

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Review of the
Alternative Energy Rider Contained in the
Tariffs of Ohio Edison Company, The
Cleveland Electric Illuminating Company,
and The Toledo Edison Company**

Case No. 11-5201-EL-RDR

**MEMORANDUM CONTRA OF OHIO EDISON COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY TO
DIRECT ENERGY'S MOTION FOR LEAVE TO FILE AN APPLICATION FOR
REHEARING**

I. INTRODUCTION

In its Motion for Leave to File an Application for Rehearing, Direct Energy Services, LLC and Direct Energy Business, LLC (collectively, "Direct Energy"), request that the Commission grant Direct Energy leave to file an application for rehearing in this proceeding. Direct Energy, however, cannot meet the basic requirements imposed by Ohio law for such motions. Specifically, Direct Energy has not shown just cause for its failure to enter an appearance in this proceeding prior to the issuance of the Commission's Opinion and Order on August 7, 2013. Further, the interests of Direct Energy are already adequately represented by a party to this proceeding. These defects prove fatal. As demonstrated below, Direct Energy's motion should thus be denied.

II. STANDARD OF REVIEW

In order for the Commission to grant a motion for leave to file an application for rehearing, the movant must satisfy the two-pronged test mandated by Section 4903.10 of the Ohio Revised Code. Section 4903.10 provides:

Leave to file an application for rehearing shall not be granted to any person, firm, or corporation who did not enter an appearance in the proceeding unless the commission first finds:

(A) The applicant's failure to enter an appearance prior to the entry upon the journal of the commission of the order complained of was due to just cause; *and*,

(B) The interests of the applicant were not adequately considered in the proceeding.¹

R.C. § 4903.10 (emphasis added).

The Commission routinely denies such motions when the movant fails to satisfy *both* prongs of Section 4903.10. *See, e.g., In the Matter of the Application of the City of Hamilton and American Municipal Power, Inc., for a Certificate of Environmental Compatibility and Public Need for the Construction of a Substation in Franklin and Washington Townships*, Case No. 10-2439-EL-BSB, 2012 Ohio PUC LEXIS 84, 2-4* (Jan. 23, 2012) (denying motion for leave to file application for rehearing for failure to satisfy either prong of Section 4903.10); *In the Matter of the Application of FirstEnergy Corp. on Behalf of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of Their Transition Plans and for Authorization to Collect Transition Revenues*, Case No. 99-1212-EL-ETP, *20-21 (Sept. 13, 2000) (same); *In the Matter of the Application of Cincinnati Bell Telephone Company for Authority to Revise its General Exchange Tariff PUCO No. 8 to Establish Regulations, Rates, and Charges for Custom Calling PLUS Services*, Case No. 91-1648-TP-ATA, 1992 Ohio PUC LEXIS 884, *7-8 (Oct. 6, 1992) (same).

¹ R.C. § 4903.10 (emphasis added).

III. ARGUMENT

In its motion, Direct Energy does not satisfy either prong of Section 4903.10. As demonstrated below, Direct Energy has not shown just cause for its failure to make an appearance prior to issuance of the Commission's Opinion and Order in this proceeding. Likewise, Direct Energy's claim that its interests have not been adequately represented does not pass muster. Therefore, the Commission should deny Direct Energy's request.

A. Direct Energy Has Failed To Show Just Cause.

On August 7, 2013, the Commission issued its Opinion and Order in the instant proceeding. On September 6, 2013, Direct Energy filed its Motion for Leave to File an Application for Rehearing. Section 4903.10 requires that a party seeking leave to file an application for rehearing show just cause for its failure to make an appearance in this proceeding prior to the issuance of a final order by the Commission. Direct Energy has not made this showing.

Direct Energy claims that it failed to make a timely appearance because it had "little notice....to participate prior to the Commission's Opinion and Order."² There is no substantive basis to this claim. Direct Energy admits that it was aware of the Exeter Report, filed on the docket in this proceeding on August 15, 2012, almost 13 months ago.³ Direct Energy further admits that it was aware that the Exeter Report had recommended a possible disallowance or refund.⁴ Direct Energy then claims that because the Exeter Report did not indicate the

² Direct Energy Mot. At 3.

³ *Id.*

⁴ *Id.*

mechanics of any refund, Direct Energy had no idea “how any disallowance [would] be handled.”⁵

This argument rings hollow at best. Presumably, given the possibility of a disallowance, the mechanics thereof would be subject to Commission determination. Direct Energy was, at a minimum, on “constructive notice” that a disallowance might be ordered and that it should have intervened in these proceedings in timely fashion to make its desired voice so heard.⁶

