

**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.)

**DUKE ENERGY OHIO, INC.'S MEMORANDUM IN OPPOSITION TO THE OFFICE
OF CONSUMERS' COUNSEL'S MOTION TO STRIKE**

I. Introduction

In its Opinion and Order dated September 27, 2017, the Public Utilities Commission of Ohio (Commission), among other things, amended a stipulation and recommendation filed by parties, and placed a cost-recovery cap on Duke Energy Ohio, Inc.'s (Duke Energy Ohio or Company) costs of compliance with Ohio's energy efficiency and peak demand response (EE/PDR) portfolio standard requirements under Ohio Revised Code 4928.66.¹ Duke Energy Ohio timely sought rehearing of the Commission's Opinion and Order challenging the Commission-imposed cost recovery cap. By Entry dated November 21, 2017, the Commission granted the Company's rehearing application (among others) for further consideration.² To date, the Commission has not issued a substantive decision on rehearing.

On December 16, 2019, Duke Energy Ohio submitted its Notice of Additional Authority, informing the Commission of the Ohio Supreme Court's October 15, 2019 decision in *In re Application of Ohio Edison Co.*, Slip Opinion No. 2019-Ohio-4196 (*Ohio Edison*).³ The *Ohio Edison* decision determined an issue identical to the issue currently pending before the Commission

¹ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case No.16-576-EL-POR Opinion and Order, (September 27, 2017).

² *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its 2017-2019 Energy Efficiency and Peak Demand Reduction Program Portfolio Plan*, Case No.16-576-EL-POR Entry on Rehearing, (November 21, 2017).

³ *In re Application of Ohio Edison Co.*, Slip Opinion No. 2019-Ohio-4196.

on rehearing in this proceeding; in *Ohio Edison*, the Supreme Court invalidated a cost-recovery cap imposed on another public utility's costs of compliance with the same statute.⁴ Therefore, *Ohio Edison* directly impacts the Company's Application pending in Case No. 19-622-EL-RDR and will also govern the Commission's ultimate entry on rehearing in this case.

In light of the recent Supreme Court decision, the Commission should, on rehearing, amend its prior order to remove the cost-recovery cap, and improper limitations on the inclusion of shared savings for 2017 as reflected in its Opinion and Order dated September 27, 2017. As such, the current cost recovery cap imposed upon the Company's EE/PDR Rider for the period 2017-2019 should be removed and the Commission should approve the Stipulation and Recommendation submitted in this case with no cost cap.

The Office of the Ohio Consumers' Counsel (OCC) wishes that the Commission turn a blind eye to recent precedent of the Supreme Court of Ohio that overturns the Commission on the exact issue that has been under consideration by the Commission in this proceeding for more than two years. Contrary to OCC's claims, the Commission has the discretion to accept the Company's Notice of Additional Authority and indeed has accepted such notices in the past. Commission precedent not only supports the ability of parties to submit such notices, but also the Commission's discretion to both accept and consider such filings when the circumstances are justified. Such is the case here. The OCC's Motion to Strike Duke Energy Ohio's Notice of Additional Authority should be overruled by the Commission, and the Commission should act in compliance with the Court's directive, as it has done time and time again, and indeed is required to do under the law.

⁴ See generally Notice of Additional Authority Submitted by Duke Energy Ohio, Inc. (December 16, 2019).

II. Law and Argument

A. The Commission has discretion to accept notices of additional authority.

The Commission's regulations vest it with discretion to accept additional authority, particularly when good cause exists to do so. The Company could not have included any argument pertaining to the *Ohio Edison* decision in its Application for Rehearing, because the application deadline occurred nearly two *years* before the *Ohio Edison* decision issued. This is not an instance of a party attempting to belatedly "beef up" a hastily drafted filing with materials that were available prior to the deadline. Thus, there is no basis to construe the notice as an unauthorized "supplement" to the Application for Rehearing (as OCC does).

Moreover, even if the Company's notice of additional authority constitutes a supplement to its Application for Rehearing, which it does not, Ohio Administrative Code (O.A.C.) 4901-1-38 allows the Commission, on its own (or by motion of a party), to waive any requirement of O.A.C. 4901 for good cause shown.⁵ Duke Energy Ohio respectfully submits that the Ohio Supreme Court issuing a decision regarding an action taken by the Commission that is not only directly applicable, but identical to the issue at bar in these proceedings that remains under rehearing consideration by the Commission, constitutes a case where good cause exists. The Commission should consider its decision to impose a cost cap on Duke Energy Ohio's energy efficiency programs in these cases in light of the Court's *Ohio Edison* decision.

