

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In The Matter of the Application of Duke)
Energy Ohio, Inc. for a Waiver.) Case No. 16-1017-EL-WVR
)

**MOTION TO INTERVENE AND COMMENTS OF
THE OHIO MANUFACTURERS' ASSOCIATION**

In accordance with Rule 4901-1-11, Ohio Administrative Code and Section 4903.22, Ohio Revised Code, the Ohio Manufacturers' Association (OMA) respectfully moves to intervene in this matter with the full powers and rights granted to intervening parties. OMA has a real and substantial interest that may be adversely affected by this proceeding and that interest cannot be adequately represented by any existing parties. Because OMA satisfies the standard for intervention set forth in the Public Utilities Commission of Ohio's (Commission) rules and by statute, the motion should be granted. OMA also respectfully submits comments in opposition to Duke Energy Ohio, Inc.'s (Duke) request for a waiver. A memorandum in support is attached.

Respectfully submitted,

/s/ Danielle Ghiloni Walter

Kimberly W. Bojko (0069402)

Danielle Ghiloni Walter (0085245)

Carpenter Lipps & Leland LLP

280 North High Street, Suite 1300

Columbus, Ohio 43215

Telephone: (614) 365-4100

Email: bojko@carpenterlipps.com

(willing to accept service by email)

ghiloni@carpenterlipps.com

(willing to accept service by email)

Counsel for the OMA

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MEMORANDUM IN SUPPORT

I. OMA's request for intervention.

Pending before the Commission is an application filed by Duke that seeks a limited waiver of Rule 4901:1-39-04(A), Ohio Administrative Code (O.A.C.)¹ Duke seeks a waiver to delay filing the market potential study portion of its energy efficiency and peak reduction program (EE/PDR) program portfolio plan (POR Plan) until October 15, 2016.² Duke states the waiver is necessary because the vendor it retained to perform a market assessment will not be completed with the study until August.³ At that point, Duke states it will file an amendment to its POR Plan to reflect the findings of the market assessment study.⁴ As explained below, OMA has a real and substantial interest in the outcome of this proceeding and requests intervention.

Rule 4901-1-11, O.A.C., permits intervention by a party who has a real and substantial interest in the proceeding and who is so situated that the disposition of the proceeding may impair or impede its ability to protect that interest and whose interest is not adequately represented by an existing party. Additionally, Section 4903.221, Ohio Revised Code (R.C.),

¹ Application for Waiver of Duke Energy Ohio, Inc. at 1 (May 9, 2016).

² Id.

³ Id. at 2.

⁴ Id.

authorizes intervention where a party: may be adversely affected by the proceeding; will contribute to a full development and equitable resolution of factual issues; and will not unduly prolong or delay the proceedings.

OMA is a non-profit entity that strives to improve business conditions in Ohio and drive down the cost of doing business for Ohio manufacturers. OMA works directly with elected officials, regulatory agencies, the judiciary, and the media to provide education and information to energy consumers, regulatory boards, and suppliers of energy; advance energy policies to promote an adequate, reliable, and efficient supply of energy at reasonable prices; and advocate in critical cases before the Commission. OMA members purchase electric power services from Duke, are responsible for program costs, lost distribution revenue, and performance incentives related to Duke's energy efficiency and demand response programs, and will be affected by the Commission's determination in these matters. OMA has further participated in past years' proceedings on these issues and has a continuing interest in ensuring that its members' interests are reflected and considered by the Commission in the above-captioned matter.

OMA has a direct, real, and substantial interest in the issues raised in this proceeding and is so situated that the disposition of the proceeding may, as a practical matter, impair, or impede its ability to protect their interest. OMA's unique knowledge and perspective will contribute to the full development and equitable resolution of the factual issues in this proceeding. OMA's interest will not be adequately represented by other parties to the proceeding and its timely intervention will not unduly delay or prolong the proceeding.

Because OMA satisfies the criteria set forth in Section 4903.221, R.C., and Rule 4901-1-11, O.A.C., it is authorized to intervene with the full powers and rights granted by the

Commission to intervening parties. OMA respectfully requests that the Commission grant this motion to intervene and that OMA be made a full party of record.

II. OMA's comments in opposition to Duke's waiver request.

Pursuant to Rule 4901:1-39-02(B), O.A.C., in order for Duke to justify its request to waive the filing requirement prescribed by Rule 4901:1-39-04(A), O.A.C., and delay the filing of the market potential study portion of its POR Plan until October 15, 2016, Duke must establish good cause. Duke's request for a waiver is not supported by good cause and therefore should be denied.

