

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE PROCUREMENT OF STANDARD SERVICE OFFER GENERATION AS PART OF THE FOURTH ELECTRIC SECURITY PLAN FOR CUSTOMERS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY.

CASE NO. 16-776-EL-UNC

IN THE MATTER OF THE PROCUREMENT OF STANDARD SERVICE OFFER GENERATION FOR CUSTOMERS OF DAYTON POWER & LIGHT COMPANY.

CASE NO. 17-957-EL-UNC

IN THE MATTER OF THE PROCUREMENT OF STANDARD SERVICE OFFER GENERATION FOR CUSTOMERS OF OHIO POWER COMPANY.

CASE NO. 17-2391-EL-UNC

IN THE MATTER OF THE PROCUREMENT OF STANDARD SERVICE OFFER GENERATION FOR CUSTOMERS OF DUKE ENERGY OHIO, INC.

CASE NO. 18-6000-EL-UNC

ENTRY ON REHEARING

Entered in the Journal on September 9, 2020

I. SUMMARY

{¶ 1} The Commission denies Interstate Gas Supply, Inc., Direct Energy Business, LLC, Direct Energy Services, LLC, and Retail Energy Supply Association's joint motion for waiver of Ohio Adm.Code 4901-1-02(D)(4) to perfect filing of their joint application for rehearing. Further, the Commission grants the applications for rehearing filed by Ohio Consumers' Counsel, FirstEnergy, Duke Energy Ohio, Dayton Power & Light Company, and AEP Ohio for the purpose of further consideration of the matters specified in the applications for rehearing.

II. PROCEDURAL BACKGROUND

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy); the Dayton Power and Light Company (DP&L); Ohio Power Company d/b/a/ AEP Ohio (AEP Ohio); and Duke Energy Ohio, Inc. (Duke) each qualify as an electric utility as defined by R.C. 4928.01(A)(11) and as an electric distribution utility (EDU) as defined by R.C. 4928.01(A)(6).

{¶ 3} R.C. 4928.141 provides that electric utilities shall provide consumers a standard service offer (SSO) of all competitive retail electric services in accordance with R.C. 4928.142 or 4928.143. The SSO functions to make generation supply available to customers that are not receiving this supply from a Competitive Retail Electric Services provider and is sometimes referred to as default supply. The Commission has approved the above EDUs' electric security plans (ESP), each of which implemented a competitive auction-based SSO format, as well as a competitive bid procurement process for the EDUs' auctions, to procure generation supply for customers of each EDU for a certain period of time. *In re Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, Case No. 14-1297-EL-SSO (ESP IV), Opinion and Order (Mar. 31, 2016); *In re Dayton Power & Light Co.*, Case No. 16-395-EL-SSO, Opinion and Order (Oct. 20, 2017); *In re The Dayton Power and Light Co.*, Case No. 08-1094-EL-SSO, et al., Proposed Revised Tariffs (Nov. 26, 2019) *In re Ohio Power Co.*, Case No. 16-1852-EL-SSO, et al., Opinion and Order (Apr. 25, 2018); and *In re Duke Energy Ohio, Inc.*, Case. No. 17-1263-EL-SSO (*Duke's ESP*), et al., Opinion and Order (Dec. 19, 2018). The use of this competitive bidding process is conducive to Ohio's legal framework that is designed to ensure that all retail electric customers served by EDUs have reliable access to electric generation supply at market-based prices.

{¶ 4} On July 25, 2019, the Federal Energy Regulatory Commission (FERC) issued an order directing PJM Interconnection, LLC (PJM) to not conduct its base residual auction (BRA) regarding the 2022-2023 delivery year, previously scheduled for August 2019. *Order on Motion for Supplemental Clarification*, Case No. EL16-49-00, at ¶ 2 (July 25, 2019). This direction prevented PJM from moving forward with a wholesale competitive bidding

process the output of which informed potential bidders in each EDU retail competitive bidding process associated with the SSO development of the forward cost of the capacity obligation arising from the provision of SSO generation supply.