B. The Commission has previously accepted additional authority submitted by parties.

Contrary to OCC's claims, the Commission has previously accepted notices of additional authority in similar situations. In fact, the practice of submitting additional authority as relevant

⁵ O.A.C. 4901-1-38-02(B).

information to the Commission for consideration in decisions is well established.⁶ And the Commission has exercised its discretion to either accept or reject such information as the situation merits.

For example, in Case No. 02-46-EL-CSS (Tomlin Case), the Commission accepted the filing of the Complainant's statement of additional authority consisting of a decision of the Ohio Supreme Court that was directly on point to an issue pending.⁷ It is noteworthy that the submission was made after briefing of the case had completed, the case was submitted for decision, and over the objection of the affected utility.⁸ In its Opinion and Order, the Commission accepted and cited to the additional authority as being "dispositive in this case" and as justification to affirm the Attorney Examiner's previous decision to deny the utility's motion to dismiss the complaint and affirm the rejection of an interlocutory appeal.⁹

Similarly, in Case No. 14-1186-EL-RDR (AEP-Ohio Case), the Commission accepted the additional authority submitted by Industrial Energy Users-Ohio (IEU-Ohio) in support of its previously briefed Motion to Dismiss.¹⁰ At issue was the Commission's jurisdiction to approve

⁶ See e.g., *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO, *et al.*, Industrial Energy Users-Ohio's Notice of Additional Authority-Mandate of the Ohio Supreme Court, (July 6, 2016); *In the Matter of the Complaint of Brian Tomlin v. Columbus Southern Power Company*, Case No 02-46-EL-CSS, Statement of Additional Authority, (October 30, 2002); *In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider* Case No. 14-1186-EL-RDR, Industrial Energy Users-Ohio's Motion for and Order Permitting the Filing of Additional Authority in Support of its Motion to Dismiss p. 5, (September 17, 2014); *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Gas Rates*, Case No. 07-589-GA-AIR *et al.*, Statement of Additional Authority of the Office of the Ohio Consumers' Counsel, (April 29, 2008); *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Approval of Tariff Adjustments*, Case No 02-2877-EL-UNC, Motion for Limited Intervention of American Greetings Corp and Statement of Additional Authority, (February 21, 2003); *In the Matter of MCI Metro Access Transmission Services, LLC Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Ameritech Ohio*, Case No 01-1319-TP-ARB, Submission of Additional Authority (April 16, 2002).

⁷ *In the Matter of the Complaint of Brian Tomlin v. Columbus Southern Power Company*, Case No 02-46-EL-CSS, Opinion and Order, (December 12, 2002).

⁸ *Id.*

⁹ *Id.* at 18.

¹⁰ *In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider* Case No. 14-1186-EL-RDR, Finding and Order, p. 15, (April 2, 2015).

the utility's application to continue its implementation of its Retail Stability Rider.¹¹ Seven days after submitting a reply to a memorandum contra, IEU-Ohio submitted, by motion, its additional authority consisting of recently decided cases that IEU-Ohio argued "bears directly on the Commission's lack of authority to provide the relief the AEP-Ohio has requested" and that it would "assist the Commission in making a proper determination..."¹² AEP-Ohio opposed IEU-Ohio's submission of additional authority. Ultimately, the Commission granted IEU-Ohio's motion to file the additional authority.¹³

The Commission should accept Duke Energy Ohio's Notice of Additional Authority as the circumstances in this instance warrant such consideration. As the Commission found in the Tomlin Case, here the Ohio Supreme Court's decision in *Ohio Edison* is dispositive. Likewise, in accordance with the situation in the AEP-Ohio Case, the additional authority submitted herein "bears directly on the Commission's lack of authority,"¹⁴ namely, its September 21, 2017 decision that imposed a cost-recovery cap on Duke Energy Ohio's costs to comply with the EE/PDR mandates under R.C. 4928.66. Moreover, the *Ohio Edison Case* will assist the Commission on "making a proper determination" on rehearing and should be accepted.¹⁵

C. The situation in Case No. 12-2400-EL-UNC *et al.*, relied upon by OCC is distinguishable.

In support of its Motion to Strike, OCC points to the Commission's decision in Case No. 12-2400-EL-UNC *et al.*, wherein IEU-Ohio's notice of additional authority was struck by the

¹¹ *Id.* at p. 2.

