FIL

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs.	))))	Case No. 09-712-GA-AAM

DUKE ENERGY OHIO, INC.

MEMORANDUM CONTRA
APPLICATIONS FOR REHEARING

BY

OHIO CONSUMERS' COUNSEL
AND
OHIO PARTNERS FOR AFFORDABLE ENERGY

I. Introduction

On November 12, 2009, the Public Utilities Commission of Ohio (Commission) issued a Finding and Order approving an application filed by Duke Energy Ohio, Inc. (Duke Energy Ohio). That application requested approval for Duke Energy Ohio to make accounting modifications to defer certain environmental investigation and remediation costs resulting from properties on which manufactured gas plants had been located. On December 9, 2009, Ohio Partners for Affordable Energy (OPAE) filed an application for rehearing of that Commission order. On December 11, 2009, the Ohio Consumers' Counsel (OCC) also filed an application for rehearing. For the reasons explained below, Duke Energy Ohio submits that the Commission should deny the applications for rehearing filed by OPAE and OCC.

II. Argument

A. OPAE's Application for Rehearing

1. Used and Useful

In OPAE's first ground for rehearing, it asserts that the Commission erred in denying OPAE's motion to dismiss and in authorizing Duke Energy Ohio to defer environmental investigation and remediation costs associated with properties that have not been proved to be used and useful in the provision of Duke Energy Ohio's natural gas utility distribution service. OPAE argues that there is no basis for the Commission to allow the deferral of costs associated with the properties when the properties are not included in the natural gas distribution rate base and they are not currently used and useful, even though Duke Energy Ohio states that the costs are prudent business costs.

Although the Commission stated, as is typical in such situations, that it was merely granting deferral authority and that no determination was being made as to the appropriateness of recovery, OPAE, nevertheless, asserts that deferral should not be allowed when ultimate recovery had not been proved to be legitimate. It argues that "[c]osts should not be deferred when there is no likelihood of recovery."

It is not true that there is "no likelihood of recovery." It is apparent that even OPAE does not believe that there is no likelihood of recovery. OPAE does not even attempt to say that evidence or facts of any nature prove that the properties in question are not, and will not be, used and useful. Rather, OPAE states that Duke Energy Ohio "has not shown" them to be used and useful. Of course, there was no requirement that Duke Energy Ohio prove the properties' used and useful nature or that it demonstrate that the properties are currently included in its rate base in this proceeding. This is not an application for recovery of these costs. This is merely a

request for authority to defer the amounts so that their recovery can be assessed at a later point in time.

In addition, it is clear that the Commission does not require applicants to prove that costs will ultimately be recoverable, prior to granting requests for deferral authority. Numerous examples of this practice can be found. For example, in a recent application by Dayton Power & Light for authority to defer expenses associated with the wind storm on September 14, 2008, the Commission specifically stated that "[t]he determination of the reasonableness of the deferred amounts and the recovery thereof, if any, will be examined and addressed in a future proceeding before the Commission. As the Supreme Court has previously held, deferrals do not constitute ratemaking. *See Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305." *In the Matter of the Application of The Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Certain Storm-Related Services Restorations Costs*, Case No. 08-1332-EL-AAM (Finding and Order, January 14, 2009) at finding 6. *Accord In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs* (Entry, September 24, 2008) at finding 10.

Rehearing should clearly be denied on this ground.

2. Staff Findings

OPAE argues, for its second ground for rehearing, that the results of the inquiry into this application by Commission Staff (Staff) was required to be made a part of the public record. OPAE claims that the Supreme Court of Ohio has required Staff recommendations to be docketed. OPAE states that "the Court held that the Commission failed to meet the requirements of R.C. §4903.09 by not providing an adequate record. Where the Commission fails to meet the requirements of R.C. §4903.09 by not disclosing the sources of its information in a contested

proceeding to those who most require it, thereby preventing the complaining party from demonstrating prejudice, the matter must be remanded for development of an appropriate record . . . . " (OPAE Application for Rehearing at 7-8.)

An examination of the opinion of the Supreme Court of Ohio in *Tongren v. Pub. Util. Comm.* (1999) 85 Ohio St.3d 87 shows OPAE's conclusion to be fallacious. As OPAE correctly notes, the facts in *Tongren* demonstrated that the Commission had, in its order, specifically referred to findings of Staff. However, the findings of Staff were not in the record.

Unfortunately, OPAE does not address the differences between the facts in the *Tongren* situation and the facts here. It is critical to note that the Commission in that case specifically relied on Staff's findings, even though those findings were not publicly docketed. In the order in that case, after repeatedly referring to Staff's review and recommendations, the Commission stated that "the proposed merger should be approved subject to the Staff's recommendations set forth above." *In the Matter of the Application of The East Ohio Gas Company and West Ohio Gas Company for Authority to Merge*, Case No. 96-991-GA-UNC (December 19, 1996) at finding 19. The Court, in remanding this case back to the Commission, explained that there was nothing in the record "to evince the bases for the commission's acceptance of [Staff's] recommendations and adoption of such findings." *Tongren* at 90.

