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
MOTION TO VACATE
BY
SIGNATORY PARTIES

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JOINT MEMORANUDUM CONTRA DUKE ENERGY OHIO, INC.'S MOTION TO VACATE BY SIGNATORY PARTIES

I. INTRODUCTION

In 2011, Duke Energy Ohio ("Duke" or "Company") and 30 parties settled a case resolving Duke's electric security plan ("ESP"). That plan established the rates for 686,000 customers in Duke's service area that are to be paid by customers through May 31, 2015. The Commission, on November 22, 2011, adopted a stipulation, after finding that it satisfied the three prong criteria employed by the PUCO for considering the reasonableness of a stipulation ("Duke Stipulation").[1] Additionally, it found the ESP, as proposed in the Duke Stipulation, more favorable in the aggregate than an MRO.[2] With minor revisions, the Commission adopted and approved the Duke Stipulation.

[1] *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*, Case No. 11-3549-EL-SSO et al., Opinion and Order at 48 (Nov. 22, 2011).

[2] Opinion and Order at 47.

Under the settlement, inter alia, Duke was allowed to collect $330 million from customers for its Electric Stability Service Charge ("ESSC") that otherwise would have been zealously contested by numerous parties to the proceeding, including customer advocates. The settlement also called for the default generation supply price to be established through a competitive bidding process, with the benefit of historically low market prices for all customers at the time.

An integral part of that agreement between Duke and the Stipulating Parties was that as long as Duke is a fixed resource requirements entity under PJM, it would provide capacity at the final zonal capacity price (FZCP) in the Duke and Kentucky load zone region, pursuant to the PJM RPM process.[3] Duke Witness Janson, testified that Duke would bear the obligation to provide the capacity resources necessary to serve all customers in its footprint for the term of the ESP and agreed to compensation for capacity resources based on competitive PJM prices.[4] Consequently, since January 1, 2012, all retail jurisdictional customers in Duke's service territory have been paying a Retail Capacity Rider based on the wholesale FZCP associated with the annual auctions conducted by PJM, Interconnection, LLC.[5]

On August 29, 2012, Duke filed an Application with the PUCO to initiate a process under which it wants ultimately to collect from customers an additional $776 million[6] of capacity revenues. In order to assure collection of the entire $776 million

[3] Opinion and Order at 11.

[4] Supplemental Testimony of Julia S. Janson at 4-5 (Oct. 28, 2011).

[5] See Tariff Sheet 111, approved by the PUCO.

[6] It is not clear from the application whether or not the $776 million includes any carrying charges. If carrying charges are proposed but not yet quantified, the cost to customers will be even greater.

from customers, Duke seeks, inter alia, a Commission Order establishing a cost-based charge[7] for its capacity.

On October 3, 2012, the Attorney Examiner assigned to Duke's application issued an Entry proposing a procedural schedule to address Duke's application. In that Entry the Attorney Examiner set up a comment period, testimony deadline, and an evidentiary hearing date.

On October 4, 2012, a group of Signatory Parties to the Duke Stipulation, filed a Joint Motion to Dismiss Duke's application. The Joint Motion was filed to prevent unjust retail electric rate increases from being imposed on customers in direct violation of the Stipulation reached less than a year earlier in Duke's ESP proceeding.

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. This pleading filed by these Signatory Parties[8] to the Duke Stipulation will address the Motion to Vacate, and explains why the Motion should be denied.[9] A separate Memorandum Contra the Application for Review was filed on October 15, 2012.

At the outset, it should be noted that the Signatory Parties stand by the Joint Motion to Dismiss filed on October 4, 2012. If the PUCO grants the Joint Motion, as it

[7] Duke claims its cost of capacity is $224.15/Mw-day. Duke Application at ¶8.

[8] 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.

[9] 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.

should, Duke's October 9, 12012 pleadings become moot. Nonetheless, Signatory Parties respond to the Motion to Vacate, as explained below.

