

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Defer Environmental Investigation and Remediation Costs.))	Case No. 16-1106-GA-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.))	Case No. 16-1107-GA-UNC

**DUKE ENERGY OHIO INC.’S MEMORANDUM CONTRA
THE APPLICATION FOR REHEARING OF THE OFFICE OF THE
OHIO CONSUMERS’ COUNSEL AND THE KROGER COMPANY**

I. Introduction

On December 21, 2016, the Public Utilities Commission of Ohio (Commission) issued an order authorizing Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) to continue deferring costs related to its environmental investigation and remediation obligations associated with one former manufactured gas plant (MGP) site (Deferral Order). The Commission specifically explained the basis for its decision, noting that the Company had demonstrated the existence of exigent circumstances, as the Commission had previously directed.¹ Furthermore, in its Deferral Order, the Commission expressly stated that “it was not determining what, if any, of these costs may be appropriate for recovery in a subsequent proceeding.”² Notwithstanding the Commission’s appropriately detailed and narrowly tailored decision, the Office of the Ohio Consumers’ Counsel and the Kroger Company (collectively, Intervenors) object, continuing to improperly advance, in the Commission’s current dockets, legal issues that are pending before the Ohio Supreme Court. Their ongoing improper diversion of Commission resources does not –

¹ Order, at pp. 12-14 (December 21, 2016).

² *Id.*, at pg. 15 (December 21, 2016).

and cannot – provide a basis for rehearing. And as discussed herein, the Commission’s decision does not violate R.C. 4903.09 as it is based upon evidence properly before and reviewed by the Commission and it was appropriately explained. The Intervenors’ request for rehearing must therefore be denied.

II. Discussion

A. Challenges as to the weight afforded any evidence cannot warrant rehearing and the Commission’s order was fully supported by the record evidence.

The Intervenors rightly quote the legal requirement that Commission decisions “set forth the reasons prompting the decisions arrived at, based upon said findings of fact.”³ They then challenge the Commission’s Deferral Order, arguing that it fails to comply with this requirement. Specifically, the Intervenors contend that the Deferral Order does not comport with the manifest weight of the evidence.⁴ Importantly, however, the only substantive evidence as to the existence of exigent circumstances necessary to authorize an extension was that submitted by Duke Energy Ohio. The Intervenors did not offer any competing evidence contrary to the Company’s or otherwise. They merely supplanted their own, restricted definition of the term, “exigent circumstances.” After having considered that definition, along with the balance of the record before it, the Commission rejected the Intervenors’ argument and confirmed the meaning of the relevant term as it intended.

The Intervenors simply disagree with the Commission. But this is not a valid basis for rehearing. Indeed, as the Commission has found, attacking the weight it gave to the evidence is “not a basis for rehearing as it does not suggest any new information exists that needs to be

³ Intervenor Application for Rehearing, at pg. 5.

⁴ *Id.*, at pg.5

heard.”⁵ The outcome should be no different here. The Commission reviewed the record, evaluated the Intervenor’s arguments, examined the evidence, and rendered its decision. The Intervenor offers nothing new in connection with their request for rehearing for the Commission to now review.

Further, the Deferral Order complies with R.C. 4903.09 as it sets forth the reasons underlying the Commission’s determination with reference to the record. It is undisputable that the Commission confirmed the controlling definition of “exigent circumstances,” as was first necessary to provide the foundation against which the Company’s evidence would be reviewed. And as was solely within its province, the Commission confirmed that the controlling definition was that offered by Duke Energy Ohio in this proceeding, not the limited definition advanced by the Intervenor.⁶ And the Commission provided the basis for that determination.⁷

The Commission then evaluated the evidence of record relative to the controlling definition. And, in doing so, detailed the evidence it found persuasive and on which it relied in granting the Company’s request. Such evidence included the existence of sensitive underground infrastructure that complicated investigation and remediation techniques, the inability to accurately confirm the level of contamination until such time that site assessments were complete, and the need to properly address unique subsurface complexities that were confirmed only after site assessments were complete.⁸ The Intervenor does not take issue with these circumstances in their rehearing request. They simply contend that they were not exigent circumstances under their suggested definition. But theirs is not the interpretation the

⁵ *In the Matter of the Petition of Elmer H. Parke and the Louisville Subscribers of the Ohio Bell Telephone Company*, Case No.90-1473-TP-PEX, Entry on Rehearing, (March 12, 1992) at pg.7. Full cite for 90-1473-TP-PEX, March 12, 1992, Entry on Rehearing.

⁶ Finding and Order at pg.13.

⁷ *Id.*

⁸ Finding and Order, at pp. 13-14.

Commission intended, as first unambiguously stated in its prior order and as confirmed in its Deferral Order. Applying the correct definition to the only evidence presented, it is undeniable that the Commission's order is properly supported by the evidence of record and includes the reasons on which it is based.

B. The Commission's decision to affix a three-year deadline, to December 31, 2019, is fully supported by the record and the rationale therefore properly set forth, in compliance with R.C. 4903.09.

As a second ground for rehearing, the Intervenors contend that the Commission failed to set forth a basis for its decision to extend the deadline related to the East End site to December 31, 2019, and, further, that there is no evidentiary basis for this decision.⁹ But the Intervenors misinterpret the statutory obligations imposed upon, and rights vested in, the Commission.

It is undisputed that Duke Energy Ohio instituted this proceeding, in part, under R.C. 4905.13, and requested authorization to extend its then-current accounting procedures to defer income statement recognition of environmental investigation and remediation costs related to the East End site.¹⁰ Duke Energy Ohio also proposed a five-year extension.¹¹ In its Deferral Order, the Commission did not adopt this time period and, instead, adopted a shorter time period that it found more consistent with its initial decision authorizing recovery of legally mandated environmental investigation and remediation expenditures.¹² It is readily apparent from this determination that the Commission evaluated, or weighed the evidence of record and did not fully agree with the Company. It is further readily apparent that the Commission, as is its right, found it appropriate to modify the Company's request by shortening the time period. This was not an unsupported or unlawful decision.

⁹ Intervenor Application for Rehearing, at pg. 8.

¹⁰ Application, at pp. 12-13 (May 16, 2016).

¹¹ Reply Comments of Duke Energy Ohio, at pg. 11.

¹² Finding and Order, at pg. 14.

As explained in the Deferral Order, under R.C. 4905.13, the Commission must “establish systems of accounts to be kept by public utilities and...prescribe the manner in which these accounts will be kept.”¹³ Additionally, as detailed in the order, “the Commission may require the creation and maintenance of such additional accounts as may be prescribed to cover the accounting procedures of gas or natural gas companies operating within the state.”¹⁴ Pursuant to this clear mandate, the Company initiated the present proceeding and sought an extension of its existing right to defer environmental remediation and investigation expenses. Here, the Commission again exercised its right in respect of Duke Energy Ohio’s accounts and, based upon its assessment of the record, authorized a three-year extension. And, in doing so, it explained the basis for its decision.¹⁵ There can be only one conclusion – the decision comports with R.C. 4903.09.

C. The Commission’s decision properly did not extend to issues not before it and the Intervenors cannot now rely on those issues as warranting rehearing.

As their final claim for rehearing, the Intervenors contend that the Commission erred in allowing deferral of costs related to property that is not used and useful.¹⁶ But this claim is misplaced.

The Commission has already determined that Duke Energy Ohio’s environmental investigation and remediation costs are recoverable, pursuant to R.C. 4909.15(A)(4), as a cost of rendering utility service.¹⁷ It is patently clear that the Intervenors disagree with this finding, having appealed the Commission’s order to the Ohio Supreme Court. But the Commission’s determinations as to the lawfulness of cost recovery are valid and its order in full force and

¹³ Finding and Order, at pg. 1.

¹⁴ *Id.*, at pp.1-2.

¹⁵ *Id.*, at pg. 14.

¹⁶ Intervenors’ Application for Rehearing, at pp. 9-10.

¹⁷ *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in its Natural Gas Distribution Rates*, Case No.12-1685-GA-AIR, *et al.*, Opinion and Order, pp. 58-59 (November 13, 2015).


effect. And in connection with its valid and legally enforceable order authorizing cost recovery, the Commission provided Duke Energy Ohio the right to seek an extension of the identified deadlines. The present proceeding, therefore, simply reflects the Company's exercise of that opportunity. The present proceeding is not one in which to determine the legality of the Commission's grant of authority to recover these necessary business expenses. That proceeding is pending in another forum and the Commission thus rightfully limited its decision to the issues before it. The Intervenors' propensity to continue to assert challenges to a legal issue for which another tribunal now has jurisdiction is still improper.

III. Conclusion

The Commission's Deferral Order was lawful. The Commission, as was its prerogative and consistent with its past decision, concluded that the Company had demonstrated the existence of exigent circumstances that warranted an extension of the deferral applicable to investigation and remediation efforts related to the East End site. In reaching this conclusion, the Commission provided, with detail, its rationale and the evidence on which it relied. Further, the Commission, as it is authorized to do, prescribed the manner in which Duke Energy Ohio would keep accounts related to said costs, after thorough review and consideration of the evidence. Its order is lawful and reasonable and the Intervenors' mere disagreement with the outcome cannot alter that conclusion. The rehearing request must be denied.

Respectfully submitted,

Duke Energy Ohio, Inc.

Handwritten signature of Amy B. Spiller in blue ink, with a horizontal line underneath.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing were filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 30th day of January, 2017. The Commission's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.


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Summary: Memorandum Duke Energy Ohio's Memorandum Contra the Application for Rehearing of the Office of the Ohio Consumers' Counsel and The Kroger Company electronically filed by Dianne Kuhnell on behalf of Duke Energy Ohio, Inc. and Spiller, Amy B. and Watts, Elizabeth H.