{¶ 5} Thereafter, on December 19, 2019, FERC ordered that PJM must submit a new schedule regarding the BRA within 90 days. *Order Establishing Just and Reasonable Rate*, Case No. EL16-49-00, at ¶ 4 (Dec. 19, 2019).

{¶ 6} By Entry issued on February 13, 2020, in *In re Duke Energy Ohio, Inc.*, Case No. 17-1263-EL-SSO, et al., Entry (Feb. 13, 2020) at ¶ 8, the Commission directed Staff to file a proposal for a modified product which contains capacity flow-through provisions since the uncertainty caused by FERC's order precludes the use of a more-traditional three-year auction product at a time when market fundamentals were signaling opportunities to use a forward looking competitive bidding process to lock in historically low energy prices for the benefit of Ohio retail electric customers.

{¶ 7} On March 13, 2020, Staff filed its proposal and recommendation, as directed by the Commission in its February 13, 2020 Entry.

{¶ 8} By Entry issued on April 6, 2020, the attorney examiner invited interested stakeholders to file public comments discussing Staff's proposal and recommendation. All comments were due by April 16, 2020.

{¶ 9} On April 16, 2020, written comments were filed by Duke; Interstate Gas Supply, Inc., Direct Energy Business, LLC, and Direct Energy Services, LLC (collectively, IGS/Direct); and Energy Harbor LLC (Energy Harbor). On May 8, 2020, FirstEnergy filed its comments.

{¶ 10} On the same date, FirstEnergy filed a motion to intervene in this proceeding. On May 21, 2020, Ohio Energy Group filed a motion to intervene, and, on May 29, 2020, Ohio Consumers' Counsel (OCC) filed a motion to intervene. No memoranda contra were filed in response to these motions. The Commission granted these motions for intervention

in its July 15, 2020 Finding and Order.

{¶ 11} By Entry issued on May 15, 2020, the attorney examiner invited interested stakeholders to file reply comments and sur-reply comments in response to the comments filed regarding Staff's proposal and recommendation and specifically requested that commenters discuss questions posed in the Entry about Energy Harbor's proposals. All reply comments and sur-reply comments were due by May 29, 2020, and June 5, 2020, respectively.

{¶ 12} On May 29, 2020, written reply comments were filed by Ohio Power Company (AEP Ohio), Duke, OCC, IGS/Direct, and FirstEnergy.

{¶ 13} Due to the Commission's offices being closed from June 1, 2020, through June 5, 2020, filing deadlines occurring while the offices were closed were extended in accordance with R.C. 1.14.

{¶ 14} Sur-reply comments were filed on June 8, 2020, by AEP Ohio, FirstEnergy, IGS/Direct, and Exelon Generation Company, LLC.

{¶ 15} On July 15, 2020, the Commission issued its Finding and Order directing each EDU to modify its SSO procurement auction in the manner described in the order.

{¶ 16} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 17} On August 14, 2020, applications for rehearing were filed by OCC, FirstEnergy, Duke, DP&L, and AEP Ohio. On the same date, Retail Energy Supply Association (RESA) filed a motion for leave to enter appearance on rehearing. On August 17, 2020, IGS/Direct and RESA (Joint Parties) filed a joint application for rehearing and also filed a joint motion for waiver of Ohio Adm.Code 4901-1-02(D)(4) to perfect filing of the

application for rehearing.

{¶ 18} On August 24, 2020, memoranda contra the applications for rehearing were filed by Industrial Energy Users-Ohio and Energy Harbor LLC.

III. REQUEST FOR WAIVER

{¶ 19} Ohio Adm.Code 4901-1-38(B) permits the Commission, upon an application or motion by any party, to waive any requirement of Ohio Adm.Code Chapter 4901-1 not mandated by statute for good cause shown.

