

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke
Energy Ohio, Inc. to Establish and Adjust
the Initial Level of its Distribution
Reliability Rider.

)
) Case No. 09-1946-EL-RDR
)

ENTRY

The attorney examiner finds:

- (1) By opinion and order issued July 8, 2009, in *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Rates*, Case No. 08-709-EL-AIR (08-709), et al., the Commission approved a stipulation submitted by Duke Energy Ohio, Inc. (Duke) and other parties in that case. The stipulation, as approved, set the Distribution Reliability Rider (Rider DR) as a mechanism to recover reasonable and prudently incurred storm restoration costs associated with the September 2008 wind storm related to Hurricane Ike. The stipulation further provided that Rider DR was to be set at zero, but authorized Duke to file a separate application to establish the initial level of Rider DR. A process for the review of Duke's application to adjust Rider DR was also established in the stipulation.
- (2) On December 11, 2009, Duke filed an application to adjust Rider DR to allow recovery of the company's storm restoration costs associated with Hurricane Ike, along with testimony supporting the application.
- (3) On February 9, 2010, the attorney examiner issued an entry which, *inter alia*, granted the motion to intervene filed by the Office of the Ohio Consumers' Counsel (OCC) and set a procedural schedule in this case. Specifically, the entry set forth February 23, 2010, as the deadline for the filing of comments and motions to intervene. Additionally, March 25, 2010, was set as the deadline for Duke to notify the Commission if all of the issues raised in the comments had been resolved.
- (4) Since the issuance of the February 9, 2010, entry, several motions to intervene have been filed in this case. Rule 4901-1-11(A)(1) and (2), Ohio Administrative Code (O.A.C.), provide that, upon the filing of a timely motion, a person shall be permitted to intervene in a

proceeding upon a showing that either: (a) a statute confers a right to intervene; or (b) the person has a real and substantial interest in the proceeding and the person is so situated that the disposition of the proceeding may impair or impede the person's ability to protect that interest, unless the person's interest is adequately represented by existing parties.

- (5) In deciding whether to permit intervention under Rule 4901-1-11(A)(2), O.A.C., paragraph (B) of that same rule states that the Commission shall consider all of the following:
 - (a) The nature and extent of the movant's interest.
 - (b) The legal position advanced by the movant and its probable relation to the merits of the case.
 - (c) Whether the granting intervention will unduly prolong or delay the proceedings.
 - (d) Whether the movant will significantly contribute to full development and equitable resolution of the factual issues.
 - (e) The extent to which the person's interest is represented by existing parties.
- (6) On February 17, 2010, The Kroger Company (Kroger) timely filed a motion to intervene in this case. In its motion to intervene, Kroger asserts that it is a consumer of significant amounts of electric service provided by Duke; therefore, Kroger submits that it stands to be significantly affected by any change in Duke's rates. Moreover, Kroger maintains that no other party can protect its interests in this proceeding and that its participation in this proceeding will not unduly delay the proceeding or prejudice the interests of any party to the proceeding. No memorandum contra Kroger's motion to intervene was filed. Upon consideration of Kroger's motion to intervene, the attorney examiner finds that Kroger has set forth sufficient justification to grant intervention to Kroger, in accordance with the criteria for intervention set forth in Rule 4901-1-11, O.A.C. Therefore, the attorney examiner finds that Kroger's motion to intervene is reasonable and should be granted.
- (7) On March 1, 2010, Albert Lane filed a request "to reactivate and merge all of PUCO docket # 08-709-EL-AIR with PUCO docket # 09-1946-EL-ATA/RDR. . . objection, comments and ask to be

reinstated as an intervenor." In addition, on March 2, 2010, Mr. Lane requested that his March 1, 2010, filing be accepted as timely filed, stating that, while he recognizes that the attorney examiner set February 23, 2010, as the deadline for filing, he did not receive notice that the instant case had been opened. Mr. Lane explains that he was an intervenor in 08-709 and, while he knew that Duke's retrieval of the storm costs had been deferred in that docket, he had no idea that deferred meant that a new docket would be created. Mr. Lane further states that, on February 25, 2010, when he read in a newspaper article that a new docket had been initiated, he sent his comments to the Commission.

