

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review of )  
Chapters 4901-1, Rules of Practice and )  
Procedure; 4901-3, Commission Meetings; ) Case No. 11-776-AU-ORD  
4901-9, Complaint Proceedings; and 4901:1- )  
1, Utility Tariffs and Underground )  
Protection, of the Ohio Administrative Code. )

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**APPLICATION FOR REHEARING**

**OF**

**DUKE ENERGY OHIO, INC.**

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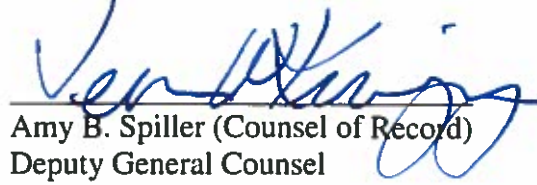
Pursuant to Ohio Revised Code (R.C.) 4903.10 and Ohio Administrative Code (O.A.C.) 4901-1-35, Duke Energy Ohio, Inc. (Duke Energy Ohio), respectfully submits this Application for Rehearing of the Finding and Order (Order) issued by the Public Utilities Commission of Ohio (Commission) on January 22, 2014, in the above-captioned proceeding. Duke Energy Ohio submits that the Order is unreasonable and unlawful in the following respects:

1. O.A.C. 4901-1-02(C)(1)(c), relating to filing requirements for a notice of appeal to the Ohio Supreme Court, was not revised as described in the Order.
2. The Commission's requirements as to service of documents that have been e-filed, as set forth in O.A.C. 4901-1-05(B), are impossible to fulfill.
3. The Commission's requirement that certain discovery-related procedural orders, if improper, be addressed through interlocutory appeals is unreasonable and in conflict with another Commission rule.

As explained in more detail in the accompanying memorandum in support, the Commission should grant rehearing.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

### I. INTRODUCTION

On March 2, 2011, the Commission issued an entry, setting forth modified rules proposed by Commission Staff (Staff), in O.A.C. Chapters 4901-1, 4901-3, 4901-9, and 4901:1-1. The Commission allowed for interested parties to file comments and reply comments, by April 1 and April 30, 2011, respectively. On January 22, 2014, the Commission issued its Order, further revising and adopting such rules.

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-23, Duke Energy Ohio seeks rehearing on three issues.

### II. DISCUSSION

#### A. Rule 4901-1-02(C)(1)(c) – Facsimile Filing of Notice of Appeal

The Commission's Order in this proceeding results in the promulgation of rules that would further the effort move to electronic filing of documents in Commission proceedings. With the approved modifications, electronic filing will be allowed in almost all circumstances. One area of some debate in the comments relates to the filing of a notice of appeal of a Commission order to the Ohio Supreme Court. According to the Order, one commenter proposed that notices of appeal be allowed to be filed electronically, in contrast to Staff's original proposal for O.A.C. 4901-1-2(D). After pointing out that a copy of any such notice must be served on either the chairman of the Commission or a commissioner, the Commission explained its conclusion:

The Commission wishes to ensure that its counsel in the appeal, timely receives service of the notice of appeal. This goal is accomplished by requiring service of the notice of appeal on the Chairman or a Commissioner. **However, we agree . . . that the notice of appeal can be fax filed or e-filed.** The rule has been modified accordingly.<sup>1</sup>

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<sup>1</sup> Order, at pg. 9 (emphasis added).

Pursuant to its determination that the notice of appeal need not be filed through a paper copy, assuming in-person service is still required, the Commission revised the previously proposed language in paragraph (D) of the rule. But paragraph (C), which sets forth facsimile filing requirements, still indicates that a notice of appeal may not be fax filed. Thus, paragraph (C)(1)(c) should be modified to correspond with the language in paragraph (D)(2)(b).

