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 4909.18.	))))	Case No. 12-2400-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 12-2401-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for the Approval of a Tariff for a New Service.	)))	Case No. 12-2402-EL-ATA

JOINT MEMORANDUM CONTRA DUKE ENERGY OHIO INC.'S APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL
BY
SIGNATORY PARTIES

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JOINT MEMORANDUM CONTRA DUKE ENERGY OHIO INC.'S APPLICATION FOR REVIEW AND INTERLOCUTORY APPEAL BY SIGNATORY PARTIES

I. INTRODUCTON

On October 3, 2012, the Attorney Examiner issued an Entry establishing a procedural schedule to address Duke Energy Ohio, Inc.'s ("Duke" or "Company") Application to impose a $776 million rate increase on the Company's 686,000 customers. In that Entry the Attorney Examiner set up a comment period, testimony deadline, and an evidentiary hearing date.

On October 9, 2012, Duke filed two pleadings: A Motion to Vacate the October 3, 2012 Entry and an Application for Review and Interlocutory Appeal. The undersigned parties[1] ("Signatory Parties"), including consumer advocates representing the

[1] The Office of the Ohio Consumers' Counsel, the Ohio Energy Group, the Ohio Partners for Affordable Energy, The Kroger Company, the City of Cincinnati, Greater Cincinnati Health Council, Ohio Manufacturers' Association, Wal-Mart Stores East LP and Sam's East, Inc., Cincinnati Bell, Inc. and the Industrial Energy Users-Ohio.

approximately 611,000 residential utility consumers of Duke, file this pleading to address Duke's Application for Review and Interlocutory Appeal. [2]

At the outset, it should be noted that Signatory Parties stand by the Joint Motion to Dismiss filed on October 4, 2012. There the Signatory Parties argued that the PUCO does not have jurisdiction to hear Duke's application, and that, on numerous other bases, the Application should and must be dismissed.[3] If the PUCO grants the Joint Motion, as it should, Duke's pleading becomes moot.

Notwithstanding, Signatory Parties contend that Duke's pleading here should be denied because it does not meet the requirements for an interlocutory appeal under Ohio Adm. Code 4901-1-15. Moreover, assuming that the application is not dismissed as being legally prohibited, establishing a reasonable procedural schedule is necessary to provide interested parties the opportunity to investigate and challenge the Company's request to impose a $776 million rate increase on the Company's 686,000 customers.

II. ARGUMENT

Ohio Admin. Code 4901-1-15 governs interlocutory appeals taken from a ruling issued by an Attorney Examiner. A party may take an interlocutory appeal to the PUCO,

[2] Industrial Energy Users-Ohio support the views expressed in this pleading as to the nature and effect of Duke's Application, but believe that vacating or staying the procedural schedule is appropriate until the Commission addresses the Joint Motion to Dismiss, filed October 4, 2012.

[3] Additionally, a number of Signatory Parties to this pleading continue to contest the PUCO's authority to: (1) allow an EDU an opportunity to collect "transition revenue" beyond the term provided by law and contrary to prior settlements resolving any transition revenue claim and (2) invent and apply a cost-based ratemaking methodology for purposes of substantially increasing an EDU's compensation for generation capacity. See *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, Applications for Rehearing filed by IEU-Ohio, OCC, OEG (Aug. 1, 2012). See also *In the Matter of the Application of Columbus Southern Power company and Ohio Power company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan*, Case No. 11-346-EL-SSO, et al., Applications for Rehearing filed by IEU-Ohio, OCC, OEG (Sept.7, 2012). These issues remain pending on rehearing.

but under certain limited conditions. Under Ohio Admin. Code 4901-1-15(A), an immediate interlocutory appeal, without certification, may be taken where one of four conditions are met. All other interlocutory appeals can only be made if the appeal is certified to the PUCO.[4] Since none of the conditions listed in Ohio Admin. Code 4901-1-15 (A) (1)-(4), apply,[5] Duke's appeal can proceed only if it is certified to the Commission under Ohio Adm. Code 4901-1-15(B).

Under that division, an appeal shall not be certified unless a party demonstrates that the ruling sought to be reviewed 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 is 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." (Emphasis added). Duke, however, fails to demonstrate that both of these necessary conditions are met. Its request for certification should be denied. Moreover, even if certification is granted, the Commission should nonetheless affirm the Attorney Examiner's ruling, provided it does not dismiss the application altogether, as requested by the Signatory Parties.

A. Duke Has Neither Demonstrated That The Procedural Entry Issued By The Attorney Examiner Presents A New Or Novel Question Of Interpretation, Law, Or Policy Nor That The Attorney Examiner's Ruling Represents A Departure From Past Precedent.

