

**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 CONTRA MOTION OF GE AVIATION TO INTERVENE
OUT OF TIME AND MOTION TO STRIKE COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

General Electric Aviation's ("GE Aviation") motion to intervene¹ is beyond late:

- Duke Energy Ohio ("Duke") filed this case in March 2016—more than two years ago.
- Motions to intervene were due in this case in November 2016—18 months ago.²
- The Attorney Examiner held a hearing and closed the record in this case in March 2017—more than 14 months ago.
- The Public Utilities Commission of Ohio ("PUCO") approved a settlement, with amendments, in September 2017—eight months ago.
- Duke and the Office of the Ohio Consumers' Counsel ("OCC") filed timely applications for rehearing on the PUCO's order in October 2017—seven months ago.

Yet now, GE Aviation seeks not only to intervene in this case, but to supplement the record with its comments. Specifically, GE Aviation asks that the PUCO "consider its comments prior to the issuance of the next Entry on Rehearing and incorporate these

¹ Motion of GE Aviation to Intervene Out of Time (May 15, 2018) (the "GE Motion to Intervene").

² Ohio Adm. Code 4901-1-11(E) (motion to intervene must be filed five days before the scheduled date of hearing); Entry (Oct. 26, 2016) (scheduling hearing for November 28, 2016).

comments into its decision process.”³ In this regard, GE Aviation's comments echo Duke's application for rehearing opposing the cap on energy efficiency expenditures that customers pay for. Additionally, GE Aviation’s comments seek to work around the cap, requiring Duke's customers to pay additional energy efficiency costs.

But GE Aviation has not demonstrated the good cause or extraordinary circumstances required for late intervention under R.C. 4903.221 and Ohio Administrative Code 4901-1-11(F). And its comments (a) are not supported by any facts in the record, (b) were not subject to discovery, (c) were not subject to cross examination at the hearing in this case, (d) are not supported by any witness, (e) are unverifiable hearsay, and (f) are nothing more than an unlawful application for rehearing.

The PUCO should deny GE Aviation’s motion to intervene and should strike the comments attached thereto.

Respectfully submitted,

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³ GE Motion to Intervene at 4.

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In the Matter of the Application of Duke)
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**MEMORANDUM IN SUPPORT OF MEMORANDUM CONTRA MOTION OF
GE AVIATION TO INTERVENE OUT OF TIME AND MOTION TO STRIKE
COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. MEMORANDUM CONTRA MOTION TO INTERVENE

Parties must seek intervention no later than five days before the scheduled date of hearing.⁴ The hearing in this case was initially scheduled for November 28, 2016.⁵ Motions to intervene, therefore, were due November 23, 2016.⁶ GE Aviation's motion to intervene, filed May 15, 2018, is 538 days late.

The PUCO allows late intervention only (a) for "good cause shown"⁷ and (b) "only under extraordinary circumstances."⁸ The PUCO routinely denies late intervention, especially intervention as late as GE Aviation's. In *In re Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power*

⁴ R.C. 4903.221(A)(2); Ohio Adm. Code 4901-1-11(E).

⁵ Entry (Oct. 26, 2016).

⁶ The November 28, 2016 hearing was subsequently continued and actually began February 27, 2017. *See* Transcript (Feb. 27, 2017). Thus, even if this date is used, motions to intervene were due February 22, 2017, which is over 15 months ago.

⁷ R.C. 4903.221(A)(2).

⁸ Ohio Adm. Code 4901-1-11(F).