¹² *In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider* Case No. 14-1186-EL-RDR, Industrial Energy Users-Ohio's Motion for an Order Permitting the Filing of Additional Authority in Support of its Motion to Dismiss p. 5, (September 17, 2014).

¹³ *In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider* Case No. 14-1186-EL-RDR, Finding and Order, p. 15, (April 2, 2015).

¹⁴ *In the Matter of the Application of Ohio Power Company to Adopt a Final Implementation Plan for the Retail Stability Rider* Case No. 14-1186-EL-RDR, Industrial Energy Users-Ohio's Motion for an Order Permitting the Filing of Additional Authority in Support of its Motion to Dismiss, p. 5, (September 17, 2014).

¹⁵ *Id.*

Commission.¹⁶ However, the facts in that case are distinguishable from those at bar in these proceedings. In Case No. 12-2400-EL-UNC, IEU-Ohio sought to introduce extra-jurisdictional cases from the U.S. District Court of Maryland and the District Court of New Jersey alleging that the Commission's actions were unconstitutional. It is important to note that none of the cases submitted by IEU-Ohio were binding authority or involved any action taken by the Public Utilities Commission of Ohio. There was no court finding that the (Ohio) Commission had done anything improper. Such is not the case here.

The *Ohio Edison* case, unlike those submitted by IEU-Ohio in Case No. 12-2400-EL-UNC, is not merely persuasive authority; it involves a decision of the *Ohio* Supreme Court over actions taken by the *Ohio* Commission. Such actions found improper by the Ohio Supreme Court are identical to those at issue on rehearing in these proceedings. The Commission should take this recent action by the Ohio Supreme Court regarding the Commission's own actions into account in finally addressing the issues pending rehearing before it.

D. The *Ohio Edison* Case is directly relevant and dispositive to the Commission's pending decision on rehearing in these proceedings.

The Commission is "bound by the precedent established by the Ohio Supreme Court."¹⁷ A fundamental tenant of Ohio regulatory law is that the Commission is a creature of statute and has no more power than that which is granted by the General Assembly.¹⁸ Moreover, Ohio law vests the Ohio Supreme Court with appellate jurisdiction over decisions by the Commission.¹⁹ The Ohio Supreme Court has the authority to reverse, vacate, or modify a final order made by

¹⁶ *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18 Revised Code*, Case No. 12-2400-EL-UNC, *et al.*, Opinion and Order p. 7, (February 13, 2014).

¹⁷ *See In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals, et al.*, Case Nos. 10-2376, *et al.*, Entry, p. 6 (January 11, 2012) ("[D]espite our misgivings regarding the chilling effect disclosure of draft negotiation proposals will have . . ., we believe we are bound by the precedent established by the Ohio Supreme Court . . .").

¹⁸ *See e.g. Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957.

¹⁹ R.C. 4903.12.

the Commission if it finds the Commission's order to be unlawful or unreasonable.²⁰ And, on rare occasion, the Ohio Supreme Court does find that the Commission reaches too far. Such was the case in *Ohio Edison*, where the Court found reversible error in the Commission's establishment of a cost-recovery cap on FirstEnergy's EE/PDR portfolio. The Court found that the Commission "acted unlawfully here by modifying the stipulation to include the 4 percent cost cap," and "lacked authority under R.C. 4928.66 to impose a cost-recovery cap."²¹ The bounds set by the Court on the Commission's authority constitute binding precedent.

The same facts exist in these proceedings. The Commission's September 21, 2017 Opinion and Order modified a stipulation to impose a four percent cost cap. Like *Ohio Edison*, Duke Energy Ohio sought, and was granted, rehearing on this issue. However, unlike *Ohio Edison*, the Commission has yet to issue a final appealable order in these proceedings. The Commission's imposition of a four percent cost cap on Duke Energy Ohio's EE/PDR portfolio is just as unlawful here as it is in the *Ohio Edison* case. The facts are identical. And the Commission should take appropriate action to follow Court precedent, as it has done time and time again.

III. Conclusion

The Commission has the discretion to accept additional authority, particularly when good cause exists. Such is the case herein, where an identical action by the Commission has recently been found to have exceeded the Commission's authority and resulted in the Court reversing and remanding to the Commission. The Commission should accept the Company's additional authority, consisting of an opinion by the Ohio Supreme Court that overturns the Commission on an identical issue.

²⁰ R.C. 4903.13.

²¹ *In re Application of Ohio Edison Co.*, Slip Opinion No. 2019-Ohio-4196 pp 8-9.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 6th day of January 2020, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.

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