

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Direct Energy Business, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 14-1277-EL-CSS
	)	
Duke Energy Ohio, Inc.	)	
	)	
Respondent.	)	

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**MEMORANDUM CONTRA  
DUKE ENERGY OHIO'S MOTION TO STRIKE  
OF DIRECT ENERGY BUSINESS, LLC**

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ATTORNEYS FOR DIRECT ENERGY  
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## I. INTRODUCTION

Duke bears the burden of supporting its motion to strike. It does not carry its burden. To begin with, numerous flaws afflict the motion: procedurally, it does not clearly explain what exactly it is requesting, and substantively, it cites no legal authority that supports granting relief. And the underlying theory of Duke's request—premised on the idea that a competitive supplier suffers no cognizable harm, no matter how greatly the incumbent utility fails to cooperate in the provision of service to the supplier's customer—only confirms that Duke does not take its obligations to competitive suppliers seriously.

## II. ARGUMENT

### A. Duke has not shown that its motion should be granted.

A party making a request has the burden of supporting that request. The rule before the Commission has long been that “once a party raises an issue the burden of proof then falls upon the party who raised that issue.” *In re E. Ohio Gas Co.*, Case No. 82-87-GA-GCR, 1983 Ohio PUC LEXIS 73, Opin. & Order, at \*20 (Apr. 13, 1983); *see also, e.g., In re Complaint of River Gas Co.*, 87-232-GA-CSS, Entry, 1990 Ohio PUC LEXIS 163, at \*33 (Feb. 13, 1990) (“once complainant had set forth sufficient evidence to prove the elements of its claim . . . the burden of persuasion with respect to the affirmative defenses asserted by respondents properly shifted to the respondents”). Duke's motion, however, is both procedurally defective and legally unsupported. It must be denied.

#### 1. The motion is imprecise as to *what* should be stricken.

At the most basic level, Duke's motion fails even to clearly explain *what* the Commission is being asked to strike. That at least some part of Duke's document is intended as a motion to strike seems clear: the phrase “Motion to Strike” appears in the caption, and the word “stricken” appears once in the document. (*See* Duke Br. at 1 & 7.) The document itself, however, contains

no division or other heading clearly setting forth which portion is Duke's reply brief and which portion is Duke's motion to strike. The document does not specify what pages and lines of Direct's brief are subject to the request, or otherwise explain why and for what reason such a remedy is appropriate or necessary.

This is not merely a matter of document organization, but it leaves unclear what Duke is even arguing about or asking for. The confusion is compounded by Duke's apparent belief that a motion to strike is how one attacks a position on non-merits-based grounds. Assuming for sake of argument this is true,<sup>1</sup> it makes the lack of specificity in Duke's "motion" all the more confusing. After all, Duke raises *numerous* arguments that seek to avoid the merits question of whether Duke complied with its tariff obligations. Duke alternately suggests that Direct's arguments are waived, subject to an exculpatory provision, non-jurisdictional, or improper due to lack of standing. So if a motion to strike is a proper way to attack a position without reaching the merits, then any of these arguments could be a subject of Duke's motion to strike—leaving it even less clear what Duke is asking to strike.

Form should not be placed over function, but some form is needed. The utter lack of proper form here makes it difficult even to understand what Duke is asking for. The remedy is to deny the motion.

**2. The motion does not provide adequate legal support—the sole authority relied upon are rules of evidence, which are inapplicable to a post-hearing brief.**

Duke fails to carry its burden in another way—it fails to cite any authority that applies here and supports its request. Ohio law is clear that a party who fails to cite applicable legal

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<sup>1</sup> Direct does not share this belief: a motion to strike primarily remedies evidentiary issues or procedural violations. For example, even assuming that Direct lacked standing to present any of its arguments (which is not the case; as explained later, Direct clearly has standing), the remedy would not be to *strike* the offending argument, but simply *to rule against* Direct on that issue.

support for a request fails to carry its burden. *See, e.g., In re Appl. of Columbus S. Power Co.*, 129 Ohio St.3d 271, 2011-Ohio-2638, ¶ 14 (failure to “cite a single legal authority” or “present an argument that a legal authority applies on these facts and was violated \* \* \* alone is grounds to reject [a] claim”); *In re Ohio Edison Co.*, Case No. 12-1230-EL-SSO, Order ¶ 21 (Jan. 30, 2013) (rejecting arguments that “are bereft of legal authority” and where party “cite[d] to no statutes, no Supreme Court rulings, and no Commission decisions in support of their arguments”). Duke’s motion runs afoul of these authorities.

