

**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 and Peak Demand)
Reduction Portfolio of Programs.)

**APPLICATION FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

In its November 21, 2017 Entry on Rehearing, the Public Utilities Commission of Ohio ("PUCO") unreasonably and unlawfully granted Duke Energy Ohio's motion¹ for a waiver to charge customers up to \$56 million for energy efficiency program costs and utility profits. Instead, the PUCO should have denied the Motion and required Duke to stay within the \$38-39 million budget that Duke consistently presented to the PUCO and stakeholders for the past 17 months.

The Entry on Rehearing is unlawful and unreasonable in the following respects:

Assignment of Error 1: The Entry on Rehearing is unlawful and unreasonable because it violates the PUCO's September 27, 2017 Order² in this case by permitting Duke to materially exceed its proposed 2017 budget of \$38-39 million.

Assignment of Error 2: The Entry on Rehearing is unlawful and unreasonable because it violates R.C. 4903.09 by approving Duke's Motion without any factual record regarding the Motion or any explanation of the PUCO's reasoning.

¹ Motion of Duke Energy Ohio, Inc., for a Waiver (Oct. 12, 2017) (the "Motion").

² Opinion & Order (Sept. 27, 2017) (the "Order").

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Christopher Healey

Christopher Healey (0086027)
Counsel of Record

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor

Columbus, Ohio 43215

Telephone: (614) 466-9571

christopher.healey@occ.ohio.gov

(Willing to accept service by e-mail)

**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 and Peak Demand)
Reduction Portfolio of Programs.)

MEMORANDUM IN SUPPORT

I. BACKGROUND

On January 27, 2017, Duke and other parties (but not OCC or the PUCO Staff) filed a settlement in this case.³ In its September 27, 2017 Order, the PUCO found that the Settlement did not benefit customers as filed because it would allow Duke to charge customers too much for energy efficiency. Thus, the PUCO modified the Settlement to include a \$38.6 million per year "cost cap," which means that Duke can charge customers a maximum of \$38.6 million for energy efficiency program costs and utility profits per year.⁴ The PUCO's acknowledgement that amounts customers pay for energy efficiency should be limited is much appreciated.

The Order, however, also provided a limited exception to the cost cap for 2017 only. In 2017, Duke may exceed its cost cap, but only for program costs and not utility profits.⁵ The PUCO ordered Duke to scale back its programs "to avoid materially exceeding its Portfolio Plan budget for 2017."⁶ The PUCO also found that Duke was not permitted to exceed the 2017 budget without first obtaining a waiver from the PUCO.⁷

³ Amended Stipulation & Recommendation (Jan. 27, 2017) (the "Settlement").

⁴ Order ¶¶ 46-47.

⁵ *Id.* ¶ 47.

⁶ *Id.*

⁷ *Id.*

Shortly after the Order was entered, Duke filed its Motion seeking such a waiver. In the Motion, Duke noted that its 2017 budget was around \$39 million.⁸ But Duke asked the PUCO for a waiver to charge customers the "actual costs" of its 2017 programs and stated that it "anticipates spending \$56 million" for 2017 program costs.⁹

Several parties, including OCC and Duke, filed applications for rehearing regarding the September 27 Order. OCC also opposed Duke's Motion for a waiver.¹⁰

On November 21, 2017, the PUCO entered the Entry on Rehearing granting parties' applications for rehearing for the purpose of giving itself more time to consider them.¹¹ In the entry, however, the PUCO also granted Duke's Motion for a waiver to charge customers up to \$56 million for energy efficiency in 2017.¹²

OCC applies for rehearing with respect to the PUCO's entry granting Duke's Motion for a waiver.

II. STANDARD OF REVIEW

After an order is entered, intervenors in a PUCO proceeding have a statutory right to apply for rehearing "in respect to any matters determined in the proceeding."¹³ An application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."¹⁴

⁸ Motion at 2 (stating that budget was originally \$38,788,550 and subsequently amended to \$39,126,072).

⁹ *Id.* at 3.

¹⁰ Memorandum Contra Motion of Duke Energy Ohio, Inc. for a Waiver to Charge Consumers More for Energy Efficiency by the Office of the Ohio Consumers' Counsel (Oct. 27, 2017) (the "Memo Contra").

¹¹ Entry on Rehearing ¶¶ 8, 10.

¹² *Id.*

¹³ R.C. 4903.10.

¹⁴ R.C. 4903.10(B). *See also* Ohio Admin. Code 4901-1-35(A).