On March 8, 2010, Duke filed a memorandum in opposition to Mr. Lane's March 1, 2010, filing and request to intervene. In support of its position, Duke points out that Mr. Lane's filing was untimely and, pursuant to Rule 4901-1-11(F), O.A.C., untimely motions to intervene "will be granted only under extraordinary circumstances."

Upon consideration of Mr. Lane's March 2, 2010, request that his March 1, 2010, filing be deemed timely submitted, the attorney examiner construes the request as a motion for leave to file out of time. Upon consideration of the request, the attorney examiner finds that the request is reasonable and should be granted; therefore, the attorney examiner will consider the substance of Mr. Lane's request.

- (8) Turning now to the essence of Mr. Lane's March 1, 2010, filing, in support of his request for consolidation of the instant docket with 08-709 and intervention, Mr. Lane states that he was opposed to the merger that was approved by the Commission in *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*, Case No. 05-732-EL-MER, et al. (05-732). Mr. Lane also states that he was granted intervention in 08-709 and opposed the recovery of the costs of the storm related to Hurricane Ike in that proceeding. In addition, Mr. Lane asserts that he is opposed to Duke seeking to set an initial level of Rider DR, despite the fact that the stipulation in 08-709 set such a procedure. Mr. Lane explains that, although he was invited to the meeting where the stipulation in 08-709 was discussed and signed, he chose not to attend. Therefore, Mr. Lane maintains that he was disenfranchised by the

docketing of this matter in a new case and should be reinstated as an intervenor.

- (9) In its March 8, 2010, memorandum in opposition to Mr. Lane's March 1, 2010, filing and motion to intervene, Duke argues that Mr. Lane does not demonstrate how he satisfies any of the five factors to be considered for granting intervention as articulated in Rule 4901-1-11(B), O.A.C. With regard to the nature and extent of Mr. Lane's interest in this proceeding and whether his interest is represented by existing parties, Duke acknowledges that Mr. Lane, as a residential customer of Duke, has a slight financial interest; however, Duke notes that OCC has already been granted intervention in this case and OCC competently represents Mr. Lane's interests. Duke asserts that there was no legal position advanced by Mr. Lane that relates to the merits of this case, which relate to determining whether Duke calculated Rider DR correctly; rather, Mr. Lane is continuing his argument in opposition to the creation of Rider DR, which the Commission already approved in 08-709. Furthermore, Duke believes that granting Mr. Lane intervention will unduly prolong or delay the proceedings because Mr. Lane appears to be interested in litigating cases already decided by the Commission. Duke also states that Mr. Lane will not significantly contribute to full development and equitable resolution of the factual issues in this case, pointing out that the issue in this case is the calculation of the deferred storm expense and Mr. Lane has not demonstrated any special expertise in such matters. Finally, Duke opposes Mr. Lane's request that 08-709 be reactivated pointing out that the Commission has already issued its final decision in that docket and Mr. Lane did not appeal the Commission's decision in 08-709.
- (10) Upon consideration of Mr. Lane's request to merge the present case with 08-709, the attorney examiner notes that 08-709 has already been fully litigated and the Commission has already issued its final appealable order in that case approving a stipulation that set Rider DR at zero and authorizing Duke to file a separate application to establish the initial level of the rider. While Mr. Lane states that he was opposed to the merger that was approved in 05-732 and he requests that the current case be consolidated with 08-709 so that he and other intervenors do not have to refile any comments that were originally filed in 08-709, the attorney examiner does not find this to be sufficient justification to reopen 08-709. Accordingly, the attorney examiner finds that Mr. Lane's motion to consolidate the

present case with 08-709 is unwarranted and inappropriate, and should be denied.

- (11) Upon consideration of the substance of Mr. Lane's request for intervention, the attorney examiner notes that, although Mr. Lane was granted intervention in 08-709, he does not specify in his March 1, 2010, filing why his request for intervention in the instant case should be granted. The attorney examiner finds that Mr. Lane does not have a statutory right to intervene in this case in accordance with Rule 4901-1-11(A)(1), O.A.C. In addition, upon review of the five considerations for intervention contained in Rule 4901-1-11(B), O.A.C., Mr. Lane does not satisfy the criteria necessary to intervene under Rule 4901-1-11(A)(2), O.A.C. Of particular concern to the attorney examiner is that Mr. Lane does not indicate how his interest is not adequately represented by other parties to this case. Therefore, the attorney examiner finds that Mr. Lane's motion to intervene is substantively deficient and should be denied.
- (12) On March 3, 2010, Shirley Hayes also filed an untimely motion to intervene and requested that the date for motions to intervene be extended to March 3, 2010. Ms. Hayes also requests that the instant case be consolidated with 08-709 stating that she filed petitions in 08-709, which opposed Duke's recovery of the storm costs.

