

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Power Company for an Increase in)	Case No. 20-585-EL-AIR
Electric Distribution Rates.)	
)	
In the Matter of the Application of Ohio)	Case No. 20-586-EL-ATA
Power Company for Tariff Approval.)	
)	
In the Matter of the Application of Ohio)	Case No. 20-587-EL-AAM
Power Company for Approval to Change)	
Accounting Methods.)	

**MEMORANDUM CONTRA OFFICE OF THE OHIO CONSUMERS' COUNSEL
MOTION TO STRIKE**

I. INTRODUCTION

At this early stage of the case, before many parties have intervened and the Commission has yet to set a procedural schedule, the Ohio Consumers' Counsel ("OCC") asks the Commission to take the extreme measure of eliminating parts of the Ohio Power Company's ("AEP") application that it disagrees with. OCC filed its Motion to Strike on June 23, 2020, pushing the idea that the Commission's entry on a different recovery mechanism in a different case means that the Commission should strike AEP's request for an administration fee in the DSM programs under consideration. Neither the law nor the facts of this case support such a step.

The Environmental Law & Policy Center ("ELPC") urges the Commission to deny that Motion because it is premature, draws irrelevant comparisons to Duke's recent shared savings provision, and ignores the legal basis for such cost recovery in voluntary energy efficiency programs. OCC pushes for a draconian result without sufficiently justifying why the parties cannot debate this issue after discovery and more thorough briefing. Moreover, OCC's argument

for striking AEP's proposal for an administration fee is misplaced. The Commission's entry in Duke's recent energy efficiency portfolio case, Case No. 20-1013, concerned a shared savings proposal, an entirely different recovery mechanism that the Commission struck based on the distinct facts of that case. OCC cannot conjure *stare decisis* out of thin air. Nothing in the law prevents AEP from requesting an administration fee for well-run DSM programs, and Commission precedent suggests that such fees are permissible even without mandated energy efficiency benchmarks. Therefore, ELPC respectfully requests the Commission deny OCC's Motion.

II. DISCUSSION

A. OCC's Motion Does Not Meet the High Bar for a Motion to Strike, Which Favors Considering Issues on the Merits.

OCC styles its filing as a "motion to strike," but it offers little explanation as to why such a motion is proper at this early stage of the proceedings. Although the Commission has not offered a clear standard for when it will grant motions to strike, it is certain that the bar is a high one. Looking to the Ohio Rules of Civil Procedure as guidance,¹ motions to strike are appropriate only when a pleading contains an "insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter." Ohio Rules Civ. P. 12(F). Put simply, motions to strike are appropriate only when a filing presents an argument or makes a request that is obviously contrary to law, incomplete, or potentially harmful.

OCC does not, and cannot, explain why its complaints with AEP's proposal for an administration fee meet this onerous standard. Striking a major portion of AEP's base rate

¹ Although the Commission does not strictly follow the Ohio Rules of Civil Procedure, it has regularly applied those Rules in other proceedings on procedural issues comparable to this motion. *See* Ohio Rev. Code 4903.082 (explaining that in the discovery context, "the Rules of Civil Procedure should be used wherever practicable"); *In re Duke Energy Ohio, Inc.*, Case No. 12-2400-EL-UNC (Feb. 13, 2014) (noting the persuasive value of the Ohio Rules of Civil Procedure in determining the Commission's procedure).

application before the Commission has set a procedural schedule and after only a handful of parties have intervened is, at best, premature. In practice, the Commission has rarely granted motions to strike.² Instead, the Commission favors “follow[ing] a thorough evidentiary process, in order to give all interested parties an opportunity to be heard on the issues pertaining to [an EDU’s] application.” *In re Duke Energy Ohio, Inc.*, No. 12-2400-EL-UNC (Feb. 13, 2014). OCC’s Memorandum in support of its Motion focuses on its disagreements with the substance of AEP’s proposal, but it does not explain why resolving these disputes on the merits is necessary at this point. In the absence of such a showing, the Commission should deny the Motion to Strike.

B. AEP’s Proposed Administration Fee Is Not the Same as Shared Savings, Making Duke’s Shared-Savings Proposal a Poor Comparison.

Even if a motion to strike were appropriate at this stage, OCC’s attempt to justify striking the proposed administration fee misinterprets AEP’s filings and the Commission’s Entry in Duke’s recent energy efficiency portfolio case. Case No. 20-1013-EL-POR, Entry (June 17, 2020). OCC argues that the requested fee is “substantially identical to Duke’s proposal for shared savings, which the PUCO recently struck from Duke’s application.” OCC Memorandum at 2. But in this argument for its Motion, OCC already concedes that the programs are different: “substantially similar” is just another way of saying not the same. OCC’s argument elides the critical ways in which the proposals differ, ways that mean the Commission cannot import its reasoning in the Duke energy efficiency case to a premature disagreement on the merits in this base rate case.

² See, e.g., *In re Dayton Power & Light Co.*, Case No. 16-395-EL-SSO *et al.*, Finding and Order (Dec. 18, 2019) (denying motions to strike); *In re Ohio Edison Co. et al.*, Case No. 14-1980-EL-ATA *et al.*, Entry (June 5, 2015) (same). But see *In re Duke Energy Ohio, Inc.*, Case No. 17-690-GA-RDR, Finding and Order (Oct. 11, 2017) (noting the attorney examiner’s granting of a motion to strike because the stricken comments were outside the scope of the proceeding).