Duke cites a single case in support of the proposition that one must have standing, but that case provides no support for striking anything, as it involved neither a motion to strike nor admissibility issues in general. Duke also cites Rules of Evidence 402 and 403, but provides no explanation of how these rules support its request. These rules do not help Duke and are facially inapplicable. Both rules pertain to the *admissibility of evidence*, but Direct’s post-hearing brief is *not* evidence, and the evidence in this case has already been admitted.

Indeed, the procedural posture of this case renders Duke’s motion to strike all the more improper. The customer-enrollment issue that Duke now complains about was discussed in detail in the prefiled testimony of Direct’s witness Robert Kennelly. (*See* Direct Ex. 2.0, Kennelly Dir. at 10–12 (explaining billing issues, including discussion of Duke’s unwillingness to provide consolidated billing to Direct’s customer).) Each party *stipulated* to the introduction of the other’s written direct testimony into the record, and each party waived the right to cross-examine. (*See* Tr. 7–8.) Although Duke did reserve the right to raise objections “within 24 hours” after Direct’s evidence was filed (Tr. 9), Direct filed its evidence and Duke did not raise any objections. (Mr. Kennelly’s testimony had been filed in April 2015, so there can be no argument Duke lacked sufficient time to detect any alleged issues.) Relying on this state of

affairs, Direct invested time and resources drafting its brief to present arguments based on the stipulated record, including those based on Duke's failure to enroll Direct's customer in consolidated billing. If Duke believed the issue of customer enrollment was strike-worthy, it could have raised this issue well before now. That time has now passed.

Duke clearly does *not* allege that Direct's post-hearing brief attempted to introduce new evidence or rely on evidence not allowed by the Commission. Direct's brief argues how Ohio law should be applied in light of the evidence properly in the record, which is precisely what a brief before the Commission ought to do, and which compels denial of Duke's motion.

**B. Direct has standing to raise the enrollment issues.**

In addition to being procedurally defective and legally insupportable, Duke's motion also fails because the underlying assumption of Duke's motion—that Direct lacks standing—is false. Direct has a real and enforceable interest in providing services to its customers, on the same terms and conditions available to other energy providers, without undue inconvenience and interference by the incumbent utility.

It takes little imagination to see that if Duke is permitted to provide certain services (such as consolidated billing) to SSO customers, but to deny the same services to CRES customers, this will have a negative impact both on the end-user *and* on the CRES provider. Not surprisingly, the law protects *both* consumers *and* suppliers from such differential treatment: “each consumer in this state *and the suppliers to a consumer* shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state.” R.C. 4928.03.

This is entirely sensible. If Duke can deny the customers of competitive suppliers the same services available to SSO customers, it creates an obstacle and inconvenience to those customers. While this harms the customer, it also harms the supplier. It could cause the customer

either to leave the CRES provider or to assign less value to its service (“although I can obtain a better rate, it will be on worse terms and conditions”). While SunCoke could undoubtedly have complained about Duke’s handling of its account, this would not have affected Direct’s right to pursue its own complaint.

Duke’s argument on standing consists of a citation of the black-letter standard for standing and the conclusory denial that Direct meets that standard. Duke’s entire argument is premised on the dubious assumption that only one person can be harmed by a given breach of a duty. That is not true as a matter of logic, nor generally as a matter of law. *See, e.g., Payne v. Cartee*, 111 Ohio App. 3d 580, 587 (1996) (“if more than one party has a right to relief arising out of a single transaction, each such party has a separate claim for purposes of merger and bar”). And it plainly is not the case here.

If Duke is permitted to deny Direct’s customers the same benefits available to Duke’s SSO customers, it will disadvantage Direct and inflict real and substantial harm upon it. It is not reasonable to suggest otherwise.

### **III. CONCLUSION**

In the end, the motion merely confirms Direct’s concern regarding Duke’s position: that CRES suppliers are owed no enforceable duty, and that so long as Duke can keep the mistreatment within a range that does not trigger an end-user complaint, it may mistreat suppliers at will.

Duke’s motion lacks specificity; it lacks legal support; and it flies in the face of Duke’s own stipulation that it had no objection to Direct’s evidence. And the premise of its motion—that Direct lacks standing to ensure that its customers may obtain the same non-competitive services

available to SSO customers—is not only false, but suggests a remarkable disregard for Duke’s legal obligations to CRES providers. The motion should be denied.

Dated: September 18, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Memorandum Contra was served by electronic mail this 18<sup>th</sup> day of September, 2017, to the following:

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/s/ Rebekah J. Glover

One of the Attorneys for Direct Energy  
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Summary: Memorandum Contra Duke Energy Ohio's Motion to Strike electronically filed by Ms. Rebekah J. Glover on behalf of Direct Energy Business, LLC