Indeed, Direct Energy provides no explanation as to why it waited until September 6, 2013, approximately 10 months after the deadline for intervention and seven months after the close of hearing, to seek to participate in these proceedings. Interstate Gas Supply, Inc. (“IGS”), a fellow CRES provider, filed a timely motion for intervention on October 9, 2012.⁷ (IGS also has sought to raise the very issues that Direct Energy seeks to introduce.) Likewise, Direct Energy fails to explain why it did not seek late intervention pursuant to Rule Rule 4901-1-11(F).⁸ In any event, Direct Energy pursued neither course, even though it was on notice of the pertinent issues in this proceeding well prior to the deadline for intervention. Direct Energy simply has failed to provide just cause to explain its failure to make either a timely appearance in this matter

⁵ *Id.*

⁶ See *In the Matter of the Application by Hardin Wind Energy, LLC, for a Certificate of Environmental Compatibility and Public Need for the Hardin Wind Farm*, Case No. 09-479-EL-BGN, 2010 Ohio PUC LEXIS 735, *6-7 (July 15, 2010) (holding that “constructive notice” of wind projects entailed that applicant could not establish just cause for failure to make an appearance and denying motion for leave to file an application for rehearing).

⁷ See Case No. 11-5201-EL-RDR, Motion for Leave to Intervene of Interstate Gas Supply, Inc. (Oct. 9, 2012).]

⁸ Rule 4901-1-11(F), O.A.C. provides: “A motion to intervene which is not timely will be granted only under extraordinary circumstances.”

or, at the very least, to seek late intervention prior to issuance of a final order. Given Direct Energy's failure to show just cause, its motion should be denied.⁹

In turn, the cases relied on by Direct Energy regarding just cause are readily distinguishable. For example, Direct Energy cites *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, 2006 Ohio PUC LEXIS 92, (Feb. 6, 2006), to stand for the proposition that lack of notice satisfies the just-cause prong of Section 4903.10. *Cinergy*, however, is not factually on point with the instant proceeding. In that case, the Commission did not hold a hearing, the information that prompted the motions for leave to file an application for rehearing was not "obvious," and the information at issue only became available three weeks before the issuance of the final order.¹⁰ In contrast, in the instant matter, a five-day hearing was held in February 2013 and the sufficiently obvious information at issue, the possibility of a disallowance/refund, became known at least as of the start of the hearing, if not many months before then.

Direct Energy also points to *In the Matter of the Adoption of Rules for Alternative and Renewable Energy Technologies and Resources, and Emission Control Reporting Requirements, and Amendment of Chapters 4901:5-1, 4901:5-3, 4901:5-5, and 4901:5-7 of the Ohio Administrative Code, Pursuant to Chapter 4928, Revised Code, to Implement Senate Bill No. 221*, Case No. 08-888-EL-ORD, Entry on Rehearing, (June 10, 2009). In that case, however, the

⁹ See *In the Matter of the Application of the City of Hamilton and American Municipal Power, Inc., for a Certificate of Environmental Compatibility and Public Need for the Construction of a Substation in Franklin and Washington Townships*, Case No. 10-2439-EL-BSB, 2012 Ohio PUC LEXIS 84, 2-4* (Jan. 23, 2012) (denying motion for leave to file application for rehearing for failure demonstrate just cause pursuant to Section 4903.10).

¹⁰ *Id.* at *9-11.

Commission granted leave to file an application for rehearing to a utility's nuclear generating affiliates because the language of a final rule implementing a new regulatory scheme only became apparent after the Commission's issuance of a final order.¹¹ Thus, neither of the cases relied upon by Direct Energy are on all-fours with the instant proceeding.

B. Direct Energy Has Failed To Demonstrate That Its Interests Have Not Been Adequately Represented.

Pursuant to the second prong of Section 4903.10, Direct Energy has also failed to demonstrate that its interests have not been adequately considered by other parties to this proceeding. Direct Energy claims that as a "retail market participant" its interests have not been adequately represented because "the Commission's decision to utilize the AER mechanism to refund any disallowance...artificially depress[es] the price to compare."¹² As demonstrated below, this claim falls flat.

Conspicuously absent from Direct Energy's Motion for Leave is any discussion of the timely participation of IGS in these proceedings. As noted, IGS, a fellow CRES provider, i.e., "a retail market participant," filed a timely motion to intervene on October 9, 2012. IGS also participated in the hearing for these proceedings and filed post-hearing briefs.¹³ Most tellingly, on August 30, 2013, IGS filed an application for rehearing in the instant matter.¹⁴ In its Application for Rehearing, IGS discusses various issues relating to the manner in which a refund

¹¹ See *id.* at 2; see also, Case No. 08-888-EL-ORD, Motion for Leave to Intervene and Application for Rehearing of FirstEnergy Solutions Associates, at 2-4 (May 15, 2009).

¹² Direct Energy Mot. at 4.

¹³ See Docket, Case No. 11-5201-EL-RDR.

¹⁴ See Case No. 11-5201-EL-RDR, Application for Rehearing of Interstate Gas Supply, Inc. (Aug. 30, 2013).

may be distributed and its potential effect on competition in the retail electric market.¹⁵ As such, Direct Energy cannot plausibly claim that its interests are not being adequately represented in these proceedings. The Commission should deny Direct Energy's motion accordingly.¹⁶

IV. CONCLUSION

For the foregoing reasons, the Commission should deny the Motion for Leave to File an Application for Rehearing of Direct Energy

¹⁵ *See id.* at 5-7.

