

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Annual Energy)
Efficiency Portfolio Status Report of Duke) Case No. 17-689-EL-EEC
Energy Ohio, Inc.)

**MOTION FOR LEAVE TO FILE OUT-OF-TIME INSTANTOR
AND MEMORANDUM CONTRA
DUKE ENERGY OHIO, INC.'S MOTION TO STRIKE COMMENTS OF THE
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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MOTION FOR LEAVE TO FILE OUT-OF-TIME INSTANTOR

To the extent necessary and pursuant to Rules 4901-1-12 and 4901-1-13(A), Ohio Adm. Code, the Ohio Manufacturers' Association Energy Group (OMAEG) respectfully requests leave to file its memorandum contra Duke Energy Ohio, Inc.'s (Duke) Motion to Strike Comments in the above-captioned proceeding one day out-of-time for the reasons discussed in the memorandum in support.

Respectfully submitted,

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In the Matter of the Annual Energy)
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Energy Ohio, Inc.)

**MEMORANDUM IN SUPPORT OF OMAEG’S MOTION FOR LEAVE TO FILE
MEMORANDUM CONTRA OUT-OF-TIME**

OMEAG respectfully requests leave to file its Memorandum Contra Duke’s Motion to Strike one day out-of-time. Extraordinary circumstances exist to grant such motion and given the brief delay in the filing, no parties to this proceeding will be prejudiced as a result of the late filing.

On April 17, 2017, Duke filed its annual energy efficiency status report claiming energy efficiency savings achieved through the implementation of its energy efficiency and demand response programs, pursuant to Rule 4901:1-39-05(C), Ohio Adm. Code (O.A.C.).¹ Under the express authority of Rule 4901:1-39-06, O.A.C.,² OMAEG filed comments regarding Duke’s Report.³ The National Resources Defense Council and Environmental Law & Policy Center (Environmental Commenters) also filed similar comments jointly.

¹ *In the Matter of the Annual Energy Efficiency Portfolio Status Report of Duke Energy Ohio, Inc.*, Case No. 17-689-EL-EEC, Annual Energy Efficiency Status Report at 5 (April 17, 2017) (Report).

² Rule 4901:1-39-06, O.A.C. provides: “Any person may file comments regarding an electric utility’s initial benchmark report or annual portfolio status report filed pursuant to this chapter within thirty days of the filing of such report.”

³ OMAEG Comments (May 17, 2017).

On Friday, June 2, 2017, Duke filed a motion to strike OMAEG's and Environmental Commenters' comments.⁴ As a party to these proceedings and because Duke's Motion is directed to comments that OMAEG filed in this docket, Duke was required to serve OMAEG a copy of its pleadings.⁵ However, as shown by the certificate of service to Duke's Motion, Duke failed to properly serve a copy of its Motion on OMAEG.⁶ As such, counsel for OMAEG was not aware of Duke's Motion to Strike until the Environmental Commenters filed their memorandum contra and properly served OMAEG.

Although it is one day after the time prescribed to file a memorandum contra Duke's motion, because Duke failed to properly serve OMAEG of its Motion, this Memorandum Contra should be considered timely. Under Rule 4901-1-12, O.A.C., any party may file a memorandum contra within fifteen days after *service* of a motion. Consistent with Rule 4906-2-3, O.A.C., Counsel for OMAEG indicated that it is willing to accept service by e-mail.⁷ Therefore, in order for service to be perfected, Duke was required to serve a copy of its Motion upon OMAEG via e-mail or by another accepted method in accordance with Rule 4901-1-05(D), O.A.C. Duke did not. Because Duke failed to properly serve OMAEG with a copy of its Motion, the time for OMAEG to file its memorandum contra has not yet begun to run. Therefore, the Commission should consider this memorandum contra timely.

Alternatively, should the Commission find that OMAEG's memorandum contra is not timely, which it is, OMAEG requests leave to file this memorandum contra out-of-time. Had Duke properly served its Motion on OMAEG on June 2, 2017 as required, OMAEG's filing of

⁴ Duke Motion to Strike (June 2, 2017) (Motion).