II. ARGUMENT

Duke contends that its application is not for an increase in rates and thus the PUCO may authorize it without a hearing.[10] Duke further alleges that the PUCO can set a hearing on such an application only when the PUCO first determines that the application may be unjust or unreasonable.[11] The Company reasons that because the Commission did not make such a finding here, it lacked authority to set the hearing, the Company reasons.[12] Duke also argues that when such a hearing does occur, the Commission should adjudicate the application "promptly" as intended by the General Assembly.[13] Duke defines promptly as requiring the PUCO to issue an order within the six-month period mentioned under the statute (R.C. 4909.18) –in this case, on or before February 26, 2013.[14] Duke asserts that to "comply with the law" the Order must be issued by February 26, 2013, and under the procedural schedule set by the Attorney Examiner, it is not possible to do so.[15] Duke also alleges it has been "unduly prejudiced" by the PUCO unreasonably delaying the resolution of its application.[16] Duke maintains that the alleged undue prejudice manifests itself in the negative returns on equity that Duke will be experiencing under market-based capacity pricing over the next several

[10] Duke Motion to Vacate at 4 (Oct. 9, 2012).

[11] Id.

[12] Id.

[13] Id. at 5.

[14] Id.

[15] Id.

[16] Id.

years.[17] Finally, Duke asserts that if the PUCO determines that its application may be unjust and unreasonable, it should establish a new procedural schedule to allow for an order to be issued by February 26, 2013.[18]

A. Duke's Application Seeks To Increase Rates Which Under R.C. 4909.18 Requires An Evidentiary Hearing.

Duke contends that it is not seeking to increase rates under its application, and thus a hearing is not required under R.C. 4909.18. Duke is wrong.

Duke seeks 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.[19] Duke also asks the PUCO to 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.[20] Duke requests that the PUCO allow it to defer the difference in revenues and collect carrying charges on those revenues, with Duke coming in no later than March 2013 with an application to collect the deferred amounts.[21] The collection will be through a rider designated as Rider Deferred Recovery –Capacity Obligation ("Rider DRCO"), which it seeks approval of in this proceeding, 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

[17] Id. at 6.

[18] Id.

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

[20] 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).

[21] Duke Application at ¶17.

report these revenues to the public if it has regulatory assurance that the amounts will be collected from customers.[22] Regulatory assurance would likely be given to the utility 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.[23] For instance, in *Ohio Consumers' Counsel v. Pub. Util. Comm.*,[24] 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.[25] 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'

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

[23] 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.

[24] 111 Ohio St.3d at ¶35.

[25] 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.

rates***." Moreover, the Court reinforced its holding in *Ohio Consumers' Counsel v. Pub. Util. Comm.*, when it issued a decision a year later in *Elyria Foundry Co. v. Pub. Util. Comm.*[26] 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."[27]

Here, Duke has in fact advised that subsequently, in an appropriate proceeding, it will request approval to begin collecting the deferred amounts, including carrying costs. 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."[28]

The Commission should grant the Joint Motion to Dismiss. Duke's pleadings then become moot. Notwithstanding, if the Commission entertains Duke's Motion, 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, if the Joint Motion to Dismiss is not granted. Accordingly, if the Commission does not grant the Joint Motion to Dismiss, the Commission must hold hearings, as contemplated by the Attorney Examiner's October 3, 2012 Entry.

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

[27] Id. at 317.

[28] Duke Application at ¶17.

B. Even If Duke Is not Seeking A Rate Increase, It is Requesting A Rate Change, Which Under R.C. 4909.18, Requires An Evidentiary Hearing.

R.C. 4909.18 defines two separate processes to be followed for applications establishing or changing rates. Under that statute, if an application does not seek to increase rates, the PUCO may authorize the application without holding an evidentiary hearing.

But, if an application seeks to modify, amend, or change an "existing rate" then an evidentiary hearing is required. Duke's application requires an evidentiary hearing because it seeks to modify, amend, or change an "existing rate." The existing rate that Duke seeks to modify or amend is the current 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 be amended and increased to $224.15/Mw-Day, calculated consistent with the formula used in the AEP capacity case.[29] This would alter the current rate for capacity that Duke is authorized to charge customers under its Retail Capacity Rider. Astoundingly, Duke refers to its current rate as the "interim mechanisms previously in place" that will be "supplanted" by the "final mechanism."[30] The Duke Stipulation, however, is void of any such terminology or even the concept of interim capacity rates within the term of the ESP.

