

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of Duke )  
Energy Ohio, Inc. for approval of a Market )  
Rate Offer to Conduct a Competitive Bidding )  
Process for Standard Service Offer Electric ) Case No. 10-2586-EL-SSO  
Generation Supply, Accounting )  
Modifications, and Tariffs for Generation )  
Service. )

DUKE ENERGY OHIO, INC.'S  
MEMORANDUM CONTRA  
MOTION TO DISMISS

Pursuant to Ohio Administrative Code (O.A.C.) 4901-1-12(B)(1) and the Entry issued in this proceeding on November 16, 2010, Duke Energy Ohio, Inc., (Duke Energy Ohio) hereby submits its memorandum contra the motion to dismiss filed by Industrial Energy Users-Ohio (IEU) and respectfully requests that this Commission deny the motion to dismiss.

On November 15, 2010, Duke Energy Ohio submitted an application for approval of a market rate offer (MRO) for its standard service offer electric generation supply, in the above-captioned proceeding. On November 16, 2010, the attorney examiner assigned to this proceeding issued an entry that, *inter alia*, required that memoranda contra be filed within three business days after the service of a motion.

IEU filed a motion to dismiss this proceeding on January 4, 2011. IEU asserts that Duke Energy Ohio's application for an MRO fails to meet statutory requirements and that, as a consequence, the Commission has no subject matter jurisdiction over the application, as filed, and must dismiss the application. IEU's argument fails, both because the application does meet

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the statutory requirements and because, even if it did not do so, the Commission would not lose jurisdiction over the application as a consequence.

It is axiomatic that a motion to dismiss is limited to the four corners of the filing that initiates the proceeding. Here, that filing is Duke Energy Ohio's application. The Commission, in assessing the merits of the motion, must consider that application in its entirety and not just the limited portions intentionally referenced by the movant. And only when the lack of subject matter jurisdiction is evident from the initial filing may the action be dismissed. *See, e.g., In the Matter of the Complaint of Lou Wenzowski v. Columbia Gas of Ohio*, Case No. 06-568-GA-CSS (Entry, September 27, 2006) at finding (9) ("*After considering the parties' pleadings, the Commission believes that the complaint concerns the denial of complainant's claim for damages by Columbia's insurer and is not a matter within our service and rate-related jurisdiction.*" Emphasis added.) *See also In the Matter of the Complaint of AT&T Ohio v. The Dayton Power and Light Company*, Case No. 06-1509-EL-CSS (Entry, March 28, 2007), at finding (5). Here, IEU conveniently ignores Duke Energy Ohio's application and the relevant portions of R.C. 4928.142 pursuant to which it is filed to incorrectly argue that this Commission cannot determine whether Duke Energy Ohio's application meets all of the requirements of R.C. 4928.142(B). This is clearly contrary to the grant of review statutorily extended to it. As discussed more fully below, IEU's motion must be denied.

In seeking dismissal, IEU relies *only* on R.C. 4928.142(D), in which it is stated that a utility's first MRO application "shall require that a portion...of the load...be competitively bid ...". And IEU maintains that the blending period, at a minimum, must be five years. IEU correctly describes Duke Energy Ohio's application as including a request that the Commission approve a blending period that would end after two years such that, after two years, the portion of the load

to be competitively bid is 100 percent. However, IEU erroneously concludes that the statutory requirements of a blend to full market cannot be met by Duke Energy Ohio's request.

A more comprehensive reading of the statute leads to a different result. Division (E) of R.C. 4928.142 specifically allows the Commission to authorize different percentages, "notwithstanding any other requirement of this section," under certain identified circumstances. As detailed in its application, the provisions of R.C. 4928.142, taken as a whole, enable an accelerated blending period. Thus, there is certainly no clear authority that the MRO application, as filed, is not in compliance with law.

IEU's second argument is even more problematic. IEU suggests that, because the MRO is allegedly not in compliance with a statutory requirement, the Commission has no subject matter jurisdiction over the entire proceeding, leaving the Commission with no option but to dismiss the application outright. This conclusion fails, as a matter of law and given the undeniably logical exercise of the Commission's authority.

The Ohio Legislature certainly did not intend that an MRO application's failure to meet all statutory requirements would result in its dismissal, at the pleading stage. Instead, the Legislature expressly included a provision that specifically directs the Commission to determine whether the application satisfies the applicable filing requirements. Indeed, the Legislature further required the Commission to allow an opportunity for an applicant to remedy any deficiencies in the application to the satisfaction of the Commission.

The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. . . . If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; otherwise, the electric distribution utility shall withdraw the application.

R.C. 4928.142(B). The law most certainly does not say that an application that allegedly is not, on its face, in compliance with statutory requirements (that is, accepting IEU's view that Duke Energy Ohio's application was not compliant) must be dismissed out of hand, especially with the Commission apparently never taking jurisdiction of the proceeding. Rather, the law requires the Commission to render a decision on the merits of the filing. Under IEU's reading, however, the Commission could *never* exercise this statutory obligation.

Nothing in Title XLIX of the Revised Code would cause the Commission to lose jurisdiction over a proceeding that is, otherwise, appropriately before it, just because the application does not fulfill all requirements. How could such an outcome be possible? For example, would the Commission lose jurisdiction over a rate case because an applicant failed to include a proposed newspaper notice, as required by statute? The Commission might have to deny the application, but the failure does not cause the Commission to lose jurisdiction. Indeed, until the Commission takes jurisdiction to review the application, the Commission would not be in a position to conclude that the application was not in compliance with the law. The same is true here: After presentation of evidence on the record, the Commission will, on the basis of the record that has been developed, determine that the application before it complies with statutory requirements. It cannot, at this point, make a determination that the statute has not been met and that it, therefore, has no jurisdiction.

Therefore, Duke Energy Ohio respectfully requests that the motion to dismiss be denied.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in black ink, appearing to read 'Amy B. Spiller', is written over a horizontal line.

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## CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was served on the following parties of record by electronic mail delivery or first class mail delivery, postage prepaid, this 7th day of January, 2011.

  
Amy B. Spiller

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