⁵ See Rule 490-1-05, O.A.C.

⁶ Motion at 5.

⁷ OMAEG Comments at 7.

its memorandum contra would only be one business day after the deadline. Given the brief delay, no parties will be prejudiced by this delayed filing and the filing will not unduly delay this proceeding or result in harm or burden to the parties to this proceeding. Further, because OMAEG was never properly served with Duke's Motion informing OMAEG of its opportunity to respond, good cause is shown why leave should be granted.

Motions for out-of-time filings are routinely granted by the Commission for good cause shown absent a showing of prejudice.⁸ In this case, not only has OMAEG demonstrated good cause for its potentially late filing, no parties will be prejudiced by the brief delay in filing. Therefore, for the reasons provided herein, OMAEG respectfully requests this motion for leave to file this memorandum contra be granted.

Respectfully submitted,

/s/ Kimberly W. Bojko

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⁸ 4901-1-13(A), O.A.C., states that "[e]xcept as otherwise provided by law, and notwithstanding any other provision in this chapter, continuances of public hearings and extensions of time to file pleadings or other papers may be granted upon motion of any party for good cause shown, or upon motion of the commission, the legal director, the deputy legal director, or an attorney examiner."

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Annual Energy)
Efficiency Portfolio Status Report of Duke) Case No. 17-689-EL-EEC
Energy Ohio, Inc.)

**MEMORANDUM CONTRA
DUKE ENERGY OHIO, INC.'S MOTION TO STRIKE COMMENTS OF THE
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

I. INTRODUCTION

On April 17, 2017, Duke Energy Ohio, Inc. (Duke) filed its annual energy efficiency status report claiming energy efficiency savings achieved through the implementation of its energy efficiency and demand response programs, pursuant to Rule 4901:1-39-05(C), Ohio Adm. Code (O.A.C.).⁹ Under the express authority of Rule 4901:1-39-06, O.A.C.,¹⁰ the Ohio Manufacturers' Association Energy Group (OMAEG) filed comments regarding Duke's annual portfolio status report.¹¹ In OMAEG's Comments, OMAEG identified where Duke in its Report relied on unsupportable figures, improperly included customer-financed energy efficiency activities in its shared savings calculations, calculated savings estimates irrespective of third party evaluations, and included savings from programs that have resulted in minimal energy savings (if any at all). Under the same authority, the National Resources Defense Council and

⁹ *In the Matter of the Annual Energy Efficiency Portfolio Status Report of Duke Energy Ohio, Inc.*, Case No. 17-689-EL-EEC, Annual Energy Efficiency Status Report at 5 (April 17, 2017) (Report).

¹⁰ Rule 4901:1-39-06, O.A.C. provides: "Any person may file comments regarding an electric utility's initial benchmark report or annual portfolio status report filed pursuant to this chapter within thirty days of the filing of such report."

¹¹ OMAEG Comments (May 17, 2017).

Environmental Law & Policy Center (Environmental Commenters) also filed similar comments jointly.

On Friday, June 2, 2017, Duke filed a motion to strike OMAEG's and Environmental Commenters' comments.¹² In its Motion to Strike, Duke asserts OMAEG's Comments are misplaced and improper because it asks the Public Utilities Commission of Ohio (Commission) to interpret Amended Substitute Senate Bill 310 (SB 310) to which the Commission can only do through rulemaking proceedings.¹³ Additionally, Duke argues OMAEG's Comments are an improper vehicle to submit evidence of Duke's improper calculation of claimed savings.

As discussed more fully below, the Commission has authority to interpret Ohio law and Commission rules in any proceeding, independent of a special rulemaking proceeding. Further, in preparing comments, OMAEG looked no further than Duke's Report and the appendix attached to that Report to show's Duke's failure to properly apply the SB 310 provisions. Therefore, the Commission should deny Duke's Motion.

