

**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.)

**MOTION TO STRIKE DUKE’S IMPROPER
“NOTICE OF ADDITIONAL AUTHORITY”
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

The Public Utilities Commission of Ohio (“PUCO”) should strike Duke’s “Notice of Additional Authority.” Duke’s so-called “notice” is not a notice at all—it is a legal brief that supplements Duke’s pending application for rehearing (where Duke argued against the PUCO decision to protect consumers by setting a \$38 million annual cost cap on energy efficiency charges). Duke’s attempt to provide a one-sided analysis of a recent Ohio Supreme Court decision—long after the filing of its pending application for rehearing—is not allowed under the law (R.C. 4903.10), the PUCO’s rules (Ohio Adm. Code Chapter 4901-1), or PUCO precedent. Duke’s filing is also highly prejudicial to the consumer interests that the Office of the Ohio Consumers’ Counsel (“OCC”) represents.

Accordingly, OCC respectfully requests that the PUCO strike Duke’s “notice” and ignore it when deciding the merits of this case.

Respectfully submitted,

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Ohio Consumers' Counsel

/s/ Christopher Healey
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MEMORANDUM IN SUPPORT

Duke’s purported “Notice of Additional Authority” is no such thing—it is in reality a procedurally improper and unlawful supplement to Duke’s application for rehearing. The PUCO should strike the entire filing as unlawful and highly prejudicial to OCC. It should be afforded no weight.

This case was litigated and fully briefed in 2017. The PUCO ruled in September 2017,¹ and Duke filed a timely application for rehearing in October 2017.² OCC filed a timely memorandum contra Duke’s application for rehearing.³ The PUCO granted Duke’s application for rehearing for further consideration.⁴

Now, more than two years later, Duke has filed what it has called a “Notice of Additional Authority.”⁵ In this “notice,” Duke cites a recent Ohio Supreme Court decision that Duke believes is relevant. But then Duke proceeds to make three pages of legal and factual arguments explaining why, according to Duke, this decision supports Duke’s pending application for rehearing.

¹ Opinion & Order (Sept. 27, 2017).

² Duke Energy Ohio, Inc.’s Application for Rehearing (Oct. 27, 2017).

³ Memorandum Contra Applications for Rehearing Filed by Duke Energy Ohio, Inc. and Environmental Parties by the Office of the Ohio Consumers’ Counsel (Nov. 6, 2017).

⁴ Entry on Rehearing (Nov. 21, 2017).

⁵ Notice of Additional Authority Submitted by Duke Energy Ohio, Inc. (Dec. 16, 2019).

The PUCO must strike Duke’s filing as unlawful under R.C. 4903.10, Ohio Adm. Code Chapter 4901-1, and PUCO precedent.

I. RECOMMENDATIONS

A. The PUCO lacks jurisdiction to consider Duke’s supplement to its application for rehearing, which is prejudicial to consumers.

The filing of an application for rehearing is governed by R.C. 4903.10. Under this statute, an application for rehearing “*shall* be filed within thirty days after the entry of the order.”⁶ The PUCO’s rules similarly provide that a party may file an application for rehearing within 30 days of an order and that any party may file a memorandum contra 15 days after that, with no opportunity for a reply in support of the application for rehearing.⁷ Duke, however, contrary to Ohio statute and rules, wants to get the last word in and has done so by providing supplemental briefing under the guise of a Notice of Additional Authority.

The PUCO has consistently ruled that once a party files an application for rehearing, it cannot supplement the application for rehearing with additional filings. In *In re Review of Youngstown Thermal, LLC & Youngstown Thermal Cooling, LLC*,⁸ for example, a party filed an application for rehearing and later filed a three-page supplement thereto. The PUCO ruled that the supplemental filing was not allowed under the rules and thus was disregarded.⁹ See also *In re Complaint of Gregory T. Howard*, Case No. 15-873-GA-CSS, Second Entry on Rehearing ¶ 31 (Dec. 20, 2017) (“nothing in R.C. 4903.10 or the Commission’s rules allows for the submission of a supplement following the filing of

⁶ R.C. 4903.10 (emphasis added).

⁷ Ohio Adm. Code 4901-1-35(A)-(B).

⁸ Case No. 17-1534-HC-UNC.

⁹ *Id.* Entry on Rehearing ¶ 15 n.1 (Sept. 27, 2017).

an application for rehearing”); *In re Application of N. Coast Gas Transmission, LLC*, Case No. 14-1754-GA-BLN, Entry ¶ 20 (Apr. 6, 2015) (Ohio Power Siting Board lacks jurisdiction under R.C. 4903.10 to consider a supplement to an application for rehearing).

