

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke )  
Energy Ohio, Inc., for Approval of its )  
Energy Efficiency and Peak Demand ) Case No.16-576-EL-POR  
Reduction Portfolio of Programs. )

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**DUKE ENERGY OHIO’S MEMORANDUM CONTRA  
APPLICATION FOR REHEARING**

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**I. INTRODUCTION**

The Public Utilities Commission of Ohio (Commission) issued an Opinion and Order (Order) in this proceeding, approving a stipulation with modification. The modification provided for a cap on program spending, and further provided that Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) could exceed the cap under certain specified conditions. The Commission, in recognition of the timing of the proceedings, included a provision allowing the Company to exceed the cap only after seeking a waiver from the Commission to do so.

The Company filed a Motion for a Waiver, and the Office of the Ohio Consumers’ Counsel (OCC) submitted a Memorandum Contra that Motion. In its Memorandum Contra, the OCC stated various reasons for opposing the motion, all of which were recognized by the Commission by reference in its Entry on Rehearing.<sup>1</sup> In the Entry, the Commission explicitly noted specified conditions limiting the circumstances wherein the Company could recover program costs for 2017 pursuant to the waiver.

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<sup>1</sup> Entry on Rehearing, (November 21, 2017).

Despite the Commission's prior consideration of the issues, the OCC continues to rehash its weary argument. The most recent iteration of the OCC's argument is twofold: that the Commission violated its original order by making provision for a waiver and that the Entry on rehearing lacks factual support. The first of these arguments is recycled and has already been rejected. The second is not applicable to a ruling on a motion. The Commission should reject the OCC's Application for Rehearing.

## **II. ARGUMENT**

### **1. The Order Is Reasonable in Permitting Duke Energy Ohio to Exceed Program Spending for 2017.**

In its first argument, the OCC does nothing more than reiterate the same points that have already been rejected twice. The OCC itself notes that the Commission expressly provided that the Company could exceed its program spending for 2017. While the OCC apparently believes the level of the waiver ultimately granted by the Commission was too high, it is well within the Commission's discretion to grant such a waiver and the OCC has no reasonable argument to the contrary. Indeed, the OCC's motion is notably lacking in legal support; there is none to provide. Pursuant to R.C.4928.66, *et seq.*, the Company is required to implement energy efficiency programs. The Commission's rules establish a mechanism for program planning, reporting, and cost recovery.<sup>2</sup> It is apparent that the OCC believes its views regarding energy efficiency spending should supersede those of the Commission. However, as there is no legal support for this view, the OCC's arguments must be rejected.

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<sup>2</sup> See O.A.C. 4901:1-39-01, *et seq.*

**2. The Commission's Decision Granting the Waiver with Conditions Was Based upon a Fully Developed Factual Record.**

The OCC wrongly argues that the Commission's decision granting a waiver to allow the Company to exceed program spending for 2017 should be reversed, on the ground that it was based upon assertions of counsel and unsupported by a record. In fact, the Commission had an extensive record upon which to base its decision because the facts and the record already existed prior to the Company's motion and, even if did not have such a record, a decision on the motion did not need to be supported by evidence.

In the Order in this case, the Commission reviewed the details of the stipulation and approved it consistent with its own precedent for reviewing such stipulations. Then, the Commission ordered its own modification of the stipulation to provide for an annual cap. It did so after reciting the views of all of the parties involved in the case, as well as those of the OCC and its own Staff.<sup>3</sup> The Commission, again after reciting the extensive record in the case and the terms of the Stipulation, reached a conclusion that included a modification to the Stipulation providing for a cap on program spending and shared savings each year.<sup>4</sup> But the Commission's Order was rendered in September, after much of the calendar year had passed. In fairness and in recognition of the timing of the proceeding, the Commission appropriately made a provision for the Company to exceed the 2017 budget, but only after moving for a waiver. The provision allowing the motion for a waiver was based upon a thorough understanding and a complete review of the stipulation that was provided by the signatory parties. And the Commission appropriately directed the Company to scale back but not suspend programs for 2017. However, in doing so, the Commission recognized that spending for 2017 had already mostly occurred.

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<sup>3</sup> Opinion and Order at p.14.

<sup>4</sup>

Now, the OCC is attempting to argue that the Commission did not have any evidence on which to base its granting of the waiver. The Commission should see through this argument, recognizing the evidence in the case, on which it based its original decision.

Although the OCC argues incorrectly that the Commission did not base its decision on a factual record, this argument fails also because the Commission is not required to hold a hearing in every issue before it. The overall issue in this case was the approval of an energy efficiency portfolio and a cost recovery mechanism. These matters are governed by R.C.4928.66 and the Commission's rules in Chapter 39, O.A.C. These rules set forth procedural requirements for establishing a portfolio, for the Commission's oversight of the portfolio annually, and for a cost recovery mechanism, *et al.* Rule 4901:1-39-07 provides that the commission *may* set a hearing *at its own discretion* if it appears that an application for a cost recovery mechanism appears unjust or unreasonable. Additionally, Rule 4901:1-39-02 provides that the Commission may waive any of the requirements of the chapter for good cause shown. OCC conspicuously neglects to recognize that a hearing on the application for a waiver was entirely within the Commission's discretion and was indeed held.

While no hearing was held on the specific issue addressed by the Company's Motion for a Waiver, no such hearing was required. O.A.C. 4901-1-12, addressing motion practice, makes no reference to a need for a hearing on motions. Indeed, as the Commission and the OCC are well aware, the regular practice is *not* to hold hearings on motions. And if there is no need for a hearing or for other presentation of evidence specifically with regard to motions, then the Commission cannot be faulted for ruling on motions without an evidentiary record.

The statute on which the OCC relies sets the requirements for the opinion and order issued by the Commission in a contested *case*, not a contested *motion*. Indeed, the Ohio Supreme Court has made this clear in its evaluation of arguments under R.C. 4903.09. For example, in the most recent decision under this law, the Court stated as follows:

R.C. 4903.09 applies to all contested commission cases and requires the commission to file “findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” As we have previously explained, “[t]he purpose of R.C. 4903.09 is to provide the court with sufficient details to enable it to determine how the commission reached its decision.”<sup>5</sup>

Ohio law does not allow for the appeal of a Commission ruling on a motion; appeals may only be taken from final orders.<sup>6</sup> Therefore, the Court’s interpretation of R.C. 4903.09 – that the statute require sufficient details to allow the Court to understand the Commission’s decision – can only mean that the statute applies to the order on the merits of the case.

The OCC cites no case in which R.C. 4903.09 was interpreted to apply to rulings on motions. There is no such precedent and the Commission should not find the statute applicable here.

### **III. CONCLUSION**

For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission deny the OCC’s Application for Rehearing.

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<sup>5</sup> *Interstate Gas Supply, Inc. v. Pub. Util. Comm. (In re Duke Energy Ohio, Inc.)*, 2016-Ohio-7535, 148 Ohio St.3d 510, at ¶ 16.

<sup>6</sup> R.C. 4903.13.

Respectfully submitted,

**Duke Energy Ohio, Inc.**

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal delivery, or electronic mail on this 2nd day of January, 2018, to the following parties.

*/s/ Elizabeth H. Watts*

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