

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates)	Case No. 12-1682-EL-AIR
)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)	Case No. 12-1683-EL-ATA
)	
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.)	Case No. 12-1684-EL-AAM
)	

**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA
THE OFFICE OF OHIO CONSUMERS' COUNSEL'S INTERLOCUTORY APPEAL
FROM THE MARCH 8, 2013 ATTORNEY EXAMINER ENTRY**

Now comes Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) in accordance with Rule 4901-1-15(D), Ohio Administrative Code (O.A.C.) and hereby submits to the Public Utilities Commission of Ohio (Commission) its Memorandum Contra the Office of Consumers' Counsel's (OCC) Interlocutory Appeal from the March 8, 2013 Attorney Examiner Entry in the above-captioned matters. Duke Energy Ohio respectfully urges the Commission to uphold the Entry on its Motion to Compel, as the Company demonstrated good cause upon which the Attorney Examiner granted the motion, and the manner in which the Attorney Examiner's Entry was issued is specifically authorized pursuant to the Commission's regulations.

I. Factual Background

On February 28, 2013, Duke Energy Ohio filed with the Commission and served upon all parties in the above-captioned proceedings, a notice of deposition (Notice) for a number of OCC

witnesses.¹ The testimony of each of these witnesses had been neither filed nor available until February 25, 2013.

On March 1, 2013, OCC sent a letter to Duke Energy Ohio, claiming that the Company sent its Notice “nearly six weeks after the PUCO’s discovery period ended in this case (and during a time of considerable constraints on OCC’s resources with cases that Duke and other utilities have filed to increase consumers’ rates).” Under this rationale, OCC alerted the Company that it would not make its witnesses available for deposition by the Company on March 11, 2013.

On March 5, 2013, the Company contacted the OCC in an attempt to resolve the discovery dispute. Despite this conversation, the parties were unable to reach an agreement that would definitively resolve the issue. Accordingly, on March 7, 2013, the Company filed motions to extend the discovery deadline for the purpose of noticing depositions and to compel OCC to produce its witnesses for deposition, with a request for an expedited ruling on its motions.

By Entry dated March 8, 2013, the Attorney Examiner granted Duke Energy Ohio’s motion to extend the discovery deadline and its motion to compel the appearance of OCC’s witnesses for deposition by the Company on a date mutually agreeable to OCC and the Company. Although not cited in the Entry, the Attorney Examiner has clear authority to enlarge discovery deadlines pursuant to 4901-1-17 (G). On March 13, 2013, OCC filed an interlocutory appeal from the March 8, 2013 Entry (Interlocutory Appeal). In its Interlocutory Appeal, the OCC asserts that certification pursuant to Rule 4901-1-15, O.A.C. is not necessary, as the Entry granted a motion to compel.

¹ By means of its Notice, Duke Energy Ohio notified OCC that it intended to depose the following witnesses: Bruce M. Hayes, James R. Campbell, James Gould, Steven B. Hines, Kathy L. Hagans, Scott J. Rubin, David J. Effon, Daniel J. Duann, Ph.D., and Ibrahim Soliman.

II. Argument

Good Cause

OCC contends that “[t]he Commission’s rules do not permit discovery after the discovery cut-off, unless a party can show good cause.”² However, this statement misstates the rule that is implicated in the instant case. Rule 4901-1-17(G), O.A.C., states as follows:

Notwithstanding the provisions of paragraphs (B), (C), (D), and (E) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner may shorten or enlarge the time periods for discovery, upon their own motion or upon motion of any party for good cause shown.

Pursuant to this rule, an Attorney Examiner may grant a party’s motion to extend the discovery period for good cause shown, by the moving party. As evidenced in the March 8, 2013 Entry at ¶7, the Attorney Examiner was persuaded by Company that there was good cause to extend the discovery period because the deadline for the filing of notices of depositions “fell well before the filing of witness testimony,” and, as such, any notices issued within the deadline would “equate to mere placeholder filings.” The Attorney Examiner was demonstrably persuaded that the circumstances surrounding the procedural schedule established in these matters and the concomitant issues surrounding the identification of experts warranted the extension of the discovery deadline for the narrow purpose of service notices of deposition upon those parties whom Duke Energy Ohio **actually intended** to depose. This rationale, argued by the Company in its motions and explained in the Entry, paired with the pronouncement in Section 4903.082, R.C., that “[a]ll parties and intervenors shall be granted ample rights of discovery,” constitutes good cause for the extension of the discovery period pursuant to Rule 4901-1-17(G), O.A.C. The same good cause that permitted the Attorney Examiner to extend the

² *Id.*

discovery deadline under Rule 4901-1-17(G), O.A.C. supports the grant of a limited waiver of Rule 4901-1-17(B), O.A.C. This is true whether or not the Attorney Examiner cited to Rule 4901-1-38(B), or 4901-1-17(G), O.A.C., in the Entry.

