

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc., for the Establishment of a)
Charge Pursuant to Revised Code Section) Case No. 12-2400-EL-UNC
4909.18.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Approval to Change) Case No. 12-2401-EL-AAM
Accounting Methods.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for the Approval of a) Case No. 12-2402-EL-ATA
Tariff for a New Service.)

**MOTION OF DUKE ENERGY OHIO, INC., TO VACATE
THE OCTOBER 3, 2012, ENTRY AND FOR THE ISSUANCE OF A
PROCEDURAL SCHEDULE CONSISTENT WITH R.C. 4909.18**

Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) and hereby moves the Public Utilities Commission of Ohio (Commission) for an order vacating the attorney examiner's entry of October 3, 2012, and establishing a procedural schedule consistent with the provisions of R.C. 4909.18. More specifically, Duke Energy Ohio respectfully requests a procedural schedule that will enable an opinion and order on its Application to be issued within six months of the commencement of these proceedings, as contemplated by the law. Duke Energy Ohio further seeks an expedited ruling on its motion pursuant to O.A.C. 4901-1-12(C).

Duke Energy Ohio submits the following memorandum in support of its motion.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. Introduction

Duke Energy Ohio instituted these proceedings on August 29, 2012, by filing an Application for Establishment of a Charge Pursuant to Section 4909.18, Revised Code, Approval to Change Accounting Methods, and Approval of a Tariff for a New Service (Application). The Application was filed, consistent with Ohio's new state compensation mechanism adopted by the Commission on July 2, 2012, and Duke Energy Ohio thus submits that said application is just and reasonable. Furthermore, through the Application, Duke Energy Ohio expressly seeks no increase in rates.¹ Consequently, the Application can, pursuant to R.C. 4909.18, be approved without a hearing. Consistent with the Application and intending to remedy the negative returns on equity that the Company is currently projected to earn over the next several years,² Duke Energy Ohio further proposed with the Application to initiate a subsequent, separate proceeding by March 1, 2013, for purposes of adjusting the rider pursuant to which it would recover just and reasonable compensation for its undisputed obligations as a fixed resource requirement (FRR) entity in PJM Interconnection LLC.

On October 3, 2012, the attorney examiner issued an entry setting forth a procedural schedule that includes deadlines for the submission of comments and testimony, as well as a hearing date (Entry). In the Entry, the attorney examiner scheduled the hearing to commence on April 2, 2013. As will be discussed herein, the attorney examiner was without authority to set the Application for hearing. Consequently, Duke Energy Ohio requests an order vacating the Entry. Furthermore, should the Commission determine that the Application may be unjust and unreasonable, Duke Energy Ohio requests a procedural schedule that will enable the

¹ In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code, et al., Case No. 12-2400-EL-UNC, Application at ¶ 11 (Aug. 29, 2012).

² *Id.*, at ¶ 15.

Commission to issue an opinion and order on the Application within six months of its filing, or February 26, 2013,³ consistent with the provisions of R.C. 4909.18.

II. Discussion

R.C. 4909.18 sets forth the requirements applicable to, among other matters, a utility's request to establish a charge and for a new service. If the filing is not for an increase in rates, the Commission is statutorily permitted to authorize the proposal set forth in the application, including its effective date. Significantly, an application that is not for an increase in rates does not require a hearing, as the Commission has historically acknowledged.⁴ R.C. 4909.18 does permit the Commission to set a hearing in respect of an application that is not for an increase in rates, but only where the Commission first determines that the application may be unjust or unreasonable. R.C. 4909.18 further provides that, where a hearing does occur, the Commission is to issue an order, where practicable, within six months of the date on which the application was filed.

Here, the Commission has made no determination that Duke Energy Ohio's Application may be unjust or unreasonable. As that determination is a substantive one and is a prerequisite to a hearing, Duke Energy Ohio submits that the attorney examiner incorrectly issued the October 3, 2012, Entry. The Company has filed, contemporaneous herewith, an interlocutory appeal challenging the issuance of the Entry.

³ Assuming a month to equate to 30 days, R.C. 4909.18 contemplates an order on an application within 180 days of its filing.

⁴ See, e.g., In the Matter of the Application of Cincinnati Bell Telephone Company for Authority to Revise Its General Exchange Tariff PUCO No. 8, to Establish Regulations, Rates, and Charges for Custom Calling Plus Services, Case No. 91-1648-TP-ATA, Entry on Rehearing at 11-12 (October 6, 1992); In the Matter of the Application of the Ohio Edison Company for Approval of Experimental Real Time Pricing, Case No. 96-436-EL-ATA, Finding and Order at 7 (August 1, 1996); In the Matter of the Application of Arcadia Telephone Company to Discontinue the Offering of Four- and Five-Party Service Except to Existing Customers, Case No. 85-1812-TP-ATA, Entry at 3 (February 19, 1996); In the Matter of the Application of The Ohio Bell Telephone Company to Revise its Wide Area Telecommunications Service Tariff, PUCO No. 1, Case No 91-1211-TP-ATA, Finding and Order 7-8 (August 29, 1991); and In the Matter of the Application of DE-Ohio for Approval of its RS3P Residential Three-Phase Tariff, Case No. 07-625-EL-ATA, et al., Finding and Order (July 25, 2007).