Scheduling evidentiary hearings on applications is not a new or novel practice for the Commission. Establishing a procedural schedule in a Commission proceeding is a

[4] Ohio Admin. Code 4901-1-15(B).

[5] Neither does Duke argue that these conditions apply.

routine matter with which the Commission and its examiners have had long experience.[6] It presents no question of interpretation, law, or policy.

Nor is the Attorney Examiners' Entry a departure from past precedent. Duke itself declares that it "has been unable to locate any prior Commission interpretations of the provision."[7] The reason Duke cannot find any precedent as to the interpretation of the provision it relies upon is because the six-month provision is completely discretionary; merely a goal for the Commission. Duke explained it perfectly: "the six-month **goal** for issuing an order with regard to applications such as the one under consideration here is not new."[8]

Additionally, the two citations[9] Duke does provide for alleged authority have little if anything in common with the case it has filed. The precedent Duke cites pertains to applications by utilities to amend existing tariff sheets. Here, if one is to accept Duke's claims that its application is for a new service,[10] there is no commonality in the cases cited by Duke. Moreover, in the Dayton Power and Light Case cited [11] by Duke, the Commission scheduled a hearing to provide affected parties an opportunity to express

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[6] See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Recover Costs Associated with the Construction and Ultimate Operations of an Integrated Gasification Combined Cycle Electric Generating Facility*, Case No. 05-376-EL-UNC, Entry at ¶7 (May 10, 2005) (denying request to certify an interlocutory appeal of an Entry establishing a procedural entry).

[7] Duke Application for Review at 5.

[8] Id. (Emphasis added).

[9] *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 Suppliers (AGS) Tariff Sheet No. G.8*, Case No. 03-2341-EL-ATA, Entry (Feb. 26, 2004).

[10] See Duke Application at ¶11 (Aug. 29, 2012). Duke's application is for a rate increase or at the very least should be considered as an application to modify existing rates. Both of these scenarios mandate a hearing.

[11] *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 Suppliers (AGS) Tariff Sheet No. G.8*, Case No. 03-2341-EL-ATA, Entry (Feb. 26, 2004).

their views on the application.[12] That precedent is consistent, not inconsistent, with the approach the Attorney Examiner took in the October 3, 2012 Entry.

B. Duke Has Failed To Demonstrate That An Immediate Determination By The Commission Is Necessary To Prevent Undue Prejudice Or Expense.

Duke claims that if a hearing is held, consistent with the Attorney Examiner's proposed procedural schedule, it will be "subjected to the expense and delay that result."[13] This outcome, according to Duke, would be "unjust" and can only be avoided by obtaining a PUCO Order on the question prior to the delay and the holding of a hearing.[14]

Although Duke bears the burden of proof on this issue, it has only broadly alleged that the procedural schedule creates expense and delay. It has not demonstrated how the procedural schedule results in "undue" prejudice or expense. Unsubstantiated allegations that expense and delay will result under the procedural schedule imposed is not sufficient. Duke's claims must fail.

C. There Is No Merit To Duke's Interlocutory Appeal.

Even if the October 3, 2012 Entry were certified to the Commission on appeal, Duke fails to present a legal or factual basis to warrant the Commission reversing or modifying the Attorney Examiner's ruling. Instead, if the Commission considers the merits of the Interlocutory Appeal, it should affirm the Attorney Examiner's ruling, if it has not already determined to dismiss the application altogether.

[12] Id. at ¶10.

[13] Duke Application for Review at 6.

[14] Id.

The Attorney Examiner's ruling was authorized under R.C. 4909.18. And the ruling is authorized per R.C. 4901.13 (giving the PUCO authority to govern its proceedings) and Ohio Admin. Code 4901-1-14 (authorizing Examiners to make procedural rulings in PUCO proceedings). The Examiner exercised the authority of law and rule to set forth a procedural schedule which should afford parties the opportunity to investigate and challenge the $776 million rate increase proposed. In absence of a ruling to dismiss Duke's application, there is nothing unjust and unreasonable about the Attorney Examiner's ruling.[15]

1. The Company's application seeks a rate increase or seeks to modify an existing rate, requiring an evidentiary hearing under R.C. 4909.18, without a finding that the application may be unjust and unreasonable.

The fatal flaw to the Company's argument is that it is premised upon a faulty assumption. Duke assumes that its application is "not for a rate increase" under R.C. 4909.18. And, where the application "is not for a rate increase" the statute makes it clear that an evidentiary hearing is not necessitated, but can be held.

But, where the application seeks to increase rates or seeks to modify an existing rate, an evidentiary hearing is required under R.C. 4909.18, provided the application is accepted and not dismissed by the PUCO. There is no need to find that the application "may be unjust and unreasonable."