Certification and Substantial Right of a Party

In its Interlocutory Appeal, OCC argues that certification of the appeal to the commission is not necessary, as “appeals can be taken without certification when an Attorney Examiner has granted a motion to compel discovery.”³ OCC’s statement, however, glosses over the tight language used in Rule 4901-1-15(A). The rule states, in pertinent part,

Any party who is adversely affected thereby may take an immediate interlocutory appeal to the commission from any ruling issued under rule 4901-1-14 of the Administrative Code or by any oral ruling issued during a public hearing or prehearing conference that does any of the following:

- (1) Grants a motion to compel discovery or denies a motion for protective order.

The March 8, 2013 Entry grants Duke Energy Ohio’s motion to compel the attendance of OCC witnesses at depositions on a future date, but it was only able to grant that motion by means of the Attorney Examiner’s decision on another motion: the Company’s motion to extend the discovery deadline for the purpose of issuing deposition notices. Rulings granting motions to extend discovery deadlines are not among those exceptions to certification enumerated in Rule 4901-1-15(A)(1) through (4), O.A.C. Arguably, therefore, pursuant to Rule 4901-1-15(B), O.A.C., an appeal of the ruling extending the discovery deadline, which was the heart of the Company’s pleading, must be certified to the Commission in the following manner:

[b]y the legal director, deputy legal director, attorney examiner, or presiding hearing officer. The legal director, deputy legal director, attorney examiner, or presiding hearing officer shall not certify such an appeal unless he or she finds that: the appeal 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

³ See Interlocutory Appeal at 3.

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.

OCC has not asserted in its appeal that the appeal presents a new or novel question of interpretation, law or policy. Further, although OCC has asserted that its appeal is taken from a ruling which represents a departure from past precedent, in that it was not afforded the opportunity to file a responsive pleading to the Company's March 7, 2013 motions, Rule 4901-1-12(F), O.A.C., specifically provides the following:

Notwithstanding paragraphs (B) and (C) of this rule, the Commission, the legal director, the deputy legal director, or the attorney examiner may, upon their own motion, issue an expedited ruling on any motion, with or without the filing of memoranda, where the issuance of such a ruling will not adversely affect a substantial right of any party.

This rule explicitly authorizes an Attorney Examiner to take the specific action that was taken, i.e., issuing a motion without the filing of memoranda, where issuing such ruling will not adversely affect the substantial right of any party. Here, a "substantial right" of OCC was not adversely affected by the issuance of the Entry. OCC outlines its argument that the Entry affects a substantial right in its Interlocutory Appeal, stating as follows:

The Attorney Examiner found that there is no reason to believe that her Entry will adversely affect a substantial right of any party. The harm is to OCC that relies on the PUCO's rules for the rate case process. From OCC's perspective, the harm arises because the lack of early notice to OCC places a further strain on OCC resources at a time of high volume case activity ongoing at the PUCO. The OCC is especially resource-constrained with Duke's two rate case proceedings and capacity case, and Dayton Power & Light Company's electric security plan case, in addition to all the other active cases that are presently confronting OCC for consumers.⁴

Parties participating in matters before the Commission are well accustomed to experiencing a slight strain on resources, as is the Commission itself. Placing a slight strain on a

⁴ See Interlocutory Appeal at 5.

party's resources does not equate to affecting a substantial right of that party. Moreover, these cases have been pending since June of 2012 and the Parties were on notice to anticipate and appropriately plan for these contingencies. In view of these circumstances, the Company strongly urges the legal director, the deputy legal director, the Attorney Examiner, or the presiding hearing officer considering OCC's Interlocutory Appeal for certification to the Commission to deny certification. Notably, any decision to deny certification does not preclude OCC of its opportunity to raise the propriety of the Attorney Examiner's ruling on the motion to extend the discovery deadline. Pursuant to Rule 4901-1-15(F), O.A.C.,

Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code . . . and that . . . (2) files an interlocutory appeal that is not certified by the attorney examiner may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case.

OCC's opportunity to raise the propriety of the Attorney Examiner's ruling is preserved under Rule 4901-1-15(F), O.A.C. Therefore, the Company respectfully requests that the legal director, the deputy legal director, Attorney Examiner, or the presiding hearing officer considering OCC's appeal deny certification to the Commission.

III. Conclusion

For the reasons stated above, Duke Energy Ohio respectfully requests that the legal director, deputy legal director, attorney examiner, or presiding hearing officer, decline to certify OCC's appeal to the Commission. In the event, however, that the appeal is certified, or that certification is deemed unnecessary, the Company respectfully requests that the Commission deny OCC appeal, as good cause was shown to extend the discovery deadline and to issue an expedited ruling on the Company's motions.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 18th day of March, 2013, by U.S. mail, postage prepaid, or by electronic mail upon the persons listed below.


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Summary: Memorandum DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA THE
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