Duke, however, seeks to do precisely what the PUCO has ruled is unlawful: supplement its application for rehearing with a multi-page memorandum that includes a citation to a recent Ohio Supreme Court decision, an explanation of that decision, and arguments for why the PUCO should consider this decision in support of Duke’s pending application for rehearing. In other words, Duke is attempting to bolster the arguments that it has already submitted to the PUCO in its application for rehearing. In light of the plain language of R.C. 4903.10 requiring applications for rehearing to be filed within 30 days of the order, and PUCO precedent explaining that it cannot consider supplements to applications for rehearing, Duke’s supplemental filing must be struck.

B. The PUCO has struck similar attempts by parties to file a “notice of additional authority” and should do so here to protect consumers.

In *In re Application of Duke Energy Ohio, Inc.*,¹⁰ following the completion of briefing, Industrial Energy Users-Ohio (“IEU”) filed a notice of additional authority, citing opinions that were issued following the completion of briefing.¹¹ Ironically, it was Duke in that case that opposed such a notice. As Duke explained in that case:

The Commission’s procedural rules, set forth in O.A.C. Chapter 4901-1, provide a clear set of instructions for participants in Commission proceedings. Absolutely nothing in those rules allows for a filing such as the one made by IEU.¹²

...

¹⁰ Case No. 12-2400-EL-UNC.

¹¹ Case No. 12-2400-EL-UNC, Notice of Additional Authority (Oct. 18, 2013).

¹² Case No. 12-2400-EL-UNC, Motion of Duke Energy Ohio, Inc. to Strike Unauthorized Notice of Additional Authority (Oct. 21, 2013).

IEU's purported "Notice" filing must be viewed for what it is—a legal brief through with IEU attempts to advance its position in this case.

Duke was right—IEU's filing violated the PUCO's rules, and the PUCO granted Duke's motion to strike IEU's notice of additional authority.¹³

Yet now, Duke has done precisely what IEU did: file a legal brief to advance its case and fashioned it as a "notice" of additional authority. Not surprisingly, Duke does not cite to authority for its filing, as none exists. The PUCO should follow its precedent and hold utilities to the same standards as other parties. Duke's "notice" should be struck.

C. Duke's unlawful supplemental filing is highly prejudicial to the consumer interests that OCC represents.

As explained above, Duke filed a timely application for rehearing, and OCC filed a timely memorandum contra. That is the extent of the advocacy allowed on an application for rehearing. There is no opportunity for a party to reply to a memorandum contra an application for rehearing, much less reply two years later. Yet now, long after the deadline for its application for rehearing, Duke has filed a substantive legal brief, citing case law and explaining to the PUCO why, in Duke's view, that case law supports Duke's position, a position that was clearly articulated already in Duke's application for rehearing. The PUCO rules and Ohio statutes rightfully establish an end to applications for rehearing—an end that Duke fails to recognize.

¹³ Case No. 12-2400-EL-UNC, Opinion & Order (Feb. 13, 2014).

Again, Duke got it right in the prior case in its motion to strike IEU’s “notice”:

The prejudice to Duke Energy Ohio’s position and the impact on due process resulting from IEU’s blatant disregard of the Commission’s regulations are unavoidable. A single party, providing purported ‘additional authority’ to the Commission, cannot provide the Commission a full explanation of the issues. Indeed, such an outcome is the antithesis of due process.¹⁴

The same logic applies here (except with Duke now on the other side as the party demonstrating “blatant disregard” for the law and PUCO rules). It would be unduly prejudicial for the PUCO to allow Duke to identify additional case law, provide Duke’s spin on how that case law should be interpreted, and encourage the PUCO to rule in Duke’s favor considering that case law.¹⁵ Duke’s attempt to get the final word on the issues fully briefed and under reconsideration should not be allowed.

II. CONCLUSION

The PUCO lacks jurisdiction to consider Duke’s filing because the supplemental filing, regardless of what Duke named it, is an unlawful supplement to its application for rehearing. The filing also violates the PUCO’s rules and precedent. It is highly prejudicial to consumers and other parties. And it is an unfair attempt to provide the PUCO with one-sided analysis of case law.

The PUCO should strike Duke’s filing and give it zero weight.

¹⁴ Case No. 12-2400-EL-UNC, Motion of Duke Energy Ohio, Inc. to Strike Unauthorized Notice of Additional Authority at 5 (Oct. 21, 2013).

¹⁵ For reference, the Ohio Supreme Court’s rules do allow a party to file a notice of additional authority, but the party is to include a citation only with no additional argument whatsoever. *See* S. Ct. Prac. R. 7.04(A), 16.08, 17.09(B). There is no similar rule for PUCO proceedings.

Respectfully submitted,

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/s/ Christopher Healey

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion was served on the persons stated below via electronic transmission, this 20th day of December 2019.

/s/ Christopher Healey
Christopher Healey
Counsel of Record

The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

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Summary: Motion Motion to Strike Duke's Improper "Notice of Additional Authority" by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Healey, Christopher Mr.