In a recent entry in PUCO Case No. 16-576-EL-POR, et al. (Duke Previous Waiver), the Commission denied Duke's request for a six month extension to file its POR Plan and directed Duke to file its POR Plan by June 15, 2016.⁵ The Commission stated that Duke's request for a six month extension until October 15, 2016 was "excessive" and noted that the 60-day extension was a "reasonable time" for Duke to file its POR Plan.⁶

Duke's waiver request is barred by the doctrines of res judicata and collateral estoppel, as it essentially amounts to a request by Duke to relitigate the same issue that the Commission reviewed in the Duke Previous Waiver case. "These doctrines operate to preclude the relitigation of a point of law or fact that was at issue in a former action between the same parties and was passed upon by a court of competent jurisdiction."⁷ The Supreme Court of Ohio has held that the doctrine applies to administrative proceedings.

Here, the parties and the issue are the same. Both OMA and Duke were involved in Duke's Previous Waiver case, and Duke is again seeking to extend the filing of its POR Plan

⁵ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Program Portfolio Plan, et al.*, Case No. 16-576-EL-POR, et. al., Entry at 4 (April 7, 2016).

⁶ Id.

⁷ *Office of Consumers' Counsel v. Public Utilities Com'n of Ohio*, 16 Ohio St.3d 9, 10, 475 N.E.2d 782 (1985).

until October 15, 2016. In its initial waiver request, Duke did not raise the issue of the inability of its vendor to timely complete the market assessment report.⁸ Instead, Duke focused on the number of pending waiver requests before the Commission as well as matters pending before the General Assembly, in making its request for a waiver and extension.⁹ Only now does Duke also assert that the basis for requesting a waiver is that its vendor cannot complete the market assessment in time.¹⁰ However, the Commission issued a final decision in that case when it directed Duke to file its POR Plan by June 15, 2016. The fact that Duke is requesting an extension of only the market assessment portion of its POR Plan is irrelevant. Rule 4901:1-39-03(A), O.A.C., requires that the market assessment study be included in the POR Plan, thus the Commission's Entry directing Duke to file its POR Plan by June 15, 2016 inextricably included the market assessment and allowed no extension beyond June 15, 2016 for any portion of the POR Plan. Thus, the doctrines of collateral estoppel and res judicata apply to Duke's waiver request.

Moreover, Duke's request for a waiver directly contradicts the Commission's Entry in Duke's Previous Waiver case, thereby circumventing the rehearing procedure established in Section 4903.10, R.C., Section 4903.10, R.C., states, in relevant part:

After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding. Such application shall be filed within thirty days after the entry of the order upon the journal of the commission.¹¹

⁸ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Program Portfolio Plan, et al.*, Case No. 16-576-EL-POR, et. al., (March 16, 2016).

⁹ *Id.* at 1.

¹⁰ *Id.*

¹¹ Section 4903.10, Revised Code.

If Duke disagreed with the Commission's Entry, Duke could have filed an application for rehearing and requested the Commission reconsider its decision. Rather, Duke seeks to completely circumvent procedural process and file the Application for Waiver in a separate case number, premised on the same issue and including the exact same extension filing deadline of October 15, 2016. This contravenes the procedures established by the Commission for adjudicating issues and should not be considered a valid waiver request.

III. Conclusion.

For the foregoing reasons, OMA should be granted intervention in this proceeding pursuant to Section 4903.221, R.C., and Rule 4901-1-11, O.A.C., with the full power and rights granted by the Commission to intervening parties. Moreover, as detailed in OMA's comments, OMA requests the Commission deny Duke's request for a waiver.

Respectfully submitted,

/s/ Danielle Ghiloni Walter
Kimberly W. Bojko (0069402)
Danielle Ghiloni Walter (0085245)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: bojko@carpenterlipps.com
(willing to accept service by email)
ghiloni@carpenterlipps.com
(willing to accept service by email)

Counsel for the OMA

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on May 26, 2016.

/s/ Danielle Ghiloni Walter_____
Danielle Ghiloni Walter

Amy.spiller@duke-energy.com
Elizabeth.watts@duke-energy.com
orourke@carpenterlipps.com

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Summary: Motion To Intervene And Comments Of The Ohio Manufacturers' Association
electronically filed by Mrs. Kimberly W. Bojko on behalf of Ohio Manufacturers' Association