Duke based its shared-savings proposal on statutory language and administrative rules that House Bill 6 effectively eliminated or amended to require the wind down of mandated energy efficiency plans. Duke filed its application pursuant to Ohio Administrative Code 4901:1-39-04 and 4901:1-39-6 and Ohio Revised Code 4928.66, each of which addresses the energy efficiency portfolio plans required before the General Assembly enacted House Bill 6. As the Commission noted, the portfolio plans required before House Bill 6 allowed for shared-savings provisions that “were intended to provide utilities with an incentive to exceed the statutory benchmarks in any given year.” Case No. 20-1013-EL-POR, Entry at ¶ 8. Despite the end of the portfolio plans this year, Duke explicitly requested shared savings under the administrative rules and statutory language that House Bill 6 changed.

In contrast, AEP’s proposed administration fee does not rely on R.C. 4928.66 or the associated administrative rules. AEP bases its request, instead, on the Revised Code’s clear policy statement in favor of energy efficiency and the Commission’s regular practice of approving energy efficiency programs before Ohio law mandated portfolio plans. *See* Direct Testimony of Jon F. Williams on Behalf of Ohio Power Company at 8, 12–13. OCC ignores that critical distinction. As AEP explains, the proposed DSM programs are based on “programs to help customers save energy and manage peak demand” that it historically offered “prior to any legislative requirements to do so.” *Id.* at 8. Therefore, the Commission’s striking of shared-savings from the Duke case has little bearing here given that AEP is explicitly grounding its proposal on pre-House Bill 6 programs and statutory language distinct from that which Duke cited in its proposal.

Furthermore, the proposed administration fee is operationally different from shared savings. Duke’s shared savings proposal would have allowed the utility to collect up to \$4

million per year through shared savings. *See* Case No. 20-1013, Application. AEP’s proposal is markedly different. AEP seeks to collect 10% of total spending on energy efficiency, which is capped at \$36.6 million per year, as an administration fee. Williams Testimony at 6. Indeed, the more apt comparison of the proposed administration fee is not to shared savings, but to the approved administration fee in AEP’s 2018 electric vehicle pilot program. There, the Commission approved the fee, noting evaluation of “future technology, such as EV charging stations and microgrids,” was critical, and that an administration fee helped make it possible for AEP to pursue that evaluation. Opinion and Order, *In re Ohio Power Company*, Case No. 16-1852-EL-SSO, ¶ 173 (Apr. 25, 2018). AEP’s proposal is similar here—particularly given the inclusion of an electric vehicle program aimed at better controlling the inevitable distribution changes from the growing number of electric vehicles in Ohio. Although OCC would like to use the Commission’s unusual decision in Duke’s portfolio case as *stare decisis*, the differences the programs reveal that one cannot apply that decision here, particularly in light of the Commission’s history of approving similar administration fees.

C. Ohio Law Encourages Energy Efficiency and Does Not Prohibit Administrative Fees.

As with the rest of its Motion, OCC fails to provide a legal basis for its argument that AEP is *prohibited* from seeking administration fees for its DSM programs. Numerous provisions of the Ohio Revised Code support EDU-led energy efficiency programs, even in the absence of annual energy efficiency mandates. For example, as the Commission noted in its June 17, 2020 Entry in Duke’s 2021 Portfolio Plan Application, Ohio Revised Code 4928.02(A) specifically defines state policy as focused on “[e]nsur[ing] the availability to consumers of adequate, reliable, safe, *efficient*, nondiscriminatory, and reasonably priced electric service.” 4928.02(A) (emphasis added); *see* Entry at ¶ 7. Here, the DSM proposals and associated administration fee

help ensure that AEP has the proper incentives to provide efficient electric service to its customers.

Moreover, the absence of clear statutory language on voluntary energy efficiency programs does not indicate, as OCC would like, that the Commission cannot approve such programs and their associated administration fees. Instead, as Jon Williams notes in his testimony in support of AEP's application, voluntary energy efficiency programs are critical and traditional EDU offerings in Ohio. Williams Testimony at 5–6. Before Senate Bill 221 introduced energy efficiency requirements, EDUs already ran energy efficiency programs with approval from the Commission. And when state law required EDUs to file energy efficiency portfolio plans, gas utilities also received administration fees for running their own voluntary energy efficiency. *E.g., In re Columbia Gas*, Case No. 16-1309, Appendix Application B3 at 25. Although the state does not mandate that gas utilities run such programs, Ohio's major natural gas distribution utilities have proposed portfolio plans that closely align with the modest plan AEP proposes in this proceeding. Columbia Gas Ohio, for example, serves 1.4 million customers in Ohio and spends will spend roughly \$35 million per year on demand-side management under its energy efficiency programs its residential and commercial customers. *See, e.g.,* Case No. 11-5028-GA-UNC, *et al.*; Case No. 16-1309-GA-UNC, *et al.* Even when asking for shared savings for these voluntary programs, the gas utilities have received the Commission approval for incentive payments under these voluntary energy efficiency programs. *See, e.g.,* Case No. 16-1309-GA-UNC. The mere fact that House Bill 6 eliminated the required electric utility energy efficiency portfolio plans does not mean that AEP is prohibited from following historical precedent and proposing an administration fee on voluntary programs today. More importantly, it

does not mean that OCC can have the Commission eliminate that proposal before the parties have even discussed its merits.

III. CONCLUSION

OCC's Motion to Strike misunderstands the standards governing motions at this stage, AEP's proposal, and the Commission's own precedents. The Commission should deny the Motion and consider AEP's proposed administration fee on the merits later in this proceeding.

July 8, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra the Motion to Strike of Ohio Consumers' Counsel has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on July 8, 2020.

/s/ Caroline Cox
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Summary: Memorandum Contra Office of the Ohio Consumers' Counsel Motion to Strike
electronically filed by Ms. Caroline Cox on behalf of Environmental Law and Policy Center