{¶ 20} In support of their joint motion for waiver of Ohio Adm.Code 4901-1-02(D)(4), the Joint Parties admit that their docketed version of the application for rehearing shows that it was received by the Commission at 5:47 p.m. on August 14, 2020. They assert that because their application was actually received by the Commission on the 30th day following the July 15, 2020 Finding and Order, it is deemed “filed” as of August 14, 2020, in accordance with the judicially-recognized definitions of the terms “filed” and “day.” They concede that their application was deemed filed on the next business day after August 14, 2020, under Ohio Adm.Code 4901-1-02(D)(4) but contend that the actual filing date is the date that matters under R.C. 4903.10. Consequently, they maintain that their application was timely filed. The Joint Parties further argue that the circumstances surrounding the late filing demonstrate good cause for waiver. They claim that they experienced technical issues with the Commission’s electronic docketing system as they began the filing process shortly after 5:00 p.m. on August 14, 2020. They state that they were able to successfully file the motion for leave to enter for appearance on rehearing, but their attempted filing of the application for rehearing resulted in error messages until the docketing system accepted the filing at 5:47 p.m. The Joint Parties state that, normally, counsel would have walked a paper filing to the Commission’s offices when experiencing such an issue, but, due to the global pandemic and the suspension of in-person paper and facsimile document filing, they were unable to do so. *In the Matter of the Proper Procedures and Process for the Commission’s Operations and Proceedings During the Declared State of Emergency and Related Matters, Case*

No. 20-591-AU-UNC, Entry (Mar. 12, 2020) at ¶¶9, 14 (*Emergency Declaration Entry*). Also, they argue that denying this waiver will be prejudicial to them since it would terminate their appellate rights.

{¶ 21} We note that the time stamp on the confirmation page of the Joint Parties' application for rehearing states that it was filed on August 14, 2020, at 5:47 p.m. and is, therefore, deemed filed on the next business day, August 17, 2020, pursuant to Ohio Adm.Code 4901-1-02(D)(4). Here, the Joint Parties partly argue that a strict statutory interpretation should be held by the Commission to deem the application for rehearing filed within the statutory deadline, contravening our current electronic e-filing rule.

{¶ 22} The facts and applicable law here are not in dispute. R.C. 4903.10 and Ohio Adm.Code 4901-1-35 provide that any party who has entered an appearance in a Commission proceeding may apply for rehearing of a Commission order with respect to any matters determined therein by filing and application for rehearing within 30 days after the entry of the order upon the Commission's journal. R.C. 4901.10 requires the Commission's office to be open between 8:30 a.m. and 5:30 p.m. throughout the year, Saturdays, Sundays, and legal holidays excepted. Accordingly, when the Commission adopted rules for e-filing, we constrained the Commission's e-filing system to abide by the traditional deadlines for paper filings to follow the statutory requirement set forth in R.C. 4901.10 and to create a level playing field for parties who may not have the resources to make e-filings. Therefore, Ohio Adm.Code 4901-1-02(D)(4) currently provides that any electronically-filed (e-filed) document received after 5:30 p.m. shall be considered filed on the next business day.

{¶ 23} R.C. 4901.13 authorizes this Commission to adopt and publish rules to govern its proceedings and to regulate the mode and manner of all valuations, tests, audits, inspections, investigations, and hearings relating to parties before it. Pursuant to this authority, the Commission has, since 2005, developed procedures to accommodate e-filing in a series of rule-making cases in which the appropriate time for determining the official

date of filing was raised and considered. See, e.g., *In re the Request of SBC Ohio for a Waiver of Procedural Rules to Permit Electronic Filing*, Case No. 05-548-AU-WVR; *In re the Expansion of the Electronic Filing Pilot Project and Waiver of Procedural Rules in Ohio Adm.Code 4901-1-02 through 4901-1-04*, Case No. 06-900-AU-WVR. The Commission has also considered stakeholder arguments in retaining the 5:30 p.m. deadline for different methods of filing. *In re the Commission's Review of Ohio Adm.Code Chapters 4901-1, 4901-3, 4901-9, and 4901:1-1*, Case No. 11-776-AU-ORD (*E-Filing Rules Case*), Finding and Order (Jan. 22, 2014) at ¶¶13-14, 22, 40.

