

In the Matter of the Review of The)
Alternative Energy Rider Contained in)
The Tariffs of Ohio Edison Company, The) Case No. 11-5201-EL-RDR
Cleveland Electric Illuminating Company)
and The Toledo Edison Company.)

September 16, 2013

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Alternative Energy Rider Contained in)
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disallowance of FirstEnergy's overcharges.² Rather, Direct Energy is moving, in part, for permission to file an Application for Rehearing (which it filed with its Motion) to propose how that disallowance should be credited back to customers.

The PUCO should deny Direct Energy's Motion for Leave to file an Application for Rehearing. R.C. 4903.10 bars the filing of an application for rehearing unless the party seeking leave can meet the two-prong test set forth in that statute. Direct Energy meets neither. If the PUCO grants Direct Energy leave to apply for rehearing, then the PUCO should deny Direct Energy's request for the PUCO to allocate the \$43.3 million disallowance amongst all FirstEnergy distribution customers. By no coincidence, one of Direct Energy's proposals would result in the marketers' customers (including Direct Energy's customers) receiving a share of the \$43 million credit.

II. THE COMMISSION SHOULD DENY DIRECT ENERGY'S MOTION FOR LEAVE TO FILE AN APPLICATION FOR REHEARING BECAUSE DIRECT ENERGY FAILED TO ESTABLISH THAT IT MEETS THE REQUIREMENTS OF R.C. 4903.10.

The statutory prerequisites for filing an application for rehearing have been summarized in PUCO decisions: "Section 4903.10, Revised Code, provides that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days after the entry of the order upon the journal of the Commission,"³ without filing a motion for leave. In other contested proceedings, "Section 4903.10, Revised Code, provides that

² Application for Rehearing and Memorandum in Support of Direct Energy Services, LLC and Direct Energy Business, LLC. ("Direct Energy Application for Rehearing") at 3 (Sept. 6, 2013).

³ *In the Matter of the Application of the City of Hamilton and American Municipal Power, Inc., for a Certificate of Environmental Compatibility and Public Need for the Construction of a Substation in Franklin and Washington Townships*, Case No. 10-2439-EL-BSB, 2012 Ohio PUC LEXIS 84, Entry on Rehearing at 2 (Jan. 23, 2012) (citing R.C. 4903.10).

leave to file an application for rehearing shall not be granted to any person who did not enter an appearance in the proceeding, unless the Commission finds that: (1) the applicant's failure to enter an appearance prior to the Commission's order complained of was due to just cause; and (2) the interests of the applicant were not adequately considered in the proceeding."⁴

The PUCO recently denied a motion for leave to file an application for rehearing where the parties "failed to demonstrate, in accordance with the first prong of the requirements set forth in Section 4903.10, Revised Code, that their failure to enter an appearance prior to the Order was due to just cause." In so holding, the PUCO specifically noted that the "movants were aware of the[] proceedings and had an opportunity to file timely motions to intervene," but failed to do so before the intervention deadline.⁵

Direct Energy cites to the Dominion Retail, Inc. ("Dominion") and WPS Energy Services ("WPS") Applications for Rehearing filed in Duke Energy Ohio's merger proceeding.⁶ In that case, the PUCO granted Dominion and WPS leave to file their applications for rehearing by finding that the issue of allocating a surcredit to nonshopping customers (as raised in the Dominion and WPS Applications for Rehearing) "was neither present in earlier filings in these proceedings nor obvious."⁷ Based upon

⁴ *Id.*

⁵ *In the Matter of the Application of the City of Hamilton and American Municipal Power, Inc., for a Certificate of Environmental Compatibility and Public Need for the Construction of a Substation in Franklin and Washington Townships*, Case No. 10-2439-EL-BSB, 2012 Ohio PUC LEXIS 84, Entry on Rehearing at 4 (Jan. 23, 2012).

⁶ Direct Energy Motion for Leave at 2-3.

⁷ *In the Matter of the Joint Application of Cinergy Corp., on Behalf of the Cincinnati Gas & electric Company, and Duke Energy Holding Corp. for Consent and Approval of a Change of Control of The Cincinnati Gas & Electric Company*, 05-732-EL-MER, 2006 Ohio PUC LEXIS 92, Entry on Rehearing at 2 (Feb. 6, 2006).

this precedent, Direct Energy argues that there is just cause for leave to file its Application for Rehearing because “[t]he need to participate in this proceeding was neither present nor obvious in early parts of the proceeding.”⁸ That is mistaken.

Direct Energy explains that “the issue of how to refund customers any potential disallowance was not raised until intervenor testimony was filed (January 31, 2013) which was over two (2) months after the intervention deadline.”⁹ While it is true that the Exeter Auditor did not make a specific recommendation regarding how to refund the disallowance,¹⁰ the Exeter Auditor did, in fact, recommend “that the Commission examine disallowance of excessive costs associated with purchasing RECs to meet the FirstEnergy Ohio utilities In-State All Renewables obligations.”¹¹

Moreover, it should be noted that, with OCC representing residential consumers in the case, Direct Energy could have anticipated that credits to customers would become an issue. Therefore, at least by the date (if not before) that the Auditor filed its Audit Report on August 15, 2012 (90 days before the intervention deadline), Direct Energy was on notice of a potential disallowance and that the mechanics of refunding that disallowance would likely become an issue at some point in the future of this proceeding.

