

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review)
of Chapters 4901-1, Rules of Practice and)
Procedure; 4901-3, Commission Meetings;)
4901-9, Complaint Proceedings; and) Case No. 11-776-AU-ORD
4901:1-1, Utility Tariffs and Underground)
Protection, of the Ohio Administrative)
Code.)

COMMENTS OF DUKE ENERGY OHIO, INC.

Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) and respectfully submits its comments on proposed changes to administrative rules, as issued by the Public Utilities Commission of Ohio (Commission) on March 2, 2011. The Commission's entry issuing the proposed changes, allows for the filing of initial comments by no later than April 1, 2011.

Duke Energy Ohio comments herein on certain of the rules that would be modified by the proposal. For ease of reading, citations to rules will omit the agency number and the reference to the Ohio Administrative Code.

Rule 1-02(A)(6): Filing of Pleadings and Other Documents - Consolidation

Commission Staff proposes to add a provision, in Rule 1-02(A)(6), that would require a "party seeking to consolidate a new case with one or more previously filed cases, or with cases being concurrently filed," to file a motion asking the Commission to consolidate the cases. Duke Energy Ohio agrees with the proposed modification to the extent that the applicant wishes to consolidate a new case with an existing one. In addition, Duke Energy Ohio is not disputing the

wisdom of requiring such a motion where two seemingly unrelated cases are filed contemporaneously and the applicant wishes them to be considered together.

The proposed rule change is inadvisable, however, to the extent that it is intended to apply to single applications, the substance of which include multiple requests that would appropriately be styled under different case purpose codes. For example, many rate cases properly address matters that fall under several purpose codes and, therefore, include multiple case captions and dockets. It is a waste of resources to require such filings to include a motion and a memorandum in support of that motion, and to require the Commission to consider and rule on such a motion.

The rule change should be modified to exclude applications that are filed under multiple case captions and codes contemporaneously.

Rule 1-02(B)(2): Filing of Pleadings and Other Documents – Confidentiality

Commission Staff proposes a new subdivision to indicate that all documents will be publicly available unless a concurrent or prior request for a protective order is made under Rule 1-24. Duke Energy Ohio would respectfully suggest that certain specific situations also be addressed in this rule.

First, the rule should take into account the fact that some confidential filings are made at the specific direction of an attorney examiner. In cases where a transcript has been sealed due to confidential testimony, an attorney examiner may order various filings, whether briefs or otherwise, to be made following the hearing, which filings may include material that was ruled confidential during the course of the hearing. In addition, during the course of a proceeding, an attorney examiner or the Commission may have ruled in writing that certain material was to be treated as confidential and subsequent filings may rely on that ruling. The subsequent filings

may be made either by the party who sought the confidential treatment or by other parties in the proceeding.

When an attorney examiner or the Commission has ruled the material is to be treated as confidential and subsequent filings rely on that ruling, the filing party should, at most, be required only to submit a cover letter indicating that redactions and confidential versions are based on such prior rulings.

The proposed rule should also address situations in which the party who is filing a document is aware that certain included information is considered to be confidential by another person. In that case, the rules should allow the filing party to include a cover letter indicating that the document should be treated confidentially pending the filing of an appropriate motion by the person who wishes the information to be confidential.

Proposed Rule 1-02(B)(2) should be amended to provide for these additional circumstances, and should also refer more specifically to the applicable subdivision of Rule 1-24: Rule 4901-1-24(D).

Rule 1-02(C): Filing of Pleadings and Other Documents – Filing by Facsimile

Duke Energy Ohio appreciates the Commission's continued willingness to receive filings by a variety of methods, including facsimile transmissions. However, the various requirements imposed on facsimile filings are overly burdensome and unnecessary.

Facsimile filings are limited as to length. They must be filed earlier than documents filed by other means. They require a description of the document and prior notification to docketing staff. All of these requirements are unnecessary. Subdivision (C)(6) clearly states that the person making a fax filing bears all risk, including the risks of backups at the receiving facsimile machine, legibility, timing, and other failures. That provision further states that documents that are not actually received until after 5:30 p.m. are to be file-stamped the next day. Thus, there is

no need to add a variety of burdens to the filer; if the filing entity waits until 5:25 p.m. to send a document by facsimile transmission and the transmission is not complete until 5:32 p.m., the Commission will merely file-stamp the document the next day.