{¶ 24} We also note that the Supreme Court of Ohio has long held that time is of the essence with respect to the filing of an application for rehearing, and if such application is filed out of time, the Commission has no jurisdiction to entertain it. *City of Dover v. Pub. Util. Com.*, 126 Ohio St. 438, 449, 185 N.E. 833 (1933), Syllabus 1 and 2; *Greer v. Pub. Util. Comm.*, 172 Ohio St. 361, 362, 16 O.O.2d 214, 176 N.E.2d 416 (1961). However, the question presented here is different from the issues raised in the above cited cases because a new method of filing is now available. Nevertheless, the Commission addressed the statutory deadline for e-filing applications for rehearing in *In re the Complaint of Cynthia Wingo v. Nationwide Energy Partners, LLC, et al.*, Case No. 16-2401-EL-CSS (*Wingo Case*), Entry on Rehearing (Jan. 17, 2018), where it set forth the reasoning articulated above regarding e-filing rule development and ultimately held that the Commission's establishment of the 5:30 p.m. e-filing deadline is reasonable, consistent with the statutory requirements set forth in R.C. 4901.10, and well within this Commission's authority under R.C. 4901.13. *Wingo Case* at ¶¶11-15.

{¶ 25} The Joint Parties submit that good cause exists to waive Ohio Adm.Code 4901-1-02(D)(4) because of the technical difficulties they experienced when attempting to e-file and because of the subsequent inability to paper file the application due to the suspension of in-person filing as a result of the pandemic. While the Commission has extended filing deadlines in previous cases for building closures and technological impediments, the circumstances here are distinguishable from these prior cases, especially since R.C. 1.14 and

rules governing computation of time, as examined further below, are inapplicable in the instant case. See, e.g., *In re the Extension of Filing Dates for Pleadings and Other Papers Due to a Building Emergency*, Case No. 14-38-AU-UNC, Entries (Jan. 8, and Mar. 3, 2014); *In re the Commission's Review of Ohio Adm.Code Chapter 4901:1-10*, Case No. 12-2050-EL-ORD, Entry (Dec. 21, 2017); *In re the Extension of Filing Dates for Pleadings and Other Papers Due to a Building Emergency*, Case No. 20-1132-AU-UNC, Entry (June 8, 2020). As set forth above, as articulated in the *Wingo Case* at ¶15, and unlike the above cases that primarily extended non-statutorily-mandated filing deadlines or invoked R.C. 1.14, the Commission's establishment of the 5:30 p.m. e-filing deadline is consistent with the statutory requirements set forth in R.C. 4901.10 and well within this Commission's authority under R.C. 4901.13.

{¶ 26} Moreover, as far as the Joint Parties' good cause argument can be construed as invoking R.C. 1.14 and Ohio Adm.Code 4901-1-07(D), that argument is not well-taken. R.C. 1.14 and Ohio Adm.Code 4901-1-07(D) state that when a public office is closed or closes early on the last day an act required by law is to be performed, then that act may be performed on the next succeeding day that is not a Saturday, Sunday, or legal holiday. R.C. 1.14; Ohio Adm.Code 4901-1-07(D). While in-person paper filing was suspended pursuant to the *Emergency Declaration Entry*, the building in which the Commission sits was not closed on August 14, 2020, nor were the Commission's offices, and the Commission's docketing division was accepting mailed and e-filed documents until 5:30 p.m. The Commission is also unaware of any system-wide Docketing Information System failure significant enough in length or breadth to effectively close out e-filers on that date, proof of which exists in that other parties successfully e-filed their applications for rehearing throughout the afternoon of August 14, 2020. Furthermore, the Joint Parties had substantial notice of this in-person filing suspension since the Entry declaring such suspension was issued on March 12, 2020, within which it also declared that this suspension would remain in effect until further notice. *Emergency Declaration Entry*. The Commission has previously discouraged end-of-day filing and encouraged e-filers to make an e-filing no later than 4:00 p.m. to allow time for same-day review and acceptance of e-filings, as well as notified e-filers that they bear the risk of