Here what Duke seeks is either to increase or modify existing rates. Under either scenario, R.C. 4909.18 requires an evidentiary hearing, provided the application is

[15] Notwithstanding the arguments contained here, Signatory Parties stand by the primary arguments made in the Joint Motion to Dismiss, filed on October 4, 2012. There Signatory Parties argued that the PUCO has no authority to entertain the application and on numerous bases, the PUCO should summarily dismiss the Application.

accepted and not dismissed by the PUCO. Thus, the Attorney Examiner in establishing a procedural schedule, which includes evidentiary hearing, was following the law. The Commission should affirm the Attorney Examiner's ruling, and go forward with the procedural schedule, if it does not grant the Joint Motion to Dismiss.

Duke's application seeks the PUCO approval to establish deferrals to account for the difference between the amount currently being collected by it for capacity service and Duke's cost of providing capacity service.[16] Duke also asks the PUCO to determine that the rate for capacity services associated with its fixed resource requirement ("FRR") obligations is $224.15/Mw-Day, calculated consistent with the formula used in the AEP capacity case.[17] Duke requests that the PUCO allow it to defer the difference in revenues and collect carrying charges on those revenues, with Duke filing to collect those deferred amounts through an application filed no later than March 2013.[18] Duke seeks to collect $776 million in increased rates through a rider designated as Rider Deferred Recovery –Capacity Obligation ("Rider DRCO"). In this application, Duke seeks PUCO approval of the rider, albeit at a zero initial level.

Thus, it is clear that Duke wants the Commission to approve its application so that it can recognize for financial accounting purposes revenues that are not yet but will likely be collected from customers in the future. Under accounting standards, Duke can only report these revenues to the public if it has regulatory assurance that the amounts will be

[16] Duke Application at ¶9 (Aug. 29, 2012).

[17] Id. at ¶14; *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, Opinion and Order (July 2, 2012).

[18] Duke Application at ¶17.

collected from customers.[19] Regulatory assurance would likely be sufficient if the PUCO allows the deferrals, sets the rate for capacity, and approves the Rider.

If the Commission approves Duke's requests, a regulatory asset will be created for Duke amounting to $776 million that Duke can recognize as revenues for financial reporting purposes. But Duke's approach, insisting that its application is not a rate increase, is misleading and ignores the clear fact it will be seeking to increase customer rates to recover the deferrals created, no later than March 2013.

The Ohio Supreme Court has recognized the reality of PUCO ratemaking—that customers end up paying in rates what the PUCO accounting orders allow to be booked as revenues in regulatory accounting adjustments.[20] For instance, in *Ohio Consumers' Counsel v. Pub. Util. Comm.*,[21] the Ohio Supreme Court found customers were in fact harmed, establishing a right to appeal, where only accounting authority had been approved. In that case, arguments were made that pressed for a continuation of earlier rulings where the Court distinguished accounting from ratemaking and declined to find that rates are affected by accounting.[22] The Court dismissed such arguments, instead declaring it to be a distinction without much difference: "To be sure, as Consumers' Counsel contends, FirstEnergy and Dayton Power and Light, having secured the accounting changes, will likely ask the PUCO for permission to raise customers' rates***." Moreover, the Court reinforced its holding in *Ohio Consumers' Counsel v.*

[19] See Statement of Financial Accounting Standards 71, Financial Accounting Standards Board of the Financial Accounting Foundation (1982).

[20] See *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853 at ¶35; *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164.

[21] 111 Ohio St.3d at ¶35.

[22] See e.g. *Ohio Consumers' Counsel v. Pub. Util. Comm.* (1983), 4 Ohio St.3d 111, 115; *Ohio Consumers' Counsel v. Pub. Util. Comm*. (1983), 6 Ohio St.3d 377.

Pub. Util. Comm., when it issued a decision a year later in *Elyria Foundry Co. v. Pub. Util. Comm*.[23] There, the Court found that an order authorizing a fuel deferral, as part of a rate certainty plan, was equivalent to seeking a rate increase: "Thus we hold that the Commission's accounting order authorizing the increased fuel cost deferral was conclusive for ratemaking purposes and ripe for our consideration."[24]

Here, Duke has in fact advised that it will request approval to begin collecting the deferred amounts, including carrying costs in the future. Duke indicated that the Rider DRCO would be adjusted from its zero level, through an application filed no later than March 1, 2013: "[T]hrough such a proceeding the Commission would approve the establishment of a rate that would allow for the collection of $258,747,429 per year for three years."[25]

The Commission should grant the Joint Motion to dismiss which would render Duke's pleading moot. However, if it does not grant the Joint Motion to dismiss, it should conclude that Duke's application is an application for an increase in rates which will harm customers. Under R.C. 4909.18 it should be treated as an application for an increase in rates, which if accepted and not dismissed by the PUCO, requires, inter alia, evidentiary hearings. Accordingly, if the Commission does not grant the Joint Motion to Dismiss,[26] the Commission must hold hearings, as contemplated by the Attorney Examiner's October 3, 2012 Entry.

