

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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|--------------------------------------|---|------------------------|
| In the Matter of the Application of |) | |
| Duke Energy Ohio, Inc. for Recovery |) | Case No. 14-457-EL-RDR |
| of Program Costs, Lost Distribution |) | |
| Revenue and Performance Incentives |) | |
| Related to Its Energy Efficiency and |) | |
| Demand Response Programs. |) | |

**MEMORANDUM CONTRA ENVIRONMENTAL LAW AND POLICY CENTER,
OHIO ENVIRONMENTAL COUNCIL, NATURAL RESOURCES DEFENSE
COUNCIL, AND PEOPLE WORKING COOPERATIVELY’S
APPLICATIONS FOR REHEARING
BY
THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL**

I. INTRODUCTION

This case involves a charge that Duke Energy Ohio, Inc. (“Duke”) seeks to collect from customers for electric service. At issue are costs associated with Duke’s Energy Efficiency and Peak Demand Reduction (“EE/PDR”) programs for 2013.

On May 20, 2015, the Public Utilities Commission of Ohio (“PUCO”) issued a Finding and Order (“F&O”) in this proceeding. In the F&O, the PUCO declined to place a cap on shared savings that Duke will receive from customers through the EE/PDR programs, and approved Duke’s method of calculating the shared savings.¹ The PUCO also rejected Duke’s use of banked savings (i.e., savings from previous years that had not been used toward meeting the shared savings benchmarks) to claim a shared savings incentive that customers would pay.² The PUCO stated that Duke could use banked

¹ F&O at 4.

² Id. at 5.

savings in order to meet the statutory energy efficiency benchmarks, but could not use banked savings to exceed the benchmarks in order to claim a savings incentive that customers would pay through rates.³

On June 19, 2015, Duke filed an application for rehearing of the F&O. In addition, Environmental Law and Policy Center, Ohio Environmental Council and Natural Resources Defense Council filed a joint motion for leave to file an application for rehearing (“Joint Motion for Leave”),⁴ and a joint application for rehearing (“Environmental Application”), seeking clarification of the F&O regarding the use of banked savings in determining Duke’s shared savings incentive.⁵ Also, on June 22, 2015 People Working Cooperatively (“PWC”) filed a one-page letter urging the PUCO to “reconsider” the F&O.⁶ The Office of the Ohio Consumers’ Counsel (“OCC”) files this Memorandum Contra to the Environmental Applicants’ application for rehearing.⁷ The Environmental Application does not “set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful” as required by R.C. 4903.10. And the PUCO has ruled that it is inappropriate to merely seek

³ Id.

⁴ OCC notes under the PUCO’s Rules for Motions (4901-1-12), there is additional time for opposition to the Joint Motion for Leave filed by the Environmental groups who have not previously participated in this proceeding.

⁵ Joint Application at 2.

⁶ Attached hereto as Exhibit A.

⁷ OCC files this Memorandum Contra pursuant to Ohio Adm. Code 4901-1-35(B). If OCC does not address a specific argument raised in any application for rehearing, that fact should not be construed as OCC’s acquiescence to or disagreement with the argument. For example, OCC is not accepting of Duke’s interpretation of the (November 18, 2011) Stipulation filed in Case No. 11-4393-EL-RDR.

clarification through an application for rehearing.⁸ Hence the joint application is not proper and the PUCO should dismiss it.

OCC also opposes the letter filed by PWC. The letter constitutes neither an application for rehearing nor a memorandum in support of Duke's application for rehearing. Neither document is proper under R.C. 4903.10 and the PUCO's rules of practice. The PUCO should disregard the letter.

II. DISCUSSION

A. **The Environmental Application does not meet the requirements for applications for rehearing found in R.C. 4903.10 and the PUCO's rules; hence the PUCO should dismiss the Joint Application.**

The Environmental Application does not claim that the F&O was unlawful or unreasonable in any respect. Instead, the purpose of the Environmental Application is to "seek clarification of the Commission's Order with respect to Duke's use of banked savings in determining its shared savings incentive."⁹ This is an inappropriate purpose for applications for rehearing under R.C. 4903.10 and does not conform to the PUCO rules.

Ohio law provides that, within thirty days after issuance of an order from the PUCO, "any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding."¹⁰ Further, the application for rehearing "shall set forth *specifically* the

⁸ See *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, 2006 Ohio PUC LEXIS 746 *59, where the PUCO held that "motions for clarifications of a Commission order will be denied."

⁹ Joint Application at 2.

¹⁰ R.C. 4903.10.

ground or grounds on which the applicant considers *the order to be unreasonable or unlawful*.”¹¹ Ohio Adm. Code 4901-1-35 mirrors this requirement.

The Supreme Court of Ohio and the PUCO have determined that an application for rehearing does not comply with R.C. 4903.10 if the application does not specify the grounds on which the PUCO’s order is unlawful or unreasonable. The Court has held that “when an appellant’s grounds for rehearing fail to specifically allege in what respect the PUCO’s order was unreasonable or unlawful, the requirements of R.C. 4903.10 have not been met.”¹² The Court has further mandated that there be “strict compliance with such specificity requirement.”¹³ The Environmental Application does not meet the specificity required by R.C. 4903.10 and should be dismissed.