Contrary to the assertions made in its application,[31] Duke is not seeking to establish a new service. Duke has failed to show that it is a "new service" when R.C.

[29] *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).

[30] Duke Application at ¶4.

[31] Duke Application at ¶11.

4909.18 requires it to do so.[32] Its capacity service is no different than the capacity service it presently offers under its ESP.

If Duke's application proposed a new service, then the Commission could merely "permit the filing of the schedule proposed and fix a time when such schedule shall take effect." And in such a case, R.C. 4909.18 encourages the PUCO to promptly adjudicate the matter, if the matter goes to hearing.

But here, those provisions of R.C. 4909.18 are not applicable. That is because Duke is seeking to modify its existing capacity rates that it charges to customers, including rates collected under the Retail Capacity Rider. Given that Duke seeks to modify existing rates, a hearing is mandatory. 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. If the Joint Motion to Dismiss is not granted, the Attorney Examiner's Entry should be affirmed, not vacated.

C. Under The Joint Motion To Dismiss, The Signatory Parties Have Shown That The Application May Be Unjust And Unreasonable, Thus Requiring A Hearing.

Assuming arguendo that Duke is correct in asserting that its Application is not for an increase in rates, then the Commission has the discretion as to whether to hold a hearing. Under the statute, the Commission can hold a hearing if it determines that the application may be unjust and unreasonable. In the instant case, the Commission can

[32] R.C. 4909.18 provided "If such application proposes a new service ***the application shall fully describe the new service ***and explain how the proposed service or equipment differs from services or equipment presently offered."

make this finding, and should make this finding based upon the Joint Motion to Dismiss, provided it does not grant the Motion the Dismiss outright.

In the Joint Motion to Dismiss, the Signatory Parties to the Duke Stipulation contend that Duke's proposal violates the settlement and the PUCO should enforce it. The Joint Motion also points out that Duke failed to timely apply for rehearing of the PUCO Order approving the Duke Stipulation and failed to appeal, causing the Commission to have no jurisdiction to entertain Duke's belated request for rehearing. Additionally, the Joint Motion presents arguments under the doctrines of res judicata and collateral estoppel as to why Duke should be precluded from re-litigating its electric security plan where it agreed to RPM based capacity pricing for capacity provided to CRES suppliers and SSO customers for the duration of its ESP. Moreover, the Joint Motion maintains that the PUCO has no authority to grant Duke the relief it requests.[33]

The Joint Motion to Dismiss presents rationale that merit dismissing the Application. The Joint Motion should be granted by the PUCO. This would render Duke's Motion to Vacate moot. At the very least, the Commission should determine that the Joint Motion to Dismiss establishes that Duke's Application may be unjust and unreasonable. On that basis the Commission has authority to set the matter for hearing. Duke's motion should be denied.

[33] 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.

D. Any Undue Prejudice To Duke Is Self-Imposed And Not A Consequence Of The PUCO's Procedural Schedule.

Duke argues that it will be experiencing negative returns under market-based capacity pricing over the next several years.[34] While the merits of its claims have not yet been tested, it is clear that Duke's arguments, even if assumed true, do not present a legitimate basis for granting what Duke seeks in its Application. Any negative returns under market-based pricing that Duke may be experiencing are attributable to it agreeing to accept market-based pricing for its capacity for the duration of the ESP. Duke knew or should have known, at the time it signed the Duke Stipulation, the financial impact of accepting market-based pricing for its capacity. It willingly agreed to do so, and now, when it appears that another utility has obtained a better deal, it comes before the PUCO to complain about its finances. Such opportunistic claims do not amount to undue prejudice. Any undue prejudice that Duke may be suffering is the result of its own voluntary actions, not the result of a Commission order implementing a reasonable procedural schedule in a case where a utility seeks $766 million in increases from customers.

E. The Procedural Schedule Proposed By The Attorney Examiner Was Lawful, Reasonable, And Within The Discretion Of The PUCO. Duke Has Shown No Good Cause To Vacate That Schedule.