Purchase Agreement,⁹ a party sought intervention 144 days late and after the hearing had concluded, claiming unforeseen circumstances.¹⁰ The PUCO denied intervention. It found that the circumstances were not unforeseen and that the party's concerns were already raised during the case.¹¹

The PUCO consistently denies motions to intervene that are filed substantially earlier than GE Aviation's. In *In re Application of Columbia Gas of Ohio, Inc. for Approval of Demand-Side Management Programs*,¹² for example, one party filed a motion to intervene before the hearing began, and it was denied as late for lack of extraordinary circumstances.¹³ In *In re Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge*,¹⁴ the PUCO denied a request for late intervention, noting that in the rare instances in which late intervention has been allowed, the interventions came "well before the hearing began."¹⁵ See also *In re Review of the Alternative Energy Rider Contained in the Tariffs of [FirstEnergy]*, Case No. 11-5201-EL-RDR, Opinion & Order (Aug. 7, 2013) (denying party's motion to intervene that was 220 days late); *In re Application of [FirstEnergy] for Authority to Provide for a Standard Service Offer*, Case No. 14-1297-EL-SSO, Opinion & Order (Jan. 13, 2016) (denying party's motion to intervene that was 454 days late).

GE Aviation has not established that there is good cause for its late intervention, nor has it demonstrated that there are any extraordinary circumstances in this case. GE

⁹ Case No. 14-1693-EL-RDR, Opinion & Order (Mar. 31, 2016).

¹⁰ *Id.* at 12-14.

¹¹ *Id.*

¹² Case No. 16-1309-GA-UNC.

¹³ *Id.*, Opinion & Order (Sept. 27, 2016).

¹⁴ Case No. 10-2376-EL-UNC.

¹⁵ *Id.*, Opinion & Order (Dec. 14, 2011).

Aviation seeks intervention to complain about the PUCO's decision to impose a cost cap limiting the amount that Duke can charge customers for energy efficiency programs. This issue was heavily litigated in this case by Duke and various other parties. GE Aviation does not assert that it was prohibited from intervening earlier or that it was in any way prevented from participating in the case. Further, the interests of large customers like GE Aviation were represented in this case by Industrial Energy Users-Ohio, the Ohio Manufacturers Association Energy Group, and the Kroger Company.¹⁶

GE Aviation's motion to intervene was not just a little bit late. It was a year-and-a-half late. And it came many months after this case went to hearing, the record was closed, and the case was fully briefed and decided. The PUCO has routinely denied motions to intervene that were filed much earlier than GE Aviation's. The PUCO should deny GE Aviation's motion to intervene as well.

II. MOTION TO STRIKE

In addition to its late-filed motion to intervene, GE Aviation filed unsolicited comments.¹⁷ In its comments, GE Aviation presents a work around the cap, where customers of Duke would pay even more for energy efficiency. GE Aviation asks that the PUCO "consider its comments prior to the issuance of the next Entry on Rehearing and incorporate these comments into its decision process."¹⁸ The PUCO should strike these comments and not consider any of the issues raised by GE Aviation for several reasons.

¹⁶ See Docket Card, available at <http://dis.puc.state.oh.us/CaseRecord.aspx?Caseno=16-0576&link=DIVA> (showing motions to intervene by these parties).

¹⁷ GE Motion to Intervene at 9-14.

¹⁸ GE Motion to Intervene at 4.

First, the comments rely on numerous facts that are not in the record, and the PUCO must base its opinion on facts in the record of the case.¹⁹ The law precludes the PUCO from considering these comments.

Moreover, the assertions made by GE Aviation in its comments cannot be considered as a matter of fundamental fairness to the parties to this case. GE Aviation's comments were not subject to discovery, were not subject to cross-examination, and are the untested hearsay of GE Aviation's counsel. GE Aviation even admits that some of its comments are pure speculation.²⁰ There is no basis on which the PUCO can verify the veracity of these comments, and they should be afforded no weight.

Third, GE Aviation's comments are nothing more than a very late-filed application for rehearing.²¹ GE Aviation's comments reflect its disagreement with the cap the PUCO placed on charges to consumers for energy efficiency. GE Aviation states that it agrees with Duke that a cap on energy efficiency will have negative consequences on energy efficiency programs, and it argues that the cap is contrary to Ohio law and policy. These were all matters that could have been properly raised in an application for rehearing of the PUCO's Sept. 27, 2016 Opinion and Order.

The law (R.C. 4903.10) provides that only a "party who has entered an appearance" in the proceeding in question may file an application for rehearing. The law also requires applications for rehearing to be filed within 30 days of the order in question.²² Additionally, the PUCO may only grant and hold rehearing "on matters

¹⁹ R.C. 4903.09.