¹⁶ *See In the Matter of the Application of Cincinnati Bell Telephone Company for Authority to Revise its General Exchange Tariff PUCO No. 8 to Establish Regulations, Rates, and Charges for Custom Calling PLUS Services*, Case No. 91-1648-TP-ATA, 1992 Ohio PUC LEXIS 884, *7-8 (Oct. 6, 1992) (denying motion for leave to file application for rehearing because applicant's interests adequately represented in the subject proceeding).

DATED: September 16, 2013

Respectfully submitted,

/s David A. Kutik

James W. Burk, Counsel of Record
Carrie M. Dunn
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308
Phone: (330) 761-7735
Facsimile: (330) 761-7735
E-mail: burkj@firstenergycorp.com
cdunn@firstenergycorp.com

David A. Kutik
Lydia M. Floyd
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com
lfloyd@jonesday.com
ATTORNEYS FOR OHIO EDISON
COMPANY, THE CLEVELAND
ELECTRIC ILLUMINATING COMPANY,
AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered to the following persons by e-mail this 16th day of September, 2013:

Terrence O'Donnell
Dickenson Wright PLLC
150 East Gay Street, Suite 2400
Columbus, OH 43215
Telephone: (614) 744-2583
Facsimile: (614) 433-7274
E-mail: todonnell@dickinsonwright.com

Attorney for Mid-Atlantic Renewable Energy Coalition

William Wright
Chief, Public Utilities Section
Public Utilities Commission of Ohio
180 East Broad Street, 6th Floor
Columbus, OH 43215
E-mail: William.wright@puc.state.oh.us

Attorneys for the Staff of the Public Utilities Commission of Ohio

Christopher J. Allwein
Williams, Allwein & Moser, LLC
1373 Grandview Ave., Suite 212
Columbus, OH 43212
Telephone: (614) 429-3092
Facsimile: (614) 670-8896
E-mail: callwein@wamenergylaw.com

Attorney for the Sierra Club

Bruce J. Weston
Melissa Yost
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Telephone: (614) 466-9565
Facsimile: (614) 466-9475
E-mail: yost@occ.state.oh.us

Attorneys for Office of the Ohio Consumers' Counsel

David F. Boehm
Michael L Kurtz
Jody M. Kyler
Boehm Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
Telephone: (513) 421-2255
Facsimile: (513) 421-2764
E-mail: dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
jkyler@BKLawfirm.com

Attorneys for The Ohio Energy Group

Michael K. Lavanga
Brickfield, Burchette, Ritts & Stone PC
1025 Thomas Jefferson Street NW
8th Floor West Tower
Washington, DC 20007
Telephone: (202) 342-0800
Facsimile: (202) 342-0807
E-mail: mkl@bbrslaw.com

Attorney for Nucor Steel Marion, Inc.

Cathryn Loucas
Trent A. Dougherty
Ohio Environment Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
Telephone: (614) 487-7506
Facsimile: (614) 487-7510
E-mail: cathy@theoec.org
trent@theoec.org

Attorneys for the OEC

Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-mail: lmcalister@bricker.com
mwarnock@bricker.com

Attorneys for The OMA Energy Group

Nicholas McDaniel
ENVIRONMENTAL LAW &
POLICY CENTER
1207 Grandview Ave., Suite 201
Columbus, OH 43212
NMCDaniel@elpc.org

Attorney for ELPC

Joseph M. Clark
DIRECT ENERGY
21 East State Street, 19th Floor
Columbus, OH 43215
joseph.clark@directenergy.com

Attorney for Direct Energy

Theodore S. Robinson
Citizen Power
2121 Murray Avenue
Pittsburgh, PA 15217
Telephone: (412) 421-7029
Facsimile: (412) 421-6162
E-mail: robinson@citizenpower.com

Attorney for Citizen Power

M. Howard Petricoff
Michael J. Settineri
Lija Caleps-Clark
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
Columbus, OH 43215
Telephone: (614) 464-5414
mhpetricoff@vorys.com
mjsettineri@vorys.com
lkalepsclark@vorys.com

Attorneys for Interstate Gas Supply, Inc.

Matthew J. Satterwhite
Steven T. Nourse
AMERICAN ELECTRIC POWER SERVICE
CORPORATION
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com
stnourse@aep.com

Attorneys for Ohio Power Company

/s David. A. Kutik

*An Attorney For Ohio Edison Company,
The Cleveland Electric Illuminating Company,
and The Toledo Edison Company*

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/16/2013 4:33:43 PM

in

Case No(s). 11-5201-EL-RDR

Summary: Memorandum Contra to Direct Energy's Motion for Leave to File an Application for Rehearing electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company