While Duke claims that the Attorney Examiner acted outside its authority in establishing a procedural schedule that was not "prompt"[35] there is no sound legal basis 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:

[34] Duke Motion to Vacate at 6.

[35] Motion to Vacate at 5.

"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 Ohio rules of statutory construction which declare that the entire statute is intended to be effective.[36]

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 those 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, unless the Commission determines to grant the Joint Motion to Dismiss. [37]

F. A Motion To Vacate An Attorney Examiner Entry Is Not Contemplated Under The PUCO's Rules.

Under Ohio Admin. Code, there are specific rules that pertain to parties' rights to challenge an Attorney Examiner's Ruling. Those rules are contained exclusively in Ohio Admin. Code 4901-1-15. Under that rule, a party may take an interlocutory appeal

[36] See R.C. 1.47((b); *Richards v. Market Exch. Bank Co*. (1910). 81 Ohio St. 348.

[37] IEU-Ohio agrees that Duke has failed to demonstrate that the October 3, 2012 Entry was unlawful, but IEU-Ohio has separately demonstrated in its Memorandum Contra filed on October 15, 2012, that the Commission should vacate the procedural schedule until it rules on the Joint Motion to Dismiss.

to the Commission from an Attorney Examiner's ruling. Additionally, if the party elects not to take an interlocutory appeal or files an interlocutory appeal not certified by the Commission, it may still raise the propriety of the ruling in an initial brief or any other "appropriate filing."[38]

While the Company did file an interlocutory appeal of the Attorney Examiner's Entry, it also filed a Motion to Vacate the Attorney Examiner's Order. But such a motion is not an "appropriate filing" under the Commission's rules. As the Commission has noted on a number of occasions, parties must follow the proper procedure established under its rules, including filing pleadings that comply with its rules.[39]

Duke's Motion to Vacate seeks rehearing of the Attorney Examiner's Entry. Duke asks that the PUCO modify the procedural schedule established or find that no hearing is required.[40] It challenges the lawfulness and reasonableness of the Attorney Examiner's Entry. Duke's Motion to Vacate amounts to an application for rehearing.

Rehearing of an Attorney Examiner's Entry, however, is not contemplated as an appropriate filing under Ohio Admin. Code 4901-1-15. Just as an Application for Rehearing of an Attorney Examiner's Entry is not appropriate,[41] the PUCO should find that the Motion to Vacate is inappropriate.

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[38] Ohio Admin. Code 4901-1-15(F).

[39] See, e.g., *In the Matter of the Complaint of Numerous Subscribers of Elyria Telephone Company and GTE North Incorporated, Complainants, v. The Elyria Telephone Company, GTE North Incorporated, and The Ohio Bell Telephone Company, Respondents, Relative to a Request for Extended Area Service,* Case No. 89-1071-TP-PEX Entry (Jan. 30, 1990).

[40] Duke Motion to Vacate at 6.

[41] *In the Matter of the Complaint of Numerous Subscribers of Elyria Telephone Company and GTE North Incorporated, Complainants, v. The Elyria Telephone Company, GTE North Incorporated, and The Ohio Bell Telephone Company, Respondents, Relative to a Request for Extended Area Service,* Case No. 89-1071-TP-PEX Entry (Jan. 30, 1990) (finding that a parties' request for an application for rehearing of an Attorney Examiner entry could not be considered).

III. CONCLUSION

The Joint Motion to Dismiss filed by the Signatory Parties should be granted. If the Joint Motion to Dismiss is granted, Duke's Motion to Vacate becomes moot.

Otherwise, Duke's Motion to Vacate the October 3, 2012 Entry should be denied. Duke has failed to show that the procedural entry was unlawful or unreasonable. There is no need to issue a new procedural schedule. Rather, the Commission should grant the Joint Motion to Dismiss, or at the very least, find that the proposal of Duke may be unjust and unreasonable, and continue forward with the procedure schedule established in the October 3, 2012 Entry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Memo Contra Motion to Vacate* was served on the persons stated below via electronic transmission this 16th day of October 2012.

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Summary: Memorandum Joint Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Vacate by Signatory Parties electronically filed by Ms. Deb J. Bingham on behalf of Grady, Maureen R. Ms.