While the existing provision puts the risk of transmission failure on the filer, it does not include the requirement that late documents be file-stamped the following day. Duke contends that the pre-existing, burdensome requirements placed on facsimile filing should be deleted, in light of the new permission granted to docketing staff to mark documents as received the following day.

The proposed rule should be amended to delete “brief description of the document” in subdivision (C)(2), and all of subdivisions (C)(3) and (C)(5).

Rule 1-02(D): Filing of Pleadings and Other Documents – E-Filing

The rule being proposed by Commission Staff is, overall, commendable. In this electronic age, it is entirely appropriate that filings should be able to be made through electronic means. Duke Energy Ohio does, however, have a limited number of suggestions for the Commission’s consideration.

Proposed Rule 1-02(D)(6) would suggest that filers allow 1-1/2 hours for the review and acceptance of e-filed documents. It is unclear whether this is a requirement and, if not followed, what repercussion is to be expected. Duke Energy Ohio understands that docketing personnel must review and accept each electronic filing and that this process takes a period of time. In addition, the Company understands that many filers choose to file at the end of the day. Thus, the wise course of action would be, as the rule suggests, to file well before 5:30 p.m. However, this rule implies that failure to do so would be contrary to the Commission’s rules. This is contrary to subdivision (D)(4), which states that it is only documents filed after 5:30 p.m. that will be considered filed the next day.

Duke Energy Ohio would suggest deleting the recommendation language or, alternatively, clarifying that filers who wait until after 4:00 p.m. bear additional risk that the required review will not be completed prior to 5:30 p.m. and, thus, that they may therefore be unable to correct any filing errors that same day.

Rule 1-05(D)(4): Service of pleadings and other papers – Confirmations

Division (D)(4) of Rule 1-05 allows parties to serve pleadings by e-mail, where the party to be served has consented to e-mail service. The rule goes on to provide that service “is complete upon the sender receiving a confirmation generated by the sender’s computer that the e-mail has been sent.” The sender is then required to retain that confirmation as proof of service.

The language of this provision should be updated, as e-mail software does not generally produce a confirmation that e-mail has been sent. It is noteworthy that the Ohio Rules of Civil Procedure, in Rule 5, allows several methods of service and, like the Commission’s rules, requires the proof of service to indicate the manner in which service was completed. However, the civil rules do not dictate the method by which an attorney may prove that appropriate service was made. Rather, the attorney practicing in civil court has the burden, if called upon to do so, to prove that service was completed, on time, by an acceptable method.

Similarly, the Commission need not dictate the documents to be retained in order to prove, to the Commission’s satisfaction, that service was completed. With today’s software, computers do generally maintain files of “sent” messages. These files electronically register the time and date of sending. Each recipient of an emailed service copy will similarly have the cover letter from the sender. Multiple means of demonstrating electronic service exist and should be acceptable under the Commission’s rules.

It is also noteworthy that no tangible evidence of standard mailing ever can be produced. It is unreasonable for the Commission to demand more in the case of electronic service.

Therefore, division (D)(4) of Rule 1-05 should be amended to delete the requirement that an electronic confirmation of service be retained. Alternatively, Duke Energy Ohio suggests amending the language to retention of any adequate proof of transmission.

Rule 1-05(E): Service of pleadings and other papers – Definition of “Party”

Division (E) of Rule 1-05, which is carried over in substance from the existing rules, should be modified further. The division requires a filing party to serve entities that have pending motions to intervene. Duke Energy Ohio agrees with this requirement entirely. However, the division limits this requirement to situations in which the filing entity has been served with the motion to intervene. Division (D)(2) continues to allow service by mail, with service being “complete” upon placing the document in the mail. Thus, an intervenor could file its motion to intervene and serve other parties by mail, thereby causing subsequent filers to be required to serve the new intervenor immediately. Unfortunately, the other parties will not yet have received the service by mail and, thus, will not know of the intervention.

Division (E) should be modified either (1) to require service of a new intervenor providing that the person “has been served with and has received a copy of the motion to intervene” or (2) to require service of a new intervenor providing that the person “has been served with a copy of the motion to intervene and such motion appears on the DIS docket for that proceeding at the time when service is made.”

Rule 1-06: Amendments

Rule 1-06 is proposed to be carried over from existing rules without amendment. While Duke Energy Ohio has no complaint with the existing provision, it also should recognize actual practice.