²⁰ See GE Motion to Intervene at 10 ("GE Aviation speculates that...").

²¹ See GE Motion to Intervene at 10 (asking the PUCO to modify its decision based on GE Aviation's comments).

²² *Id.*

specified in such application."²³ The PUCO does not permit parties to collaterally attack its orders outside the application for rehearing process.²⁴

GE Aviation's "comments" violate the law. GE Aviation is not a "party" for purposes of filing an application for rehearing.²⁵ This is because at the time applications for rehearing were made (once on October 27, 2017 and then again on December 21, 2017) GE Aviation was not an intervenor, or even a movant to intervene.

And GE Aviation did not file its application for rehearing within 30 days of the PUCO's order. The PUCO issued its order in this case on September 27, 2017. GE Aviation's "comments" were filed 230 days after the order.

GE Aviation's comments also contain matters that were not raised by any pending application for rehearing. For instance, GE Aviation presents a work-around the cap which would increase the amount other customers pay for energy efficiency.²⁶ Because this was not a matter specified in any of the pending applications for rehearing, the PUCO cannot under R.C. 4903.10 consider and incorporate the comments as GE Aviation asks.

²³ Id.

²⁴ See, e.g., *In re Application of the E. Ohio Gas Co.*, Case No. 07-829-GA-AIR, Entry (Sept. 23, 2009) (denying utility's motion to reopen case on the grounds that it was an untimely application for rehearing); *In re Application of Ohio Power Co.*, Case No. 14-1186-EL-RDR, Finding & Order (Apr. 2, 2015) (rejecting parties' arguments as a collateral attach on prior PUCO orders); *In re Application of Duke Energy Ohio, Inc.*, Case No. 12-2400-EL-UNC, Opinion & Order (Feb. 13, 2014) (dismissing utilities' application because the issues raised should have been raised in an application for rehearing).

²⁵ See Ohio Adm. Code 4901-1-10(A)(4) (only a party whose request for intervention has been granted is a "party").

²⁶ See GE Motion to Intervene at 13-14.

The PUCO therefore lacks jurisdiction to consider GE's comments because to do so would allow GE to file an untimely application for rehearing that violates the law.²⁷ Allowing GE Aviation to participate in the case at this late stage would make a mockery of the law and the PUCO's rules, which are designed to afford all parties a fair opportunity to participate in PUCO proceedings.

III. CONCLUSION

Allowing GE Aviation to participate at this late stage would set a bad precedent. Parties should not be permitted to sit on the sideline during a PUCO proceeding and then swoop in at the last minute, demanding that the PUCO consider their non-record facts and opinions without any opportunity for other parties to challenge those facts and opinions at hearing or on brief. The law requires the PUCO to strike GE Aviation's "comments," which are nothing more than an unlawfully-late-filed application for rehearing. The integrity of the PUCO's adjudicative process demands that GE Aviation be denied the special treatment it seeks in this case.

²⁷ See *In re Apparent Violation & Intent to Assess Forfeiture of Kenneth Wylie*, Case No. 15-2029-TR-CVF, Opinion & Order ¶ 13 (Nov. 3, 2016) ("Pursuant to R.C. 4903.10 and Ohio Supreme Court precedent, the Commission has no statutory jurisdiction to entertain an application for rehearing filed more than 30 days after the order was entered upon the journal of the Commission and service was made upon the parties."); *In re Application of Duke Energy Ohio, Inc. for Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case No. 12-2400-EL-UNC, Opinion & Order at 31-32 (Feb. 13, 2014) (denying application for rehearing where parties argued that the PUCO lacked jurisdiction under R.C. 4903.10 to consider an application for rehearing filed more than 30 days after the order).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra and Motion to Strike was served on the persons stated below via electronic transmission, this 30th day of May 2018.

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Summary: Memorandum Memorandum Contra Motion of GE Aviation to Intervene Out of Time and Motion to Strike Comments by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.