**B. O.A.C. 4901-1-05(B) – Service of E-Filed Documents**

Duke Energy Ohio applauds the Commission’s care and persistence in making it possible to file documents electronically. The revisions of the rules addressed in the Order reflect a major step forward in this process. Under the new rules, the Commission intends that parties, for the most part, will be served by the Commission’s own docketing system, making service by individual parties unnecessary.<sup>2</sup> Unfortunately, however, Duke Energy Ohio believes that the system envisioned by the Commission will not work as intended.

New paragraph (B), in O.A.C. 4901-1-05, indicates that the docketing system will automatically send notice of a filing to all persons who are electronically subscribed to the case. The filer is required to identify, in the document, who is being served automatically and, also, must serve anyone who is not served automatically. However, the rule makes no provision for how the filer can determine which parties are going to be served automatically. Thus, from the perspective of a filing party, there is no way to comply with the rule.

Duke Energy Ohio respectfully suggests that the rule should clarify the meaning of being “electronically subscribed” and should provide a mechanism whereby the filer can determine which parties are so subscribed. Alternatively, the rule should allow the continuation of the

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<sup>2</sup> See, generally, Order, at pp. 13-14.

current practice of serving parties by e-mail, regardless of whether such parties are automatically served by the Commission's docketing system.

### **C. O.A.C. 4901-1-23(E) – Interlocutory Appeals in Discovery**

Paragraph (E) of O.A.C. 4901-1-23 currently provides that an examiner's ruling granting a motion to compel discovery "becomes the order of the commission" if an application for an interlocutory appeal is not filed. In contrast, O.A.C. 4901-1-15, which provides the general rule for interlocutory appeals, clearly allows any party affected by a procedural ruling to choose whether to file such an appeal or to brief the issue subsequent to hearing.<sup>3</sup>

In its comments, Duke Energy Ohio proposed that the discovery-specific language be altered such that the general rule clearly apply. The Commission disagreed in the Order, citing to the need for expeditious use of discovery to prepare for hearing. The Commission did not explain why the need for expeditious discovery should make interlocutory appeals the mandatory route for addressing potentially erroneous rulings. There is nothing special about motions to compel discovery that should single them out, in contrast to other procedural rulings. Indeed, if the Commission is concerned about maintaining an expeditious discovery process, the interlocutory appeal approach should be discouraged, not mandated. If parties spend their time on the interlocutory appeal process, they have less time to spend on preparation for the actual case.

Paragraph (F) was added to O.A.C. 4901-1-15 during the Commission's last review of this chapter.<sup>4</sup> In that case, the Commission carefully weighed the relative merits of mandating the appeal or allowing briefing, and concluded that the choice should remain in place. At that time, the Commission also looked back to its 1987 discussion of that same issue, wherein it had

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<sup>3</sup> O.A.C. 4901-1-15(F)

<sup>4</sup> *In the Matter of the Review of Chapters 4901-1, 4903, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, at pp. 22-23 (March 9, 2007).

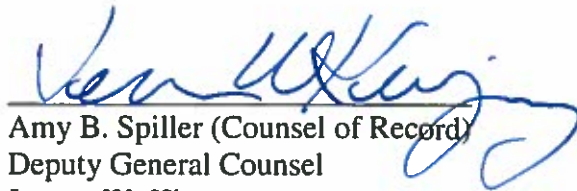
once again concluded that a party can obtain a review of any adverse ruling by briefing the issue before the Commission.<sup>5</sup> Duke Energy Ohio submits that O.A.C. 4901-1-23(E) should be modified to reflect the same choice as is currently allowed in O.A.C. 4901-1-15(F).

### III. CONCLUSION

Duke Energy Ohio respectfully requests that the Commission grant its application for rehearing and modify its proposed rules accordingly.

Respectfully submitted,

DUKE ENERGY OHIO, INC.



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<sup>5</sup> *Id.*, at 23 (citing *Amendment of Chapter 4901-1 of the Ohio Administrative Code*, Case No. 87-84-AU-ORD (Oct. 14, 1987)).

## 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 21<sup>st</sup> day of February, 2014, to the parties listed below.



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