In many circumstances, an applicant will obtain additional information or agree informally with Staff or parties to modify an application. In these situations, the applicant

simply files modifications its original application, often with a cover letter explaining the filing as necessary. Rule 1-06 should allow for such filings.

Duke Energy Ohio recommends that the rule be amended to provide that, where an applicant files an amendment or modifications to a prior filing without a motion asking for authorization, such amendment or modification shall be deemed accepted for filing unless the legal director, the deputy legal director, or an attorney examiner rules otherwise within three days after filing.

Rule 1-07: Computation of time – Three Days for Mail Service

Commission Staff proposes to delete the long-time rule, in Rule 1-07(B), that allows parties three additional days to act when they have been served by mail. Duke Energy Ohio opposes this change.

In many important cases, particularly where the Commission's time to act is limited, examiners appropriately shorten the response time in motion practice and discovery. When a party is required to act in a short time, mail service can delete a substantial portion of the allowed response time. While it is certainly true that, in most circumstances, the party who served by mail can also become aware of the filing through the DIS system, existing rules do not require parties to monitor their proceedings in that manner. If parties were expected to monitor DIS, service of filings would never be required. Service must be reliable.

It is entirely unreasonable to allow a filing party to choose to serve parties, or a party, by mail and thus to cause a dramatic effect on other parties' ability to respond. This is an important provision and should be maintained. Duke Energy Ohio would also suggest that service by mail be prohibited (unless a particular party has no ability to receive service otherwise) when an expedited schedule has been ordered.

Similarly, the deleted division (C) should be retained. This can sometimes be a serious problem in a proceeding with short response periods. Under the existing rule, a party cannot take advantage of others by serving them with pleadings after business hours.

Duke Energy Ohio does not believe that the proposed changes in division (A) are necessary. The change overcomplicates this provision without changing the result.

Divisions (B) and (C) of the existing rules should not be deleted.

Rule 1-08: Practice before the commission, representation of corporations, and designation of counsel of record

Duke Energy Ohio applauds the addition of standardized requirements, conforming to those of the Supreme Court of Ohio, for requesting permission to appear pro hac vice. The proposed rule requires that such motions include the information and documents required by the rules for the Government of the Bar of Ohio. However, the rule does not specify that such motions will be granted or denied on the same bases as the Ohio rules. It should be modified to so provide.

In addition, Commission Staff should amend division (E). The requirement that one attorney for each party be designated as counsel of record was a sensible one in the days when service of filings was made by mail. It avoided burdening the filing party with the need to make multiple copies for service. Today, where most service is accomplished electronically, this is unnecessary. While it is true that some attorneys may wish to designate a primary attorney such that communications related to the proceedings will always be made through that primary attorney, not all counsel may choose to operate in this fashion. Therefore, the rule should be discretionary. If counsel wish to designate a single person to be “counsel of record,” they may do so. But they should not be required to operate in this particular fashion.

Rule 1-11: Intervention

Division (D) of Rule 1-11, unchanged from existing rules, specifies that the Commission, the legal director, the deputy legal director, or an attorney examiner may grant limited intervention or require consolidation. It does not state that they may grant full intervention or deny intervention entirely. It should be modified.

Division (E) should be clarified to refer only to a “specific intervention deadline” rather than all deadlines.

Rule 1-12: Motions – Extensions of Time

The third sentence of division (C) in Rule 1-12 allows an attorney examiner to rule on a request for an extension of five days or less without waiting for memoranda contra. Duke Energy Ohio agrees with this provision. It would be helpful, however, if the rule provided guidance as to timing. Duke Energy Ohio proposes that the rule be modified to state that, if such a request is made and no ruling denying the request is issued within 48 hours of the filing of the request, it is deemed granted. This modification will provide parties assurance of their filing requirements and will guide them in the filing of any request for an extension.

Rule 1-12: Motions – Expedited Schedules

Many proceedings before the Commission require parties and the Commission to handle cases in an expedited manner. Abbreviated schedules may be the result of business issues or statutory requirements. Regardless of the cause, attorney examiners order parties to reduce the interval between the filing of motions and memoranda contra and replies, to reduce discovery response times, and to serve each other electronically. These order are entirely necessary and appropriate.

Unfortunately, the orders are often inconsistent from one to the next. A single practitioner may be required to obey different procedural requirements in every case. This causes preventable confusion and administrative complexities.