The situation in the present case is dramatically different from the one discussed in *Tongren*. Here, although there is a reference in correspondence from Duke Energy Ohio's counsel to a review of the case by Staff, there is no evidence whatsoever to suggest that the Commission relied on, or even considered, that review or any opinion that Staff may have formed. Rather, the Commission clearly stated that it was *not* considering the issue of future recoverability at all. Thus, it would not have relied on any findings of Staff on this topic. The

Commission properly set forth the grounds for its determination to approve the application. It was not required to obtain any recommendation from Staff or to rely on any information that Staff may have obtained. Therefore, it was also not required to mandate the filing of a report by Staff.

Rehearing on this ground should be denied.

B. OCC's Grounds for Rehearing

1. Responsibility for Costs; Recovery Vehicle

The OCC raises five grounds for rehearing. In its first ground, the OCC argues that the Commission's order is unlawful, unreasonable, and not in the public interest. It appears that the OCC bases this ground on two issues. First, it suggests that Duke Energy Ohio may not actually have any liability or responsibility for the environmental investigation and remediation costs that are to be deferred pursuant to the Commission's action in this proceeding. The OCC goes on to argue that the sites are not used and useful in the provision of natural gas distribution service. The OCC then questions whether it would be appropriate for the Commission to allow recovery of production costs through distribution rates.

Neither of these issues is relevant to the authority granted by the Commission in this proceeding. If, as the OCC is apparently suggesting, Duke Energy Ohio actually has no responsibility for environmental remediation on the sites in question and yet expends monies on this effort, the Commission would not allow recovery from ratepayers, when and if Duke Energy Ohio requests such authorization. However, that is not an issue at the present time. Similarly, the questions of how, when, and from whom any costs deferred under this authority would be recovered is not an issue in this proceeding.

The Commission's discussion of this issue in past cases is instructive. For example, in *In the Matter of the Application of the Dayton Power and Light Company for Authority to Modify its Accounting Procedure for Storm-Related Services Restoration Costs*, Case No. 08-1332-EL-AAM (Entry on Rehearing, March 4, 2009), the Commission was faced, as today, with an argument by the OCC as to the type of proceeding that would provide the appropriate procedural setting for an examination of recovery of deferrals, in the proceeding under which the Commission was considering authorizing the deferrals. The Commission disagreed with the OCC's approach in that case, stating that its concerns were "premature." It explained that it "shares OCC's concerns regarding verification and review of authorized deferred expenses prior to approval of recovery, but we do not find it necessary to mandate the forum for such recovery at this time. If the OCC has specific objections to the recovery of authorized deferrals or the forum under which such recovery is sought, it may raise its objections at the time DP&L seeks to recover these costs from ratepayers." The same applies here. The OCC should not be raising issues regarding recovery in the proceeding to allow deferral. It is premature to do so.

The OCC also attempts to argue that the Supreme Court of Ohio has concluded that authorizing deferrals is actually ratemaking and that, therefore, the Commission may not delay a decision on recovery until a subsequent time. In making this argument, the OCC relies upon the very same case that the Commission has cited to support its distinguishing between deferral authority and recovery. Given the OCC's distorted interpretation, some investigation of this case is important. In *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St.3d 305, the Court considered multiple claims and issue. In one of those issues, the Court, considering certain distribution cost deferrals, concluded that the Commission has broad discretion to authorize accounting practices. It specifically stated that the Commission's authority in this regard is

"distinct from the ratemaking statutes . . . . We have upheld the commission's accounting orders when the accounting procedure did not affect current rates and the ratemaking effect of the accounting order would be reviewed in a later rate proceeding." *Elyria Foundry* at para. 19. Because the customers' rates were not being affected by the authorization of deferrals and because the recoverability of the deferred amounts would be scrutinized by the Commission before they impacted rates, the Court concluded that the order under review should be upheld. This is the aspect of the case that is correctly cited by the Commission and that the OCC conveniently ignored in seeking rehearing.

Later in the opinion, the Court was considering certain fuel cost deferrals that were also authorized by the Commission. With regard to this issue, the Court looked into the substance of the Commission's authorization and concluded that the Commission's order was "not merely an accounting order." Rather, in that specific regard, the Commission made conclusive decisions with regard to the fuel cost deferrals that had impacts on rates. It was, as quoted by the OCC, "conclusive for ratemaking purposes . . . ." *Elyria Foundry* at para. 57. What the OCC ignores is that the deferral authority was not conclusive for ratemaking purposes simply because it was deferral authority. Rather, it was conclusive because the Commission, at the same time, was making a decision as to recoverability of those costs. That is why it was "not merely an accounting order." What is important here is not the specific language, quoted by the OCC, that the Court used to discuss the accounting order that was not merely an accounting order. What is important here is the Court's distinguishing the true accounting order, where no decision was made concerning ultimate recovery, from the so-called accounting order that actually made the decision as to collection. In the present situation, the Commission specifically stated that it was

making no decision as to recovery. It is not, under the Court's instruction, conclusive for ratemaking purposes.

