

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**THE OHIO HOSPITAL ASSOCIATION’S MEMORANDUM CONTRA THE OFFICE
OF OHIO CONSUMERS’ COUNSEL APPLICATION FOR REHEARING**

I. INTRODUCTION

The Ohio Hospital Association (“OHA”) submits this memorandum contra regarding Assignment of Error 2 the Office of Ohio Consumers’ Counsel’s (“OCC”) Application for Rehearing. Although OHA does not address OCC’s other Assignment of Errors, this should not be construed as an agreement with OCC’s position on these issues.

OHA is supportive of Duke Energy Ohio’s (“Duke’s”) EE-PDR programs and wishes to see a robust portfolio of programs for customers. When hospitals in Duke’s territory participate in Duke’s EE-PDR programs, these hospitals reduce their energy costs, which helps to reduce the overall operational costs of these hospitals. Hospitals that participated in Duke’s programs in 2017 or are considering participating in Duke’s programs in 2017 need to know that these programs will not suddenly be slashed or drastically modified in a manner that reduces the benefit of these programs. OCC’s request to impose a cost cap on Duke’s 2017 program costs could severely impair Duke’s ability to provide EE-PDR programs to its hospital customers.

The Commission’s decision to allow Duke to exceed the cost cap for 2017 is reasonable and fair. It will allow Duke to continue implementation of its 2017 programs without the substantial interruption that the cost cap would impose. Moreover, the Commission’s decision

not to impose the cost cap for 2017 avoids the unlawful imposition of a retroactive requirement on Duke's past conduct. The Commission should deny Assignment of Error 2 of OCC's Application for Rehearing.

II. LAW AND ARGUMENT

In its Application for Rehearing, OCC requests that the Commission "eliminate the provision allowing Duke to exceed the cost cap in 2017." (OCC Application for Rehearing at 4.) OCC argues that the Commission should penalize Duke for exceeding the cost cap for 2017 because "[t]here is no evidence that Duke has made any attempt to scale back its program...." (*Id.*) OCC is apparently arguing that the Order required Duke to scale back its programs *before* the Commission even issued the Order. OCC's reading of the Order is unreasonable because it would result in the Commission retroactively imposing new requirements on Duke's past conduct.

The Ohio Supreme Court has made clear that the Commission lacks authority to "alter[] the legal significance of [a party's] past conduct." *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, ¶ 51. "The prohibition against retroactive laws is a bar against the state's imposing new duties and obligations upon a person's past conduct and transactions, and it is a protection for the individual who is assured that he may rely upon the law as it is written and not later be subject to new obligations thereby." *E. Ohio Gas Co. v. Limbach*, 26 Ohio St.3d 63, 65 (1986) (internal quotations omitted). This prohibition applies to the Commission, which derives all of its power from the legislature. *Discount Cellular*, 112 Ohio St.3d 360, ¶ 43, 51; see also, e.g., *Heckler v. Community Health Serv.*, 467 U.S. 51, 61 n.12 (1984) ("an administrative agency may not apply a new rule retroactively when to do so would unduly intrude upon reasonable reliance interests"). OCC fails to cite any authority which would

allow the Commission to retroactively require Duke to “scale back” its programs before the issuance of the Order.

Further, it is apparent from the history of this proceeding and the Order that the Commission intended for Duke to scale back its programs *after* the Order was issued. Although Duke’s portfolio included proposed budgets for 2017, the Order was not issued until September 27, 2017. While this case was pending, Duke was legally obligated to meet its statutory energy efficiency and peak demand reduction requirements. As such, it was appropriate for Duke to continue implementing its current programs during the pendency of this case. Because the Order was not issued until September 27, 2017, it was entirely reasonable for the Commission to allow Duke to exceed the cost cap for 2017. To do otherwise would retroactively penalize Duke for failing to comply with a cost cap which did not exist until the September 27, 2017 Order was issued.

In addition, Commission Staff has indicated that it is not opposed to Duke’s motion for waiver to exceed the projected budget amount for 2017. (*See* October 27, 2017 Correspondence of Staff filed in Case No. 16-576-EL-POR.) Although the Commission Staff does not speak for the Commission, it is important to note that Staff is not opposed to Duke’s request to modify its budget to approximately \$56 million for 2017, which will ultimately reflect Duke’s actual program costs for 2017 when Duke seeks recovery.

III. CONCLUSION

Based on the foregoing, OHA requests that the Commission deny Assignment of Error 2 of OCC’s Application for Rehearing.

Respectfully submitted on behalf of
THE OHIO HOSPITAL ASSOCIATION



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the parties of record listed below this 6th day of November 2017 *via* electronic mail.



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Summary: Memorandum OHA Memo contra OCC's Application for Rehearing electronically filed by Mr. Devin D. Parram on behalf of Ohio Hospital Association