Duke Energy Ohio recommends that the Commission amend Rule 1-12 by adding a standardized set of requirements for expedited cases. Such requirements should address the issues normally covered by attorney examiners' procedural entries, including motion practice, discovery rules, and service rules.

Rule 1-15: Interlocutory appeals

New division (D) of Rule 1-15 would require a party who intends to file an interlocutory appeal on the day before the Commission's offices are closed to notify all other parties of that intent by 3:00 p.m. on the day of filing. Duke Energy Ohio understands the intent of this provision and agrees with its overall merit. It will greatly assist the other parties in a proceeding in a situation in which the response times are extremely short. Duke Energy Ohio suggests that provision be made for the situation in which a party is unavailable personally or by telephone and has provided no email address. It should be made clear in the rule that unavailability of a party does not impact the appealing party's right to file an interlocutory appeal.

Duke Energy Ohio also respectfully suggests that the Commission include a new provision in this rule, to require that interlocutory appeals be handled, within the legal department, only by the legal director or deputy legal director. The purpose of the appeal process is to allow the Commission to consider an issue that has been ruled upon by an attorney examiner. Pursuant to Commission practice and the authority provided under R.C. 4901.18, the attorney examiners make recommendations to the Commission as to proposed resolutions of legal issues, including interlocutory appeals. This is entirely proper and is certainly a wise and efficient use of state resources. However, in the case of an interlocutory appeal, this practice

also results in the primary review process likely being handled by the same attorney examiner whose ruling is at question. Thus, Duke Energy Ohio suggests that a process be established whereby the legal directory or deputy legal director be tasked with the review and processing of interlocutory appeals.

Rule 1-21: Depositions

Through a proposed modification of division (B) of Rule 1-21, Commission Staff would require that, “absent unusual circumstances,” deposition would occur prior to the hearing in a case. It is unclear, with this wording, what is being suggested. Can only the examiner determine that unusual circumstances exist? Can the parties agree to this among themselves? Is a motion required?

Duke Energy Ohio suggests that this new language be modified to provide that, unless the party requesting the deposition and the party from whom the deposition is requested agree otherwise, depositions are to be completed prior to the commencement of a hearing.

Rule 1-23: Motions to compel discovery

Division (E) of Rule 1-23 provides that, if an aggrieved party does not file an interlocutory appeal, an order to compel discovery “becomes the order of the commission.” This conflicts with the more appropriate provision of the interlocutory appeal rule that clearly states that a party may choose to brief an issue rather than file an interlocutory appeal. Rule 1-15(F) provides that a party who is adversely affected by a procedural ruling and elects not to appeal may still raise the issue on brief. There is no reason why a motion to compel should not be treated in the same manner. If the Commission were to agree that the motion to compel should not have been granted, it could simply refuse to consider the evidence that was improperly obtained.

Rule 1-24: Motions for protective orders

Commission Staff is proposing to add to division (F) of Rule 1-24 to provide that the Commission may, at any time, reexamine the need for continued confidentiality. Duke Energy Ohio strongly opposes this change.

The confidential treatment of sensitive business information is an important matter to companies that are regulated by the Commission. It is often critical that trade secret information be protected appropriately and that the subject utilities be able to rely on that treatment. It is entirely unreasonable to provide that, for apparently no reason and at apparently any time, the Commission may reconsider and terminate a protective order that is in place.

This new sentence must be deleted.

Rule 1-25: Subpoenas

In division (B) of Rule 1-25, Commission Staff proposes adding a limitation on the persons who may serve subpoenas. The added language provides that a person who is a party may not serve subpoenas. In order to avoid additional costs, this language should be clarified to allow counsel for parties to serve their own subpoenas.

Rule 1-30: Stipulations

Commission Staff proposes to add a division to Rule 1-30, requiring testimony in support of any stipulation. As drafted, the new language requires “parties who file” a stipulation to provide that supportive testimony. It is unclear whether this requirement only applies to the party who actually docket the stipulation (often, but not always, the applicant utility) or to all parties who have signed the stipulation.

The new division should be clarified only to require at least one party to the stipulation to provide supportive testimony.

CONCLUSION

For the reasons stated above, Duke Energy Ohio respectfully suggests that the Commission modify the proposed rules as described.

Respectfully submitted,

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Summary: Comments COMMENTS OF DUKE ENERGY OHIO, INC. electronically filed by
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