In considering an application for rehearing, R.C. 4903.10 provides that the PUCO may grant and hold rehearing if there is "sufficient reason" to do so. After such rehearing, the PUCO may "abrogate or modify" the order in question if the PUCO "is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted."¹⁵

The Entry on Rehearing is unlawful, unreasonable, unjust, and unwarranted under R.C. 4903.10. The PUCO should grant OCC's application for rehearing. It should abrogate or modify the Entry on Rehearing and deny the Motion.

Assignment of Error 1: The Entry on Rehearing is unlawful and unreasonable because it violates the PUCO's September 27, 2017 Order in this case by permitting Duke to materially exceed its proposed 2017 budget of \$38-39 million.

In its September 27, 2017 Order, the PUCO ordered Duke not to charge customers more than \$38.6 million per year in 2018 and 2019. This was a welcome consumer protection. But for 2017, the PUCO made an exception allowing Duke to exceed the \$38.6 million cost cap for program costs only. In making the exception, it ordered Duke to scale back its programs "to avoid materially exceeding" its 2017 budget of around \$38-39 million. But the Entry on Rehearing allows Duke to charge customers up to **\$56 million** for 2017.¹⁶ On its face, this "materially exceeds" Duke's \$38-39 million budget for 2017 as well as the \$38.6 million cost cap. The Entry on Rehearing violates the PUCO's own September 27, 2017 Order, which remains in effect. The Entry on

¹⁵ R.C. 4903.10(B).

¹⁶ Motion at 2.

Rehearing is therefore unlawful.¹⁷ The PUCO should grant rehearing of the Entry on Rehearing, enforce the Order,¹⁸ and deny the Motion.

Assignment of Error 2: The Entry on Rehearing is unlawful and unreasonable because it violates R.C. 4903.09 by approving Duke's Motion without any factual record regarding the Motion or any explanation of the PUCO's reasoning.

A. There is no factual record regarding the Motion. This violates R.C. 4903.09.

Under Ohio Revised Code 4903.09, the PUCO is required, in all contested matters before it, to make "a complete record of all proceedings ... including a transcript of all testimony and of all exhibits."¹⁹ The law also requires the PUCO to "file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."²⁰

There is no factual record regarding the Motion. Duke filed the Motion with no supporting testimony, no exhibits, and no other evidence. No party was afforded an opportunity to file testimony regarding the Motion, and there was no hearing regarding the Motion. The Motion is a two-page legal filing with unsupported representations of Duke's counsel and nothing more.

But statements by legal counsel in a motion are not evidence that can be relied upon for PUCO decision-making. In a recent case involving OCC and Ormet Primary Aluminum Corporation, the PUCO found that a legal pleading that Ormet filed "is not

¹⁷ See, e.g., *In re Ohio Power Co.*, 144 Ohio St. 3d 1, 5 (2015) (PUCO must "respect its own precedents" and must justify and explain any decision to modify a prior order).

¹⁸ See *In re Complaint of Orwell Natural Gas Co. v. Orwell-Trumbull Pipeline Co., LLC*, Case No. 16-2419-GA-CSS, Opinion & Order ¶ 18 (Nov. 21, 2017) ("the Commission has explicit jurisdiction to enforce compliance with Commission orders and directives").

¹⁹ R.C. 4903.09.

²⁰ *Id.*

evidence admitted into the record of this case and, thus, cannot be relied upon in reaching [the PUCO's] decision"²¹ Ohio courts have similarly found that statements by counsel, including those made in motions and other legal filings, are not evidence. In *Cincinnati Community Kollel v. Testa*, the Supreme Court of Ohio succinctly concluded: "Statements by counsel are not evidence."²² In *Glendale Federal Bank v. Brown*, the court ruled that legal pleadings do not constitute evidence: "Naked assertions in motions are not evidence. Though the attorney who drafts them certifies that he believes there is good reason to think they are correct, they are not sworn statements either by the attorney or by his client."²³

R.C. 4903.09 requires the PUCO to make findings of fact and to render its decision "based upon said findings of fact." Here, there can be no findings of fact because Duke filed a barebones motion with only the unsupported statements of its counsel. Thus, it is impossible for the PUCO to render a decision "based upon ... findings of fact," and the Entry on Rehearing violates R.C. 4903.09.

