

**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.)

**APPLICATION FOR REVIEW
AND
INTERLOCUTORY APPEAL
FILED BY
DUKE ENERGY OHIO, INC.**

Pursuant to Rule 4901-1-15, Ohio Administrative Code (O.A.C.), Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby files an Application for Review and Interlocutory Appeal of the October 3, 2012, attorney examiner entry that established a procedural schedule, including a hearing date, in these proceedings. The entry was premature and in violation of R.C. 4909.18, in that the Public Utilities Commission of Ohio (Commission) has not determined that Duke Energy Ohio's application in these proceedings may be unjust or unreasonable. In addition, the schedule established by the entry does not comply with the timing set forth in R.C. 4909.18.

For the reasons explained in the memorandum in support attached hereto, Duke Energy Ohio respectfully requests that the attorney examiner certify this appeal and that the

Commission act on this Application for Review and Interlocutory Appeal and, in so doing, vacate the attorney examiner's entry and issue a new procedural schedule, including a hearing date if deemed necessary, that enables a decision on the Company's application consistent with Ohio law.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

Introduction and Facts

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) submitted an Application to the Public Utilities Commission of Ohio (Commission) on August 29, 2012, to establish a charge pursuant to R.C. 4909.18, for approval to change accounting methods, and approval of a tariff for new service (Application). The Application was filed consistent with Ohio's new state compensation mechanism as authorized by the Commission on July 2, 2012, and is not one for an increase in rates. The Application was further filed pursuant to R.C. 4909.18, which sets forth the criteria applicable to a filing that is not for an increase in rates.

As the Application adopted the formulaic methodology employed by the Commission to arrive at the just and reasonable compensation to which a utility is entitled for fulfilling its obligations as a fixed resource requirement (FRR) entity in PJM Interconnection, LLC, Duke Energy Ohio submits that its Application is just and reasonable and can be approved without a hearing. However, the Commission may set the matter for hearing, pursuant to R.C. 4909.18, only if it first determines that the Company's Application may be unjust or unreasonable. Here, no such determination has been made.

Moreover, the attorney examiner's October 3, 2012, entry fails to enable the Commission to issue an order on the Application consistent with the statutory deadlines contemplated by R.C. 4909.18. Specifically, the law provides that such an order shall, where practicable, be issued within six months of the filing of an application. But a hearing date that is more than seven months after these proceedings were initiated renders it impossible for the Commission to meet the statutory provisions.

Legal Requirements for the Filing of an Interlocutory Appeal

Rule 4901-1-15, O.A.C. addresses the right of parties to Commission proceedings to appeal rulings issued in writing or orally by attorney examiners. Specifically, the rule provides that a party may take an interlocutory appeal to the Commission if a procedural ruling is certified to the Commission. Certification is determined through a finding that “the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.”¹

The governing rule goes on to require that interlocutory appeals must begin with an application for review that is filed with the Commission within five days after the ruling is issued. The application must set forth the basis of the appeal and citations of authorities relied upon. A copy of the ruling, or the portion of the record that contains the ruling, must be attached to the application; however, if the record is unavailable, the application may “set forth the date the ruling was issued and must describe the ruling with reasonable particularity.” Rule 4901-1-15(C), O.A.C.

The Ruling

On October 3, 2012,² 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

¹ Rule 4901-1-15(B), O.A.C.

² As the five-day deadline for filing this appeal fell on a state holiday, the appeal is being filed on the next day on which the Commission’s offices are open. O.A.C. 4901-1-07(A).

Application for hearing. Further, the schedule entirely prevents compliance with the timing parameter set forth in Ohio law.

In compliance with O.A.C. 4901-1-15(C), a copy of the Entry is attached hereto.

Basis for Certification

As noted above, an interlocutory appeal may be certified to the Commission on either of two bases: that the ruling from which the appeal is taken represents a new or novel question of interpretation, law, or policy; or that it represents a departure from precedent, where a party may suffer undue prejudice or expense if the Commission does not act immediately. Certification here is justified under both tests.

First, although the six-month goal for issuing an order with regard to applications such as the one under consideration here is not new, the Company has been unable to locate any prior Commission interpretations of the provision. While it may be that the Commission has previously endeavored to meet the deadline, it does not appear to have been addressed directly. Thus, certification of the appeal is appropriate as a new or novel interpretation of law.