Rehearing on this ground should be denied.

2. Recovery Proceeding

The OCC next argues that the Commission erred by ordering that potential recovery be determined in Duke Energy Ohio's next distribution rate case. The OCC asserts that the costs being deferred under the authority granted in this case will be costs of the production of the gas commodity, rather than distribution costs.

As discussed with regard to the OCC's first ground for rehearing, this is not the time for these arguments. Discussion of recovery is premature. In addition, it should be noted that the Commission's reference to distribution rates was only a statement that it was not making a determination concerning recovery in distribution rates. The Commission did not address the manner in which recovery should be had, if at all. Whether or not the deferred costs are appropriate for recovery through any vehicle or from any particular customers was not determined by the Commission.

Rehearing on this ground should be denied.

3. Staff Findings

Like OPAE, the OCC's third ground for rehearing asserts that the Commission erred by relying on Staff's inquiry. In contrast to the situation in *Tongren*, the Commission did not state that it was relying on Staff's informal inquiry. Therefore, for the same reasons that were discussed above, rehearing on this ground should be denied.

4. Supplemental Information

The OCC argues, in its fourth ground for rehearing, that a letter from Duke Energy Ohio's counsel, docketed in this case, should not have been treated as a supplement to the application. It goes on to assert that the Commission "accepted" the correspondence, and did so for the purpose of "establishing that the properties in question were used and useful for utility purposes . . . ."

The OCC, in this regard, exaggerates and misconstrues the words used by the Commission in its Finding and Order. First, the Commission most certainly did not say that it was transforming correspondence from Duke Energy Ohio's counsel into a "Supplement to the Application . . . ." Rather, it only reviewed the procedural history of the case and, in doing so, noted that Duke Energy Ohio "supplemented" the application, through the offering of additional information. Although this is minor linguistic difference, perhaps, the Commission clearly did not take the affirmative step of "transforming" the correspondence, as suggested by OCC.

Further, although the OCC reads the Commission's Finding and Order to "[establish] that the properties in question were used and useful," this is certainly not the case. The paragraph describing the application and the information in the correspondence is merely a recitation of the statements by Duke Energy Ohio. It is not a listing of factual conclusions drawn by the Commission. The Commission stated that it was not determining what costs might be recoverable. There is no reason to believe that the Commission was underhandedly determining the used and useful nature of the properties, in direct opposition to the words in the order.

The OCC also complains that the letter did not include any documentation to confirm that the properties were used and useful or in Duke Energy Ohio's rate base and that the Commission accepted the claims of Duke Energy Ohio's counsel over those of OPAE's counsel. Of course,

as discussed above, such proof is not required at this juncture. This proceeding merely allows deferral, not recovery. The OCC, in claiming that the Commission erred – "[contradicting] years of PUCO and Ohio Supreme Court ratemaking precedent" – by "[a]ccepting an unsupported claim by counsel as being sufficient to establish that property was used and useful," is obviously in error. The Commission did not "accept" anything in the correspondence. The Commission did not consider whether the property was used and useful. The Commission did not find that the information in the letter established any facts at all.

Rehearing on this ground should be denied.

5. Contrast with Unrelated Case

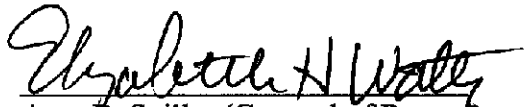
Finally, for its fifth ground for rehearing, the OCC discusses the contrast between the Commission's decision in this case and its decision in an unrelated case involving Columbia Gas of Ohio. *In the Matter of the Application of Columbia Gas of Ohio, Inc. for Authority to Defer Environmental Investigation and Remediation Costs,* Case No. 08-606-GA-AAM. In the Columbia case, the Commission imposed various requirements on Columbia's deferral and potential recovery of certain expenses. The OCC complains that the Commission did not impose all of those same requirements on Duke Energy Ohio. But, in advancing this argument as justification for rehearing, the OCC fails to establish that the Commission's decision in this regard was unreasonable and unlawful. Indeed, the OCC ignores any discussion as to whether the two situations are precisely the same. It also offers no rationale for why the Commission would have to impose the same requirements on two different entities. Instead, the OCC criticizes the Commission for not explaining why the requirements it imposed upon Duke Energy Ohio here were not identical to those it previously imposed upon another entity. In so doing, the OCC fails to explain why the Commission is obligated to provide an explanation for the

difference. This unsubstantiated criticism falls short of properly supporting the OCC's pending application. Rehearing on this ground should be denied.

III. Conclusion

In summary, neither OPAE nor OCC has raised any argument that would require the Commission to arrive at a different conclusion than that set forth in the Finding and Order. For the reasons discussed herein, the Commission's Finding and Order is reasonable and lawful. Therefore, the applications for rehearing filed by OPAE and by OCC should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via ordinary mail, postage prepaid, on the all parties of record this 18th day of December, 2009.

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