In addition, the PUCO eliminated motions for clarification of PUCO orders in 2008.¹⁴ The Environmental Application is not a proper application for rehearing, and hence the PUCO should not issue the clarification sought in the Joint Application.

B. The letter filed by PWC is not a filing that the PUCO can act upon, and the PUCO should disregard the letter.

On June 22, 2015, PWC filed a one-page letter with the PUCO supporting Duke’s “Energy Efficiency Programs and all associated cost recovery and incentive mechanisms.” PWC urged the PUCO “to reconsider any portion of their May 20, 2015, Finding and Order that in any way limits, undermines or discourages Duke from

¹¹ R.C. 4903.10(B).

¹² *Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 375, 2007-Ohio-53, 59 (citations omitted).

¹³ *Office of Consumers’ Counsel v. Public Util. Comm.* (1994), 70 Ohio St. 3d 244, 247-248 (citations omitted). See also *Discount Cellular*, 112 Ohio St. 3d at 375 (stating that “[W]e have strictly construed the specificity test set forth in R.C. 4903.10.”).

¹⁴ *In the Matter of the Review of Chapters 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order (December 6, 2008) at 55-56.

receiving appropriate cost-recovery and incentives for their Energy Efficiency programs.” But PWC’s letter is not a proper application for rehearing. It also is not a proper memorandum contra under PUCO rules. Law and rule provide very limited opportunities to plead after the PUCO issues its order.

The letter should be disregarded by the PUCO. If an application for rehearing, PWC’s filing not only fails the specificity requirements of R.C. 4903.10 discussed above it also is untimely. R.C. 4903.10 requires that applications for rehearing of an order be filed within 30 days after the order is issued. Because the F&O was issued on May 20, 2015, applications for rehearing of the F&O had to be filed by June 19, 2015. PWC docketed its letter on June 22, 2015 – three days after the deadline. As an application for rehearing, PWC’s letter violates Ohio law and should be disregarded.

If a memorandum contra supporting Duke’s application for rehearing, PWC’s letter also violates the PUCO’s prohibition against filing a memorandum supporting applications for rehearing. The PUCO has long held that Ohio Adm. Code 4901-1-35 is limited in scope to the filing of memorandum contra applications for rehearing.¹⁵ Thus, a memorandum supporting an application for rehearing is inappropriate.

The PUCO may consider a memorandum in support only if accompanied by a motion seeking leave to file such a document.¹⁶ PWC filed no motion seeking leave to file a memorandum in support. Hence PWC’s letter should be disregarded.

¹⁵ In the Matter of the Establishment of Carrier-to-Carrier Rules, Case No. 06-1344-TP-ORD, Entry on Rehearing (October 17, 2007) at 3.

¹⁶ Id.

III. CONCLUSION

The Joint Application is improper. It seeks clarification through an application for rehearing, which is an inappropriate purpose for applications for rehearing under R.C. 4903.10, and the Joint Application does not conform to the PUCO rules.

PWC's correspondence is also improper. It is either an application for rehearing that is procedurally deficient, or it is a memorandum in support of Duke's Application for Rehearing (which is prohibited under the PUCO's rules). Under either scenario, PWC's letter is improper and should be stricken from the record.

Respectfully submitted,

BRUCE J. WESTON (0016973)
CONSUMERS' COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission this 29th day of June 2015.

/s/ Kyle L. Kern
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RE: PUCO Case No. 14-457-EL-RDR: In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs.

Dear Ms. McNeal,

This correspondence is to express the support of People Working Cooperatively, Inc., for Duke Energy Ohio's ("Duke") Energy Efficiency Programs and all associated cost recovery and incentive mechanisms. People Working Cooperatively, or PWC, recently celebrated its 40th Anniversary of serving the people of the Greater Cincinnati Area. PWC has provided more than 282,000 services to eligible clients via trained staff and thousands of volunteers. These services include energy efficiency measures and retrofits, including those sponsored by Duke. The positive, long-lasting impacts of these services are a significant asset to Duke's customers and to Southwestern Ohio.

As a participating member of Duke's energy efficiency collaborative, and as the President of People Working Cooperatively, I would like to express my support for Duke Energy Ohio's ("Duke") cost-effective Energy Efficiency Program efforts. I respectfully urge the Commission to reconsider any portion of their May 20, 2015, Finding and Order that in any way limits, undermines or discourages Duke from receiving appropriate cost-recovery and incentives for their Energy Efficiency programs.

Since their inception in 1992, Duke's energy efficiency efforts have continually benefitted not only direct participants, but have greatly contributed to grid stability and system reliability in our community. Thus, it is important that cost-recovery for these programs, and the appropriate incentives that encourage Duke to generate savings above and beyond what is required, are approved by the Commission. Even with incentives, energy efficiency is the cheapest form of generation. I respectfully request that the Public Utilities Commission take the appropriate steps to ensure Duke Energy's high-quality energy efficiency efforts are properly incentivized.

Sincerely,

Jock Pitts - President and CEO
 People Working Cooperatively, Incorporated

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Summary: Memorandum Memorandum Contra Environmental Law and Policy Center, Ohio Environmental Council, Natural Resources Defense Council, and People Working Cooperatively's Applications for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Kern, Kyle L.