The Entry is further flawed in that the schedule that it purports to establish does not enable the Commission to even attempt to satisfy the legislature's expectation that an application not for an increase in rates be adjudicated promptly, consistent with R.C.4909.18. Indeed, a hearing date of April 2, 2013, makes no attempt to comply with the General Assembly's intent in establishing a prompt disposition of proceedings under the timeline set forth in R.C. 4909.18, and renders it impossible for the Commission to attempt to comply with the law and issue an order on the Company's Application by February 26, 2013.⁵

Duke Energy Ohio acknowledges the inclusion of the phrase, "where practicable," in R.C. 4909.18. However, this phrase must be read in the context in which it is relevant: only after a hearing has concluded. That is, only after the completion of the hearing is the Commission able to determine whether it is practicable to consider the complete evidentiary record, ascertain the complexity – or lack thereof – of the disputed legal and factual issues, and render an opinion and order on the application within six months of an application's filing. Therefore, until such time as the Commission has the benefit of the complete record in these proceedings, it cannot properly ascertain its ability to satisfy the provisions of R.C. 4909.18. It would be speculative, and thus contrary to said provisions, to conclude now that the Commission will not be able to do so.

Furthermore, a protracted procedural schedule, such as that reflected in the Entry, unduly prejudices Duke Energy Ohio by unreasonably delaying resolution of the issues in these proceedings. Indeed, as the Commission has declared, a cost-based compensation mechanism for FRR entities is both necessary and appropriate.⁶ And in adopting a new state compensation

⁵ 180 days from the Company's Application filed August 29, 2012.

⁶ In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company, Case No. 10-2929-EL-UNC, Concurring Opinion of Commissioner Roberto (July 2, 2012). See also, State of Ohio, ex rel. Industrial Energy Users-Ohio v. Pub. Util. Comm. Of Ohio, Case No. 12-1494, Motion to Dismiss Submitted on behalf of Respondents, the Public Utilities Commission of Ohio, et al. (September 25, 2012).

mechanism for FRR entities in Ohio, the Commission has determined that such entities should not be insufficiently compensated or exposed to an unusually low return on equity as a result of said obligations.⁷ Consistent with the Commission's findings and acknowledging the undeniable conclusion that market-based capacity pricing cannot yield reasonable compensation for a utility with an FRR obligation, Duke Energy Ohio has proposed in these proceedings the establishment of a charge that will result in sufficient compensation and avoid the otherwise inevitable result of negative returns on equity over the next several years. Recognizing the statutory provisions of R.C. 4909.18 and anticipating a timely order consistent therewith, Duke Energy Ohio further proposed, in these proceedings, an appropriate process for establishing and adjusting the rate pursuant to which it would recover fair compensation for its FRR obligations.⁸ But on April 2, 2013, hearing date patently delays resolution of the Company's Application, thereby prolonging the business uncertainty experienced by Duke Energy Ohio and its resultant negative impact.

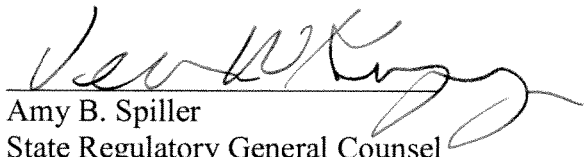
III. Conclusion

For the reasons stated herein, Duke Energy Ohio respectfully requests that the Commission issue an order vacating the October 3, 2012, Entry and consider the Company's assertion that no hearing is required. If the Commission determines, contrary to the merits of the Application, that the Application might be unjust or unreasonable, then Duke Energy Ohio also requests the establishment of a new procedural schedule that will enable the issuance of an order on the Company's Application by February 26, 2013.

⁷ *Id.*, Opinion and Order at pg. 23 (July 2, 2012).

⁸ In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code, et al., Case No. 12-2400-EL-UNC, Application at ¶ 17 (Aug. 29, 2012).

Respectfully submitted,



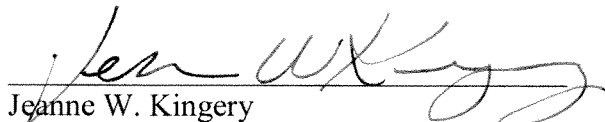
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 9th day of October 2012, to the following parties.


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