Certification is also correct because the determination by the attorney examiner that an application that is not for an increase should be set for hearing is indisputably a departure from precedent. When an application is filed under R.C. 4909.18 and such application is not one for a rate increase, it is the Commission that makes the determination as to whether it may be unjust or unreasonable, or should be set for hearing. The statutory language is clear: “If it appears to the commission that the proposals in the application may be unjust or unreasonable, the **commission** shall set the matter for hearing”³ Numerous examples of Commission precedent exist, both

³ R.C. 4909.18 (emphasis added).

where no hearing was found to be necessary and where a hearing was ultimately held.⁴ If a hearing is held on the basis of the examiner's determination, Duke Energy Ohio is subjected to the expense and delay that result. Such an outcome is unjust, and can only be avoided by obtaining a Commission determination on the question, prior to the occurrence of the delay and the holding of the hearing. Thus, certification is appropriate here, as the examiner's determination was a departure from precedent and the Company will, without certification, be subjected to undue prejudice and expense.

Discussion of the Merits

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.⁵ 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

⁴ See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Amendment of Original Sheet 75, Miscellaneous Charges*, Case No. 12-1312-EL-ATA, Finding and Order (July 2, 2012); *In the Matter of the Application Not for an Increase in Rates of The Dayton Power and Light Company for Approval to Modify its Existing Alternate Generation Supplier (AGS) Tariff Sheet No. G8*, Case No. 03-2341-EL-ATA, Entry (February 26, 2004).

⁵ 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).

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 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, 2013.⁶

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.

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

Furthermore, a protracted procedural schedule, such as that reflected in the Entry, unduly prejudices Duke Energy Ohio by unreasonably delaying the 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.⁷ And in adopting a new state compensation 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.⁸ 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.⁹ But an 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.

Conclusion

Duke Energy Ohio respectfully requests that, upon review, the Commission vacate the Entry and consider whether a hearing is required in these proceedings. In addition, if a hearing is

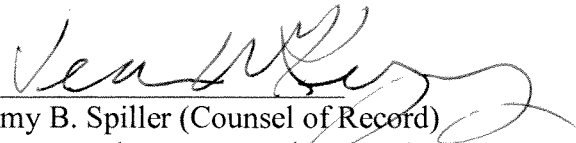
⁷ *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Concurring Opinion of Commissioner Roberto (July 2, 2012). *See also*, *State of Ohio, ex rel. Industrial Energy Users-Ohio v. Pub. Util. Comm. Of Ohio*, Case No. 12-1494, Motion to Dismiss Submitted on behalf of Respondents, the Public Utilities Commission of Ohio, et al. (September 25, 2012).

⁸ *Id.*, Opinion and Order at pg. 23 (July 2, 2012).

⁹ *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case No. 12-2400-EL-UNC, et al., Application at ¶ 17 (Aug. 29, 2012).

determined to be necessary, Duke Energy Ohio respectfully requests a schedule that will allow the Commission to issue its final order within six months of the date the Application was filed.

Respectfully submitted,



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a Charge Pursuant to Section 4909.18,)
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ENTRY

The attorney examiner finds:

- (1) On August 29, 2012, Duke Energy Ohio, Inc., (Duke) filed an application seeking to establish the amount of a cost-based charge, pursuant to a state compensation mechanism, for the provision of capacity services by Duke throughout its service territory. Duke also seeks authority to modify its accounting practices to establish a deferral to account for the difference between the amounts being recovered by Duke for the provision of capacity and Duke's cost of providing capacity as such cost is established and an order approving a new tariff for future recovery of those deferred amounts.
- (2) By entry issued on September 13, 2012, the attorney examiner established October 15, 2012, as the deadline for the filing of motions to intervene in these matters. At this time, the attorney examiner finds that an additional procedural schedule should be established as follows:
 - (a) January 2, 2013 - Deadline for the filing of comments on the application by Staff and intervenors.
 - (b) February 1, 2013 - Deadline for all parties to file reply comments.
 - (c) March 1, 2013 - Deadline for the filing of testimony by Duke.

- (d) March 19, 2013 - Deadline for the filing of testimony by Staff and intervenors.
- (e) April 2, 2013 - A hearing shall commence at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th Floor, Hearing Room 11-A, Columbus, Ohio.

It is, therefore,

ORDERED, That the parties adhere to the procedural schedule set forth in finding (2). It is, further,

ORDERED, That a copy of this entry be served upon all interested parties of record in this case.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Christine M. T. Pirik

By: Christine M.T. Pirik
Attorney Examiner

jjj/dah

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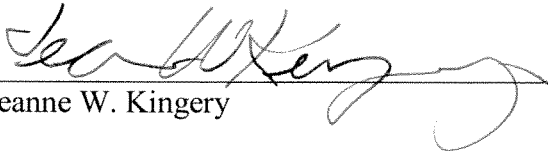
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Case No(s). 12-2400-EL-UNC, 12-2401-EL-AAM, 12-2402-EL-ATA

Summary: Attorney Examiner Entry establishes additional procedural schedule. electronically filed by Mrs. Debra Hight on behalf of Public Utilities Commission of Ohio

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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