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[23] *Elyria Foundry Co. v. Pub. Util. Comm*., 114 Ohio St.3d 305, 2007-Ohio-4164.

[24] Id. at 317.

[25] Duke Application at ¶17.

[26] Joint Motion to Dismiss (Oct. 4, 2012).

If the Commission does not dismiss the application as requested by the Signatory Parties, the Commission should rule that the Application seeks to modify, amend, or change an "existing rate." The existing rate that Duke seeks to modify or amend is the capacity rate being collected through, inter alia, the Retail Capacity Rider. Duke requests that the PUCO determine that the rate for capacity services associated with its FRR obligations is $224.15/Mw-Day, calculated consistent with the formula used in the AEP capacity case.[27] This would alter the current rate for capacity that Duke is authorized to charge customers under its Retail Capacity Rider. Duke refers to its current rate as the "interim mechanisms previously in place" that will be "supplanted" by the "final mechanism."[28]

Because Duke seeks to modify existing rates, a hearing is mandatory so long as the Commission accepts and does not dismiss the application. This reading of R.C. 4909.18 as it applies to rate changes is confirmed by the provisions of another statute, R.C. 4909.17. Under R.C. 4909.17, no change in rate shall become effective until the PUCO by order determines it to be just and reasonable. This is a determination that can only be made after an evidentiary record is developed. The Attorney Examiner's order should be affirmed, if the Joint Motion to Dismiss is not granted.

2. The procedural schedule proposed by the Attorney Examiner was lawful.

While Duke claims that the Attorney Examiner acted outside its authority in establishing a procedural schedule that was not "prompt,"[29] there is no sound legal basis

[27] *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, Opinion and Order (July 2, 2012).

[28] Duke Application at ¶7 (Aug. 29, 2012).

[29] Duke Application for Review at 7.

for such claims. While the law *encourages* a prompt determination of an application that offers a new service or reduces rates, it does not mandate such. Indeed the words read: "After such hearing, the commission shall, *where practicable*, issue an appropriate order within six months from the date the application was filed." "Where practicable" would have no meaning if one were to accept the Company's claim that an application must be fully adjudicated within six months. Additionally, such a view is inconsistent with the rules of statutory construction which declare that the entire statute is intended to be effective.[30]

Additionally, as argued above, the Company's filing does not amount to a filing for new service or a filing that will reduce rates. It is either a filing for a rate increase or a filing to modify existing rates. Under either one of these scenarios there is no six month time frame. Instead, promptness is defined by another statute, R.C. 4909.42. Under that statute, an order must be issued before 275 days after the filing of an application—otherwise a utility may file an undertaking to put the proposed rates into effect, subject to refund. The procedural schedule implemented by the Attorney Examiner is consistent with the 275-day timeline that a rate modification or rate increase is to be reviewed under the statute. It should stand if the Commission does not dismiss the application, as requested by the Joint Signatory Parties.

III. CONCLUSION

The Joint Signatory Parties filed a Motion to Dismiss Duke's application. The Commission should grant that motion. If the Joint Motion to Dismiss is granted, Duke's pleading becomes moot.

[30] See R.C. 1.47((b); *Richards v. Market Exch. Bank Co*. (1910), 18 Ohio St. 348.

Otherwise, if the Commission accepts Duke's application, its Request for Certification should be denied. Duke has failed to meet the standards of Ohio Admin. Code 4901-1-15. It has not proven that the procedural entry presents a new or novel practice for the Commission or that it represents a departure from past precedent. Duke has also failed to demonstrate that an immediate determination by the PUCO is necessary to prevent undue prejudice or harm.

Even if the Attorney Examiner certifies the appeal, the Commission should affirm the Attorney Examiner's ruling, provided it does not grant the Joint Motion to Dismiss. Duke has failed to show that the procedural entry was unlawful or unreasonable. Rather, the process established in the Attorney Examiner's Entry, absent dismissal of the application, meets the requirements of R.C. 4909.18 and other authority, and should provide parties an opportunity to investigate and challenge Duke's application to increase rates to customers by $776 million.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra Application for Review was served on the persons stated below via electronic transmission this 15th day of October 2012.

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Summary: Memorandum Joint Memorandum Contra Duke Energy Ohio Inc.'s Application for Review and Interlocutory Appeal by Signatory Parties electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.