

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service. |) | |
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| |) | |
| |) | Case No. 11-3549-EL-SSO |
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| In the Matter of the Application of Duke Energy Ohio for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20. |) | |
| |) | Case No. 11-3550-EL-ATA |
| |) | |
| In the Matter of the Application of Duke Energy Ohio for Authority to Amend its Corporate Separation Plan. |) | |
| |) | Case No. 11-3551-EL-UNC |
| |) | |

DUKE ENERGY OHIO, INC.'S
REPLY TO JOINT MOTION TO EXTEND

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Comes now Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company), by and through counsel, and for its memorandum in opposition to the Joint Motion for Extension of Time, hereby states as follows.

I. Introduction

On June 20, 2011, Duke Energy Ohio filed an Application for Approval of an Electric Security Plan Pursuant to R.C. 4928.143 (Application). The following day, the Attorney Examiner issued an Entry establishing the procedural schedule pursuant to which the matter would progress. As instructed, intervenors are to submit testimony by September 7, 2011, and, with the exception of depositions, the parties are to complete discovery by September 9, 2011. Consistent therewith, a hearing is scheduled to commence on September 20, 2011. These dates would allow the Public Utilities Commission of Ohio (Commission) to render a decision on the Application in 2011, such that Duke Energy Ohio can implement its new electric security plan (ESP), effective January 1, 2012, and upon the scheduled termination of its existing ESP. Now, nearly two months after the Attorney Examiner's instruction, a limited number of the thirty-four intervenors in this proceeding seek to extend the procedural schedule, including the date by which all intervenors are to submit testimony. Specifically, the Joint Movants include Constellation New Energy, Inc. and Constellation Energy Commodities Group, Inc. (collectively Constellation), Exelon Generation Company LLC (Exelon), the COMPETE Coalition; the Retail Energy Suppliers Association (RESA), PJM Power Providers Group, the Ohio Manufacturers' Association (OMA), City of Cincinnati, the Ohio Energy Group (OEG), the Kroger Company (Kroger), the Office of the Ohio Consumers' Counsel (OCC), and the Industrial Energy Users-Ohio (IEU). For the reasons that follow, the Joint Movants' request should be denied.

II. Discussion

A. R.C. 4928.143 does not mandate a 275-day period for the review and decision on an application for approval of an electric security plan.

The Joint Movants suggest that Ohio law imposes a firm, 275-day review period on applications filed pursuant to R.C. 4928.143¹ and, as such, the procedural schedule here must be enlarged. But the Joint Movants are incorrect. The statute clearly and unambiguously provides that the Commission shall render an order *not later than* 275 days after the application is filed. Furthermore, as the Ohio Supreme Court has concluded, this time parameter is directory and not compulsory.² Consequently, the Commission is not precluded from issuing an order on the Company's Application prior to March 21, 2012 (the 275th day following the June 20, 2011, filing date), or from establishing a procedural schedule that includes a hearing three months after the Application's filing.

B. The Joint Movants have failed to justify a two-month extension in the procedural schedule.

The Joint Movants contend that the Company's Application "raises a *host* of novel issues" that cannot be reviewed in a thoughtful manner by this Commission should a hearing proceed on September 20, 2011.³ But the Joint Applicants are admittedly well versed in the issues raised in Duke Energy Ohio's Application. Indeed, these intervenors (or their counsel) have conducted discovery, filed testimony, and submitted briefs on the competitive bidding process proposed herein, as well as the structure of proposed Riders AER-R, RECON, and UE-GEN. Similarly, the conversion of wholesale rates derived from auction results into retail rates is

¹ See Joint Motion for Extension of Time, page 2 ("Section 4928.143(a) (*sic*), Revised Code, provides a 275 day timeframe").

² See, *In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011 Ohio 1788, ¶ 37-39.

³ See, Joint Motion for Extension of Time, page 2 (August 17, 2011)(Emphasis added).

not a new issue.⁴ Thus, these elements of the Application cannot be characterized either as novel or the justification for altering the existing procedural schedule.

Similarly irrelevant to the Joint Movants' request are the proposed Rider DR and economic development fund, as Joint Movants failed to discuss them in their motion.

Moreover, Duke Energy Ohio's proposal to share in the net profits of the energy and ancillary services sales is not novel to the Joint Movants. Indeed, witnesses on their behalf have recently offered testimony, in the context of an ESP application, on the issue of crediting customers with off-system sales.⁵ Thus, a proposal that expressly includes the sharing of net profits between the Company and its customers cannot be seen as so unique an approach that protracted discovery is needed prior to a hearing and a Commission decision.

At best, the *only* issue that potentially could be perceived as novel is the Company's proposed Rider RC. But even this is a strained conclusion as a cost-based rider mechanism, in and of itself, is not foreign to the Commission or the Joint Movants. Indeed, Joint Movants OEG, OCC, OMA, IEU, Kroger, and the City of Cincinnati have been involved in numerous regulatory proceedings before this Commission that concern cost-of-service ratemaking. Further, the Joint

⁴ See, *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service*, Case No. 10-2586-EL-SSO, Direct Testimony of Teresa Ringenbach on behalf of RESA, Direct Testimony of David Fein on behalf of Constellation, Direct Testimony of Kevin Higgins on behalf of Kroger, and Direct Testimony of Stephen Baron on behalf of OEG, all filed on December 21, 2010. See also post-hearing briefs of OCC, RESA, Constellation, OMA, OEG, IEU, and Kroger, all filed on January 27, 2011, and reply briefs of OCC, RESA, Constellation, OMA, OEG, IEU, and Kroger, all filed on February 3, 2011, and reply briefs of RESA, IEU, Kroger, OEG, OMA, and OCC, and letter from the City of Cincinnati adopting Staff's post-hearing brief, all filed on February 3, 2011.