On March 8, 2010, Duke filed a memorandum in opposition to Ms. Hayes' motion intervene. In support of its position, Duke points out that Ms. Hayes' motion was untimely, and pursuant to Rule 4901-1-11(F), O.A.C., untimely motions to intervene "will be granted only under extraordinary circumstances." Duke asserts that Ms. Hayes does not demonstrate any extraordinary circumstances. Moreover, according to Duke, Ms. Hayes does not demonstrate how she meets any of the five factors to be considered for granting intervention articulated in Rule 4901-1-11(B), O.A.C.

The attorney examiner notes that, in her filing, Ms. Hayes does not explain why her motion was filed out of time, she does not request leave to file the motion, and she does not address the factors to be considered when granting intervention contained in Rule 4901-1-11(B), O.A.C., or why her interests are not already adequately represented by other parties to this case. Therefore, the attorney examiner finds that Ms. Hayes' motion for intervention is both procedurally and substantively deficient and should be denied. As for Ms. Hayes' request that this docket be consolidated with 08-709,

the attorney examiner has already determined previously in this entry that such a request is inappropriate and, therefore, her request should be denied.

- (13) On March 25, 2010, Duke filed correspondence informing the Commission that all of the issues raised in comments have not been resolved. Therefore, Duke requested that this matter be set for a hearing as soon as practicable, as carrying charges are accruing on the amount Duke seeks to recover through Rider DR, in the amount of approximately \$160,000 per month.
- (14) On March 26, 2010, OCC filed correspondence responding to Duke's notification filed on March 25, 2010. In its correspondence, OCC requested additional time to conduct discovery and requested that any hearing in this case be set after a two-month period for discovery. OCC also requested that a seven-day timeframe for discovery responses be set.
- (15) The attorney examiner agrees that additional time is warranted. However, given the accrual of carrying costs on the amount Duke seeks to recover as part of Rider DR, the attorney examiner believes that an additional two-month time period for discovery may not be in the best interest of ratepayers. Therefore, OCC's request for an additional two months to conduct discovery is denied.
- (16) However, the attorney examiner finds that, to help ensure that all parties are properly prepared for the hearing, responses to discovery requests shall be due in seven calendar days. Parties are encouraged to serve discovery requests and responses electronically.
- (17) Furthermore, in the event that any motion is made in this proceeding, any memoranda contra shall be filed within three business days after the service of such motion, and a reply memorandum to any memorandum contra will not be accepted. Parties shall provide service of pleadings on the parties and the attorney examiners via hand delivery, facsimile, or e-mail.
- (18) Accordingly, the attorney examiner finds that the following procedural schedule should be established in this matter:
 - (a) Duke shall file its testimony by May 11, 2010.
 - (b) Staff and intervenors shall file testimony by May 18, 2010.

- (c) The evidentiary hearing shall commence on May 25, 2010, at 10:00 a.m., at the offices of the Commission, 180 East Broad Street, 11th Floor, Hearing Room 11-C, Columbus, Ohio 43215-3793.

It is, therefore,

ORDERED, That the motion to intervene filed by Kroger be granted. It is, further,

ORDERED, That the requests by Mr. Lane that this docket be consolidated with 08-709 and that he be granted intervention be denied. It is, further,

ORDERED, That the requests by Ms. Hayes that the date for motions to intervene be extended to March 3, 2010, that the instant case be consolidated with 08-709, and that she be granted intervention be denied. It is, further,

ORDERED, That OCC's request to extend the procedural schedule to conduct an additional two months of discovery be denied. It is, further,

ORDERED, That the parties comply with the discovery and motion deadlines set forth in findings (16) and (17). It is, further,

ORDERED, That the procedural schedule set forth in finding (18) be observed. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record and all other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Katie L. Stenman
By: Katie L. Stenman
Attorney Examiner

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Entered in the Journal

APR 14 2010

Renee J. Jenkins

Renee J. Jenkins
Secretary