all interested parties and so not a matter that can be misrepresented."⁴ This, too, is inaccurate. The documents that Duke cites are summaries of various calculations that the PUCO Staff Rates and Analysis Department has performed. The documents do not include a description of the PUCO Staff's methodology or calculations, do not include underlying source data, and do not otherwise explain how the numbers in the documents were derived. Nor was any member of the PUCO Staff's Rates and Analysis Department cross-examined on these documents to determine whether or not they are reliable for the purpose that Duke cites them. Indeed, these documents are explicitly "for staff discussion purposes only"—they are not statements of fact to be used in the PUCO's administrative proceedings.

² Id. at 2.

³ See, e.g., <http://www.puco.ohio.gov/industry-information/statistical-reports/ohio-utility-rate-survey/urs-2016-pdf/>

⁴ Duke Memo Contra at 2.

Because Duke did not seek to introduce this information into evidence and did not request administrative notice of it, the PUCO should grant OCC's motion to strike this portion of Duke's brief.

B. The PUCO should reject OPAE's argument that it can introduce new evidence in its briefs.

OPAE's argument in its memorandum contra is essentially this: OPAE failed to rebut OCC's record evidence during the evidentiary hearing but should be allowed to introduce new evidence at the briefing stage. The PUCO should reject this unfounded theory.

OPAE's post-hearing briefs contain numerous statements about OPAE's alleged participation in various settlement meetings with Duke. For example, in its initial brief, OPAE states: "OPAE had one-on-one conversations with Duke in mid-January." Did OPAE in fact have conversations with Duke in mid-January? Is it true that no one else attended these conversations? There's no way to know the answers to these questions, because there is nothing in the record about OPAE's alleged conversations with Duke in mid-January.

Had OPAE introduced these assertions in testimony or otherwise at the hearing, OCC would have an opportunity to cross-examine OPAE about these statements, and the parties to the case and the Attorney Examiner could determine whether this statement is reliable. Instead, however, OPAE introduced this newly purported fact only in its briefs, after the record was closed. The same goes for OPAE's other newly-introduced alleged facts in its initial brief and reply brief.⁵

⁵ See generally OCC Motion to Strike at 2-3.

OPAE, like all parties in this case, was given an opportunity to file testimony. It chose not to. OPAE had an opportunity to cross-examine every witness in this case at a hearing before the Attorney Examiner. At no point did OPAE seek to introduce any evidence about its negotiations with Duke Energy. But now, in its briefs, OPAE's counsel is effectively testifying by including new facts that were never introduced, never vetted, and never subjected to cross-examination. There is no opportunity for any party to determine whether any of the new facts that OPAE has introduced are reliable, complete, or accurate. They are the very definition of hearsay, and they should be stricken.

If OPAE is permitted to introduce these new facts in its brief, then what was the point of parties submitting testimony and participating in a multi-day hearing? According to OPAE, when it fails to introduce the evidence that it wants to make its case, it can simply unilaterally introduce that new evidence at the briefing stage. This makes a mockery of the PUCO's administrative process, which is intended to provide all parties a fair opportunity to create an evidentiary record through direct testimony, cross-examination, and administrative notice.

1. OPAE claims that it was "impossible" for OPAE to introduce its facts into evidence. This is false.

In its memorandum contra, OPAE makes various excuses about why its new alleged facts are not part of the record. According to OPAE, it did not file expert testimony because only OPAE's counsel participated in the settlement meetings and negotiations, and "OPAE's counsel cannot file expert testimony."⁶ This argument fails for at least five reasons.

⁶ Ohio Partners for Affordable Energy's Memorandum Contra the Motion to Strike ("OPAE Memo Contra") at 4 (Apr. 27, 2017).

First, there is no rule prohibiting OPAC's counsel from filing testimony. PUCO rule 4901-1-29 permits parties to file expert testimony, and nowhere in that rule does it say that the expert cannot be a party's attorney. OPAC may, for strategic reasons, not want its counsel to testify, but that does not mean that it is prohibited.

Second, OPAC's witness would not need to be an expert to file testimony describing what took place at a settlement negotiation. Such testimony would be basic fact testimony, so OPAC's claim that its counsel "cannot file *expert* testimony" is irrelevant.

Third, OPAC's claim that only its attorney attended the settlement negotiations is itself inadmissible hearsay. The record does not include any information about who at OPAC may have attended any particular settlement discussion with Duke. It is possible that other OPAC representatives attended settlement meetings, but without any record evidence on this topic, there is no way to know.

Fourth, even if OPAC's attorney was the only party that attended a particular settlement meeting, that was OPAC's choice. OPAC should not be permitted to voluntarily send only its attorney to a meeting, claim that the attorney cannot file testimony, and then have the attorney introduce alleged facts about that meeting for the first time in its briefs.

Fifth, OPAC could have sought to introduce facts regarding its purported participation in settlement meetings through other means. For example, OPAC could have asked one of Duke's witnesses about those meetings during cross-examination. OPAC chose not to do so.

In short, OPAE had abundant opportunity to introduce facts into the record. Despite these opportunities, the alleged facts that OPAE now relies on to make its case are not part of the record. OPAE failed to create an adequate record on which to make its legal arguments. That fault cannot and should not be cured now by allowing OPAE to introduce new, untested, and unverifiable facts in its briefs.

2. OPAE does not have the authority to decide whether OCC would have wanted to cross-examine OPAE.

OPAE also claims that "there is nothing productive to be gained by OCC cross examining an OPAE witness on OPAE's participation in settlement negotiations."⁷ But that is not OPAE's decision to make. Whether OCC would want to cross-examine OPAE's witness is a decision that OCC should have an opportunity to make at the hearing. Effectively, OPAE is arguing that it can unilaterally waive OCC's right to cross-examine OPAE regarding its version of the facts. This cannot be the case.

3. The PUCO should give no weight to OPAE's hearsay by striking it.

OPAE also tacitly admits that its newly-introduced facts are hearsay. OPAE admits that its briefs "contain information in response to the issue raised by OCC about OCC's exclusion from the settlement negotiations/meetings."⁸ But OPAE does not claim that this "information" is part of the evidentiary record—because it isn't. OPAE then goes on to argue that even if such information is hearsay, "the Commission can give hearsay evidence the weight it deserves."⁹

⁷ Id. at 4-5.

⁸ Id. at 5.

⁹ Id.

OCC agrees that the PUCO should give OPAC's hearsay the weight it deserves: zero. And the means by which the PUCO gives hearsay evidence zero weight is by striking it, as OCC has asked.

II. CONCLUSION

In its motion to strike, OCC explained that Duke's and OPAC's briefs rely on alleged facts that are not part of the record in this case. Neither Duke nor OPAC denies this; not once in their memoranda contra do Duke or OPAC claim that OCC is mistaken and that their alleged facts are indeed found in the record. The PUCO should reject OPAC's and Duke's alternative theories for why they should be permitted to rely on information in their briefs that is outside the evidentiary record in this proceeding. OCC's motion to strike should be granted in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply was served on the persons stated below
via electronic transmission this 4th day of May 2017.

/s/ Christopher Healey _____

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Summary: Reply Reply in Support of the 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.