⁵ See, e.g., *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer*, Case No. 11-346-EL-SSO, *et al.*, Direct Testimony of Joseph Dominguez, filed on behalf of Exelon (July 25, 2011), Direct Testimony of Roy Shanker, filed on behalf of FirstEnergy Solutions Corp. (July 25, 2011), as adopted by Constellation via the Direct Testimony of David Fein and Exelon via the Direct Testimony of Mr. Dominguez.

Movants have already examined the appropriateness of Duke Energy Ohio's proposed Rider RC to a level of detail that has enabled the submission of testimony on same.⁶

C. Any extension in the procedural schedule must be limited to the hearing date.

As discussed above, Duke Energy Ohio submits that Joint Movants have not demonstrated a need for extending the existing procedural schedule. Assuming, *arguendo*, consideration should be given to doing so, Duke Energy Ohio opposes any extension of the existing deadlines for the submission of testimony and the completion of discovery. As noted above, the elements of the proposed ESP are not, as a whole, so unique and foreign to the Joint Movants that more time is needed to prepare testimony or review the filing. Importantly, the purported need to extend the procedural schedule because of the "amount of money involved" is not sufficient to delay the implementation of a new plan that perpetuates a long-term competitive process in Ohio for the procurement of all of the energy supply needed for Duke Energy Ohio's standard service offer or an economic development fund intended to result in sustainable investment in southwest Ohio.

The proposals contained in Duke Energy Ohio's Application do not warrant a sixty-day extension, particularly as Joint Movants have had ample opportunity to conduct discovery. Indeed many of the intervening parties have already taken advantage of such an opportunity. The fact that several of the Joint Movants have thus far failed to avail or fully avail themselves of such an opportunity is not justification of any delay in the procedural schedule. The procedural schedule was established more than two months ago, and the Attorney Examiners have required expedited treatment in the provision of responses. Duke Energy Ohio has made diligent efforts to abide by these parameters in both providing responses and issuing its own discovery. In fact,

⁶ *Id.* See Direct Testimony of Stephen Baron, filed on behalf of Ohio Energy Group (July 25, 2011), Direct Testimony of David Fein on behalf of Constellation (July 25, 2011).

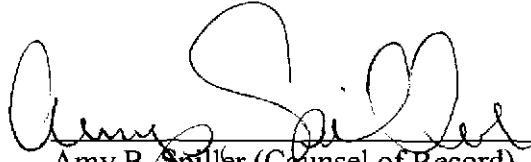
the only party that is prejudiced by the current expedited schedule is Duke Energy Ohio, which was given a brief window of opportunity to conduct discovery on intervenors prior to the September 20 hearing but following the filing of intervenor testimony on September 7. Duke Energy Ohio however, has not requested any extension. Any extension in the procedural schedule must be limited to the hearing date.

Retaining the existing deadlines for the submission of testimony and the completion of discovery has the added advantage of enabling timely and meaningful settlement discussions. Absent the submission of testimony by the intervenors and Commission Staff, the parties cannot engage in productive dialogue regarding settlement as there would be the tendency for intervenors or Staff to withhold their litigation positions. But settlement discussions warrant a full and rigorous debate and Duke Energy Ohio thus submits that neither the filing of testimony nor the completion of discovery should be delayed.

Finally, this is not the first time that parties have participated in more than one complex case on behalf of their respective clients. Many of the parties in Duke Energy Ohio's case participated in multiple cases in 1999 during the time the Commission first determined how to implement the General Assembly's directive to deregulate. And these same parties participated in multiple standard service offer (SSO) cases after Amended Substitute Senate Bill 221 was passed. Although Duke Energy Ohio is sympathetic to the challenges presented by multiple cases and complex issues, those challenges do not warrant delaying the needed certainty with regard to the SSO structure that will replace the Company's existing – and soon to expire – ESP. As such, any delay in the hearing date must be modest (*e.g.*, not more than fourteen days) such that the Company may implement a new plan effective January 1, 2012.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

A handwritten signature in black ink, appearing to read "Amy Spiller", written over a horizontal line.

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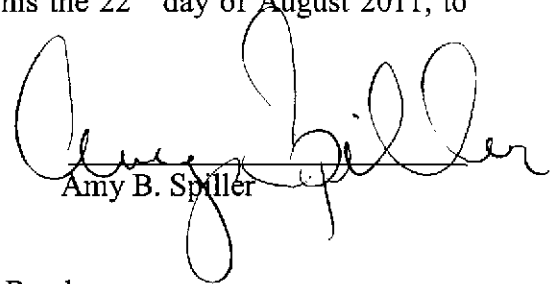
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered via U.S. mail (postage prepaid), personal, or electronic mail delivery on this the 22nd day of August 2011, to the following:



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