B. The PUCO did not explain why it granted Duke's Motion. This violates R.C. 4903.09 and Ohio Supreme Court Precedent.

The Supreme Court of Ohio has interpreted R.C. 4903.09 to mean that PUCO orders must be sufficiently detailed "to enable the court to make its review as to lawfulness and reasonableness."²⁴ Recently, in *In re Application of Columbus Southern*

²¹ *In re Complaint of Ormet Primary Aluminum Corp. v. Ohio Power Co.*, Case No. 13-2206-EL-CSS, Opinion & Order at 5 (Nov. 18, 2015).

²² 135 Ohio St. 3d 219, 226 (2013). *See also* *RNG Props., Ltd. v. Summit Cnty. Bd. of Revision*, 140 Ohio St. 3d 455, 461 n.1 (2014) ("We have long held that 'statements of counsel are not evidence.'" (quoting *Corporate Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision*, 82 Ohio St. 297, 299 (1998))).

²³ 1994 Ohio App. LEXIS 157, at *11 (Ohio Ct. App. Jan. 21, 1994). *See also* *Arizona Newsome v. Newhouse*, 1985 Ohio App. LEXIS 7590, at *4 (Ohio Ct. App. Apr. 5, 1985) (Brogan, J. dissenting) ("Counsels' assertions in their memoranda are not evidence.").

²⁴ *MCI Telecom. Corp. v. PUCO*, 32 Ohio St. 3d 306, 312 (1987).

Power Co.,²⁵ the utility argued that the PUCO failed to address its arguments regarding the proper application of the significantly excessive earnings test. The Supreme Court held that the PUCO is required to respond to parties' arguments and explain why it agrees or disagrees with them: "The commission never offered a response to AEP's claims and thus failed to explain its decision. This was error."²⁶

For these same reasons, the PUCO's Entry on Rehearing violates R.C. 4903.09 and fails the Supreme Court's test. The Entry for Rehearing is not detailed enough for a court to make any review as to its lawfulness and reasonableness, and it does not offer any explanation for why it rejected OCC's arguments against the Motion.

In opposing the Motion, OCC argued that under the Order, Duke was required to not materially exceed the \$38-39 million 2017 budget and that charges to customers of \$56 million would materially exceed that amount.²⁷ The Entry on Rehearing does not address this argument or explain how the PUCO concluded that \$17-18 million in additional charges to consumers could be considered immaterial.

OCC argued that under the Order, Duke was required to scale back its programs and there was no evidence that Duke had done so.²⁸ The Entry on Rehearing does not address this argument and makes no findings of fact regarding whether Duke scaled back its programs.

OCC argued that charges to customers of \$56 million or more for energy efficiency programs defy the PUCO's Order and will harm customers by unreasonably

²⁵ 147 Ohio St. 3d 439 (2016).

²⁶ *Id.* ¶ 66.

²⁷ Memo Contra at 4-5.

²⁸ *Id.* at 5.

adding to the costs they pay for energy efficiency.²⁹ The Entry on Rehearing does not address this argument.

R.C. 4903.09 and Ohio Supreme Court precedent require the PUCO to provide not just its bare conclusions but an explanation of why it reached those conclusions. The Entry on Rehearing does not satisfy this requirement. The PUCO should grant rehearing and deny the Motion.

III. CONCLUSION

The PUCO should grant OCC's application for rehearing and deny the Motion. Duke should not be permitted to charge customers more than \$38.6 million for energy efficiency program costs and utility profits for 2017.

Respectfully submitted,

BRUCE WESTON (0016973)
OHIO CONSUMERS' COUNSEL

/s/ Christopher Healey

Christopher Healey (0086027)
Counsel of Record

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone: (614) 466-9571
christopher.healey@occ.ohio.gov
(Willing to accept service by e-mail)

²⁹ *Id.* at 6.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing was served on the persons stated below via electronic transmission, this 21st day of December 2017.

/s/ Christopher Healey
Christopher Healey
Assistant Consumers' Counsel

SERVICE LIST

Bojko@carpenterlipps.com
Ghiloni@carpenterlipps.com
perko@carpenterlipps.com
paul@carpenterlipps.com
mfleisher@elpc.org
fdarr@mwncmh.com
mpritchard@mwncmh.com
joliker@igsenergy.com
John.jones@ohioattorneygeneral.gov

Amy.spiller@duke-energy.com
Elizabeth.watts@duke-energy.com
cmooney@ohiopartners.org
tdougherty@theOEC.org
jfinnigan@edf.org
rdove@attorneydove.com
rick.sites@ohiohospitals.org
mwarnock@bricker.com
dborchers@bricker.com

Attorney Examiner:

Richard.bulgrin@puc.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/21/2017 4:07:58 PM

in

Case No(s). 16-0576-EL-POR

Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.