Yet, despite the obvious implication of a potential disallowance (that would require allocation), like the parties in *American Municipal Power*, Direct Energy chose not to intervene in this case. This Commission should not allow Direct Energy to now avail itself of R.C. 4903.10 by arguing that it did not understand the magnitude of the

⁸ Motion and Memorandum in Support for Leave to File an Application for Rehearing of Direct Energy Services, LLC and Direct Energy Business, LLC (“Direct Energy Motion for Leave”) at 3-4 (Sept. 6, 2013).

⁹ Direct Energy Motion for Leave at 3-4.

¹⁰ Id. at 3.

¹¹ Exeter Audit Report at iv.

potential disallowance simply because pricing information was redacted from the Exeter Audit Report.¹² Like the other parties to the case, Direct Energy could have intervened and sought a protective order to acquire an unredacted copy of the Exeter Audit Report. And Direct Energy also could have projected, from OCC's intervention, that consumer advocacy would include proposing credits to customers.

Direct Energy also fails to meet the second prong in R.C. 4903.10 for leave to file an application for rehearing, where leave will be denied unless the interests of the movant for leave have not been adequately considered. As Direct Energy concedes, the interests of "all retail market participants" are affected by the Commission's decision.¹³ Therefore, because Interstate Gas Supply ("IGS"), a fellow retail marketer, was a party to this action since October 9, 2012, and has filed an application for rehearing of its own, Direct Energy's interests have been adequately considered.

III. THE PUCO SHOULD DENY DIRECT ENERGY'S RECOMMENDATIONS TO REFUND THE \$43.3 MILLION DISALLOWANCE AS A NON-BYPASSABLE CHARGE CREDITED TO ALL DISTRIBUTION CUSTOMERS, IRRESPECTIVE OF WHETHER THOSE CUSTOMERS PAID FOR RIDER AER.

To the extent the PUCO grants Direct Energy's Motion for Leave to File Application for Rehearing, it should reject Direct Energy's recommendation that the PUCO should distribute the disallowance amongst all of FirstEnergy's distribution customers regardless of whether they ever paid Rider AER.¹⁴ In disallowing the imprudent costs that FirstEnergy incurred in RFP3, the PUCO did not describe in detail how this disallowance would be returned to the customers other than directing that "the

¹² Direct Energy Motion for Leave at 4.

¹³ Id.

¹⁴ Direct Energy Application for Rehearing at 5.

Companies credit Rider AER in the amount of \$43,362,796.50, plus carrying costs.”¹⁵

Direct Energy’s concern is that crediting only those customers that currently pay Rider AER (through the SSO) will “disproportionately benefit a relatively small percentage of remaining SSO customers,”¹⁶ and “distorts the price to compare downward,” thereby “inhibit[ing] customer shopping.”¹⁷ However, Direct Energy’s suggestion of refunding Rider AER through a non-bypassable credit would inappropriately extend the refund to a large class of customers, most of whom paid none of the costs of the disallowed RECs.

According to the information upon which Direct Energy relies,¹⁸ as of December 31, 2010, 31.28% of Cleveland Electric’s customer load, 32.75% of Ohio Edison’s customer load, and 31.80% of Toledo Edison’s customer load were on the SSO and paying for Rider AER.¹⁹ Thus, Direct Energy’s proposal to credit the disallowance to all customers (shopping and non-shopping)²⁰ when over 68.72% of Cleveland Electric’s customer load, 67.25% of Ohio Edison’s customer load, and 68.2% of Toledo Electric’s customer load were not on the SSO and did not pay for Rider AER, is unreasonable for customers.

A non-bypassable credit to all distribution customers would inequitably dilute the refund to those customers who paid FirstEnergy’s exorbitant costs associated with Rider AER by allocating the refund of the disallowed RECs largely to those customers who did not pay for them. Direct Energy’s recommendation contradicts its objective of ensuring

¹⁵ Order at 28.

¹⁶ Direct Energy Application for Rehearing at 4.

¹⁷ Id. at 5.

¹⁸ Direct Energy was not a party to this case and no parties submitting any evidence to support these numbers either in hearing or in any of the Briefs or Memoranda that were filed with the PUCO in this case.

¹⁹ Direct Energy Application for Rehearing at 4.

²⁰ Id. at 5.

that certain customers are not disproportionately benefited by the refund. Therefore, the PUCO should reject Direct Energy's recommendation to refund the disallowance as a non-bypassable refund to all FirstEnergy distribution customers.

Direct Energy is concerned about the possibility of a refund to SSO customers affecting the price to compare.²¹ But the credit to customers can be structured in a manner that does not affect the price to compare or does not significantly affect it. And the disallowance should be credited back to customers by using the rider's current rate design — that is, loss-adjusted kWh charges by rate class to ensure that all refunds would be passed back to customers in the same manner in which the disallowed REC costs were originally recovered from customers. Furthermore, the PUCO should require a true-up adjustment to be performed at the end of the credit period to credit any remaining balance that has not been returned to customers at that time.

Finally, the PUCO should also ensure that parties to this proceeding are permitted the opportunity to file comments with respect to all proposed tariffs. Those comments would then be considered by the PUCO before any tariff (to provide FirstEnergy's customers with the credit to which they are entitled) is approved.

²¹ Id. at 4-5.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Memorandum Contra* was served on the persons listed below via electronic mail this 16th day of September 2013.

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