II. ARGUMENT

A. The Commission Has Authority to Interpret Statutes Outside of Rulemaking Proceedings.

In its Motion, Duke argues that before the Commission can interpret SB 310, it "must engage in rulemaking and then allow electric distribution utilities to incorporate any changes and amend as needed."¹⁴ Duke's assertion is wholly unsupported in Ohio law and Commission precedent and must be rejected.

SB 310 was codified as law in Section 4928.662 of the Revised Code (R.C.). Engaging in statutory interpretation does not require the initiation of a rulemaking proceeding under R.C.

¹² Duke Motion to Strike (June 2, 2017) (Motion).

¹³ Motion at 1-3.

¹⁴ Motion at 2.

111.15. To the extent OMAEG requests that the Commission interpret portions of SB 310 and Duke’s compliance with a number of counting provisions contained therein, such act would be an exercise in statutory interpretation of an *existing* statute. Importantly, agency rulemaking procedures specifically exclude this type of statutory interpretation. R.C. 111.15(A)(1) provides:

“Rule” does not include any guideline adopted pursuant to section 3301.0714 of the Revised Code, any order respecting the duties of employees, **any finding, any determination of a question of law or fact in a matter presented to an agency.**¹⁵

“Statutory interpretation presents a question of law.”¹⁶ R.C. 111.15(A)(1) itself excepts from the “rule” definition the type of statutory interpretation Duke asserts the Commission cannot do outside of a rulemaking. Moreover, nowhere in its comments does OMAEG suggest the Commission establish a *new* rule. Instead, OMAEG merely requests the Commission interpret and apply the General Assembly’s intended meaning of “as found” and “deemed” in an *existing* statute as it relates to Duke’s activities and status report filing.¹⁷ This request is neither an amendment to an existing law nor regulation and therefore, no rulemaking proceeding is required and no justification for Duke to amend its Report exists. As such, Duke’s Motion to Strike should be denied.

B. OMAEG’s Comments do not Address Duke’s Ability to Collect Shared Savings.

Duke asserts OMAEG’s comments challenge Duke’s ability to collect shared savings.¹⁸ This assertion is an exaggeration and conflates the issue. In its comments, OMAEG did not express concern regarding Duke’s “ability to collect shared savings.”¹⁹ Rather, OMAEG

¹⁵ R.C. 111.15(A)(1)(emphasis added).

¹⁶ *Indep. v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 18 (2014).

¹⁷ See R.C. 4928.662(B).

¹⁸ Motion at 3.

¹⁹ *Id.*

identified that Duke “claims to have counted energy savings ‘attributable to Duke Energy for ‘customer energy efficiency activities within its Ohio service territory as allowed for in Ohio Senate Bill 310.’”²⁰ By counting and recognizing in its energy savings calculation savings attributed to customer-financed energy efficiency activities, Duke is inflating the energy savings and demand reductions achieved as part of Duke’s approved programs. Because Duke did not influence customer-financed energy savings and demand reductions activities, the Commission should clarify that these activities are not eligible for sharing savings under SB 310.

III. CONCLUSION

In its comments, OMAEG requested that the Commission clarify its interpretation of certain elements of the existing law and Duke’s application of such when reporting its claimed energy efficiency savings achieved through the implementation of its energy efficiency and demand response programs. Because SB 310’s counting provisions are codified under existing Ohio law, the Commission is not required to engage in rulemaking proceedings to interpret those provisions.

Respectfully submitted,

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²⁰ OMAEG Comments at 2 (citing Appendix F at 5 (emphasis added)).

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 June 19, 2017.

/s/ James D. Perko, Jr.
James D. Perko, Jr.

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This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

6/19/2017 3:42:31 PM

in

Case No(s). 17-0689-EL-EEC

Summary: Motion Motion for Leave to File Out-of-Turn Instante and Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Strike Comments electronically filed by Mr. James D Perko on behalf of The Ohio Manufacturers' Association Energy Group