transmitting a document. *E-Filing Rules Case, Finding and Order* (Jan. 22, 2014) at ¶22; Ohio Adm.Code 4901-1-02(D)(6); Ohio Adm.Code 4901-1-02(D)(7). Yet, the Joint Parties began their filing process after 5:00 p.m. on the last day of the 30-day period set by statute, fully apprised of the foregoing circumstances and knowing they bore the risk of their application for rehearing failing to properly transmit.

{¶ 27} Accordingly, we find that the Commission should not waive Ohio Adm.Code 4901-1-02(D)(4) because the deadline to file the Joint Parties' application for rehearing is statutorily mandated and R.C. 1.14 and Ohio Adm.Code 4901-1-07(D) are inapplicable. Furthermore, the Joint Parties failed to demonstrate that good cause exists to waive this rule. Therefore, the Commission denies the Joint Parties' motion.¹ Further, we find that the Joint Parties are not prejudiced by this decision since the substance of the arguments submitted by them in their joint application for rehearing has been addressed by the other parties' arguments in their applications for rehearing. The Supreme Court of Ohio has held that R.C. 4903.10 does not require that an error be alleged in the appellant's application for rehearing; it can be in an application for rehearing filed by a nonappellant intervening party. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958 at ¶16, quoting *Cincinnati Bell Tel. Co. v. Pub. Util. Comm.* (2001), 92 Ohio St.3d 177, 180.

IV. APPLICATIONS FOR REHEARING

{¶ 28} Upon review, the Commission believes that the applications for rehearing filed by OCC, FirstEnergy, Duke, DP&L, and AEP Ohio have set forth sufficient reasons to warrant further consideration of the matters specified in the applications for rehearing. Accordingly, these parties' applications for rehearing should be granted.

V. ORDER

{¶ 29} It is, therefore,

¹ The Commission notes that RESA also filed a motion for leave to enter appearance on rehearing on August 14, 2020. In light of the denial of the waiver of Ohio Adm.Code 4901-1-02(D)(4), this motion is moot.

{¶ 30} ORDERED, That the Joint Parties' joint motion for waiver of Ohio Adm.Code 4901-1-02(D)(4) be denied. It is, further,

{¶ 31} ORDERED, That the applications for rehearing filed by OCC, FirstEnergy, Duke, DP&L, and AEP Ohio be granted for further consideration of the matters specified in the applications for rehearing. It is further,

{¶ 32} ORDERED, That a copy of this Entry be served upon all parties of record.

COMMISSIONERS:

Approving:

Sam Randazzo, Chairman

M. Beth Trombold

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

MJS/kck

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Case No(s). 16-0776-EL-UNC, 17-0957-EL-UNC, 17-2391-EL-UNC, 18-6000-EL-UNC

Summary: Entry denying Interstate Gas Supply, Inc., Direct Energy Business, LLC, Direct Energy Services, LLC, and Retail Energy Supply Association's joint motion for waiver of Ohio Adm.Code 4901-1-02(D)(4) to perfect filing of their joint application for rehearing. Further, the Commission grants the applications for rehearing filed by Ohio Consumers' Counsel, FirstEnergy, Duke Energy Ohio, Dayton Power & Light Company, and AEP Ohio for the purpose of further consideration of the matters specified in the applications for rehearing electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio