

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. 21-887-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc., for Tariff Approval.)))	
)	Case No. 21-888-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.)))	
)	Case No. 21-889-EL-AAM

**DUKE ENERGY OHIO, INC.'S MEMORANDUM CONTRA THE OFFICE OF THE
OHIO CONSUMERS' COUNSEL'S INTERLOCUTORY APPEAL, REQUEST FOR
CERTIFICATION AND APPLICATION FOR REVIEW**

Pursuant to Ohio Administrative Code (O.A.C.) 4901-1-15(C), Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby files this Memorandum Contra the Interlocutory Appeal, Request for Certification and Application for Review (Appeal) filed by the Office of the Ohio Consumers' Counsel (OCC) on September 26, 2022. For the reasons discussed below, the Appeal should be denied.

I. BACKGROUND

After several months of negotiation, and nearly a dozen settlement meetings, to which OCC was a participant (even after confirming that it did not intend to settle the underlying matter), Duke Energy Ohio filed a joint stipulation and recommendation ("Stipulation") signed by the Company, Staff, and ten other parties to this case on September 19, 2022. As requested by the parties, the Attorney Examiners held a prehearing conference to discuss the procedural schedule in this case on September 20, 2022. At that conference, all parties to the case had the opportunity to share

their opinions regarding the appropriate timeframes for filing testimony in support of or in opposition to the Stipulation, to complete prehearing discovery, and to begin the hearing in this matter. After taking those opinions into consideration, the Attorney Examiners issued an Entry setting forth a procedural schedule on the same day. Among other deadlines, the September 20th Entry required the filing of testimony in support of the Stipulation by September 22nd and the filing of testimony in opposition to the Stipulation by September 29th. It set the hearing for this proceeding to begin on October 4, 2022. And it shortened the time to respond to discovery requests to five calendar days. OCC now asserts that the procedural schedule is so unduly prejudicial that the Attorney Examiners should certify the procedural schedule to the full Commission and let the Commissioners reset the testimony deadlines and hearing date. The Attorney Examiners should decline to certify the interlocutory appeal and affirm the existing procedural schedule.

II. THE COMMISSION SHOULD DECLINE TO CERTIFY THE APPEAL

OCC's complaints about the procedural schedule do not meet the Commission's requirements for certifying an appeal to the Commission. The fact that a procedural schedule does not provide the same amount of time to conduct discovery, submit testimony, or prepare for hearing as a prior rate case involving Duke Energy Ohio does not qualify as a "departure from past precedent" for purposes of Rule 4901-1-15. Yet this is the only reason OCC provides for certification of this appeal. Moreover, none of OCC's complaints about the procedural schedule demonstrate "undue prejudice." For these reasons, and as further discussed below, Duke Energy Ohio asks that the Attorney Examiners decline to certify the procedural schedule for interlocutory appeal and affirm the schedule previously set in the September 20th Entry.

A. The Commission Exercising Control Over its Own Docket and Hearing Schedule is not a Departure from Past Precedent.

According to O.A.C. 4901-1-15(B), two determinations must be made. First, the Appeal must be certified to the Public Utilities Commission of Ohio (Commission) as either (1) presenting

a new or novel question of interpretation, law, or policy or (2) being based on a ruling that is a departure from past precedent where an immediate Commission determination is needed in order to prevent undue prejudice or expense to a party in the event the Commission ultimately reverses the ruling. OCC bases its request for certification on the second of these two factors.

OCC claims that the scheduling order issued on September 20, 2022, in this proceeding was a departure from Commission precedent.¹ But amazingly, OCC bases its claim on a single, prior instance in which opposing parties were given more time to prepare for hearing than was permitted in this instance—Duke Energy Ohio’s 2017 rate case.² OCC thus ignores the fact that the September 20th Entry gives the parties greater power to conduct pre-hearing discovery, more time to file testimony opposing the Stipulation, and more time to prepare for hearing than either statute or the Commission’s regulations require.

The default deadline for serving discovery requests in a rate case is “no . . . later than fourteen days after the filing and mailing of the staff report of investigation[.]”³ The Staff Report in this proceeding was filed on May 19, 2022. The September 20th Entry allows the parties to continue serving discovery up to the hearing and shortens the response time to five calendar days. The Commission’s rules also do not require it to give parties any particular amount of time to file testimony in opposition to a written stipulation.⁴ But the September 20th Entry gave Appellants thirteen days from the date they were first served with the Stipulation, September 16, 2022, by which to do so. And the Commission’s governing statutes require the Commission to give the parties only “ten days’ written notice” of the time and place to take testimony in a rate case.⁵ The

¹ Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review by the Office of the Ohio Consumers’ Counsel (OCC Appeal) at 3.

² *Id.*

³ Ohio Adm.Code 4901-1-17(B).

⁴ *See* Ohio Adm.Code 4901-1-30(D).

⁵ R.C. 4909.19(C).

September 20th Entry gave the parties two weeks advance notice – above and beyond the statutory requirement. The procedural schedule set by the September 20th Entry is lawful, reasonable, and in line with Commission precedent.

OCC argues that the procedural schedule is still a departure from past precedent, which OCC alleges was established in Duke Energy Ohio’s last base rate case, Case No. 17-32-EL-AIR. However, that proceeding did not establish a precedent for all subsequent rate case proceedings or establish a baseline or minimum schedule by which Duke Energy Ohio base rate proceedings must be conducted. Instead, “establishing a procedural schedule . . . is fully within the Commission’s broad discretion to manage its dockets, including the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay, and eliminate unnecessary duplication of effort.”⁶ Not surprisingly, procedural schedules vary from case to case. OCC acknowledges this, arguing only that the procedural schedule in this matter should be “consistent with the previous rate case[.]”⁷ The precedent OCC should be focused on is not just one prior rate case involving the Company, but the weight of all instances where the Commission has had managerial power over its own schedule and dockets. And OCC ignores more recent cases in which the parties opposing a stipulation had similar time to file testimony and proceeding to hearing following the filing of a stipulation.⁸ For example, in AEP Ohio’s most recent base rate case, the Attorney Examiner issued an Entry on April 5, 2021, requiring testimony in support of the stipulation be filed April 9, 2021,

⁶ *In the Matter of the Application of Duke Energy Ohio, Inc. for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs*, Case No. 18-397-EL-RDR, Entry at ¶ 10 (July 2, 2019) (citing *Duff v. Pub. Util. Comm.*, 56 Ohio St.2d 367, 379 (1978), and *Toledo Coalition for Safe Energy v. Pub. Util. Comm.*, 69 Ohio St.2d 559, 560 (1982)).

⁷ OCC Appeal at 3.

⁸ See, e.g., *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of an Increase in Gas Rates*, Case Nos. 18-0298-GA-AIR *et al.*; see also *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case No. 20-585-EL-AIR, *et al.*

four days later. The Attorney Examiner also required that testimony in opposition to that stipulation be filed April 16, 2021, seven days after testimony in support—just like the underlying case. Additionally, that case required deadlines for motions to strike objections to the Staff Report, and Memoranda contra those motions to strike (events already taken place in this case) and still managed to set a hearing date of May 10, 2021.⁹ Likewise, in 2019, the Commission considered *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc., for Approval of an Increase in Gas Rates*, Case Nos. 18-0298-GA-AIR *et al.* Again, the Commission managed its docket in this rate case, and established timelines not wholly unaligned with those in the case at hand: testimony in support of the stipulation in that case was to be filed the 17th of January, Staff testimony due the 22nd of January, opposition testimony to the Stipulation was to be filed the 28th of January, and the hearing was set for January 29th – one day later.¹⁰

Additionally, in this particular case, the hearing is scheduled to be held 398 days after the Company’s application was filed, already more than 123 days beyond that statutory deadline for the issuance of an order in a base rate case. As has been noted by the Commission on previous occasions “the Commission must also be mindful of the timing requirements in R.C. 4909.42” as “[t]he statute provides that, where the Commission fails to issue an order within 275 days of the filing of an application under R.C. 4909.18, a public utility requesting an increase on any rate . . . the increase shall go into effect upon the filing of a bond or a letter of credit by the public utility, subject to refund.”¹¹

In reality, and as recognized by the Commission, schedules vary from one case to another, based on the facts and circumstances in each. Commission precedent is clear that the Commission

⁹ *In the Matter of the Application of Ohio Power Company for an Increase in Electric Distribution Rates*, Case No. 20-585-EL-AIR, *et al.*, April 5, 2021 Entry on Procedural Schedule.

¹⁰ *In the Matter of the Application of Vectren Energy Delivery of Ohio, Inc.*, Case Nos. 18-0298-GA-AIR *et al.*, Transcript at 6:15-21 (Jan. 11, 2019).

¹¹ R.C. 4909.18

and its examiners have discretion to set procedural schedules that match the complexity of the issues in the case.¹² After due consideration of OCC's arguments regarding the procedural schedule during the prehearing conference on September 20th, the Attorney Examiners set a reasonable procedural schedule for this proceeding. The fact that the procedural schedule was different from the one OCC proposed at the prehearing conference, and different from the procedural schedules set in some other Commission proceedings, does not make the procedural schedule a departure from past precedent.¹³ OCC has failed to satisfy the first prong of Ohio Adm.Code 4901-1-15(B) for certifying an interlocutory appeal and, therefore, its interlocutory appeal should not be certified to the Commission.

The schedule set by the Attorney Examiners in this proceeding is not a departure from past precedent and therefore should not be certified.

¹² See, e.g., *In re Ohio Power Co.*, Case No. 16-1852-ELSSO, *et al.*, Entry (Feb. 8, 2018) at ¶ 24; *In re The Dayton Power and Light Co.*, Case No. 12-426- EL-SSO, *et al.*, Entry (Jan. 14, 2013) at 5; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 12-1230-EL-SSO, Entry (May 2, 2012) at 4; *In re Duke Energy Ohio, Inc.*, Case No. 08-920-EL-SSO, *et al.*, Entry (Oct. 1, 2008) at 7; *In re Ohio Edison Co., The Cleveland Electric Illuminating Co., and The Toledo Edison Co.*, Case No. 08- 935-EL-SSO, Entry (Sept. 30, 2008) at 3; *In re Vectren Energy Delivery of Ohio, Inc.*, Case No. 05-1444-GA-UNC, Entry (Feb. 12, 2007) at 7; *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 05- 376-EL-UNC, Entry (May 10, 2005) at 2.

¹³ See *In the Matter of the Application of P.H. Glatfelter Co. for Certification as an Eligible Ohio Renewable Energy Resource Generating Facility*, Case No. 09-730-ELREN, Entry, ¶ 10 (Oct. 15, 2009) (holding that challenges to a procedural schedule do not meet the requirements for certifying interlocutory appeals, because “[s]etting procedural schedules . . . is a routine matter with which the Commission and its examiners have significant experience, and, thus, . . . is not a departure from past precedent.”). See also *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Force Majeure Determination for a Portion of the 2010 Solar Energy Resources Benchmark Requirement Pursuant to Section 4928.64(C)(4), Revised Code, and Section 4901:1- 40-06 of the Ohio Administrative Code*, Case No. 11-411-EL-ACP, Entry, ¶ 7 (Mar. 16, 2011); *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Entry, ¶ 9 (May 2, 2012).

B. OCC has not Demonstrated that the September 20th Entry's Case Schedule is Unduly Prejudicial.

OCC has not met the second requirement for certification of an interlocutory appeal: demonstration of undue prejudice. OCC offers two reasons why they believe the procedural schedule is unduly prejudicial to them, neither of which demonstrates actual prejudice.

OCC's concerns are twofold: violation of their discovery rights and ample time to prepare testimony following the completion of their discovery process.¹⁴ Neither argument is compelling, nor borne out by the discovery process as it has unfolded since the Commission's scheduling order was issued. Namely, OCC fails to recognize that it has had over a year since the Company filed its application to ask all the questions it wanted. And it has known for some time what might or would be addressed in the stipulation, having been privy to every all-party settlement conference, upwards of a dozen of which took place between June and September. OCC could have been preparing testimony all along, especially considering that it was well aware it would not be joining the Stipulation some time before its filing. Indeed, OCC did file testimony in the underlying matter already on behalf of four witnesses and in opposition to the Company's Application and the Staff Report filed in the underlying case. OCC has clearly had their arguments against Duke Energy Ohio's Application and the Stipulation prepared for some time. OCC has had thirteen months to issue discovery and learn the facts and issues in this case. It is disingenuous for OCC to now maintain that it was without due process in this case. Moreover, since the scheduling order was issued on September 20th, OCC has issued three sets of discovery to the Company, which discovery was answered promptly within the 5-day period of time allotted for discovery responses. The Company has also cooperated in providing witnesses for deposition, two of which sat on Monday, September 26, 2022, at the request of OCC.

¹⁴ OCC Appeal at 4.

The Attorney Examiners should find that OCC has failed to demonstrate that an immediate determination by the Commission is needed to prevent the likelihood of any undue prejudice resulting from the September 20, 2022 Entry. OCC has had ample time to conduct discovery and prepare for hearing and has not shown that the procedural schedule is unduly prejudicial or unreasonable under the circumstances of this proceeding.

Finally, OCC takes issue with the Attorney Examiners affording Staff an opportunity to file testimony in response to objections to the Staff Report. Under the September 20, 2022 entry, any such testimony is to be filed by Staff by October 3, 2022. OCC argues that Staff is “being given a ‘second bite of the apple’” because they have been permitted to “provide testimony in support of the settlement and then an additional testimony opportunity (to apparently address objections).”¹⁵ However, this argument has no merit. As OCC itself admits, these are *two separate apples*. One to address the Stipulation, and one to address Objections to the Staff Report. Something Staff has not yet gotten a chance to do in this case. This argument is not supported by OCC and should be disregarded. The Commission can establish the type and format of testimony it hopes to hear in a case, and the timing for such submissions. It has done so here.

III. CONCLUSION

For the reasons provided above, Duke Energy Ohio respectfully requests that the Commission decline to certify OCC’s interlocutory appeal or, in the alternative, affirm the September 20, 2022 Entry.

¹⁵ OCC Appeal at 5.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra to the Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review of the Office of the Ohio Consumers' Counsel was served on the persons stated below via electric transmission this 28th day of September 2022.

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Case No(s). 21-0887-EL-AIR, 21-0888-EL-ATA, 21-0889-EL-AAM

Summary: Memorandum Duke Energy Ohio, Inc.'s Memorandum Contra The Office of The Ohio Consumers' Counsel Interlocutory Appeal, Request For Certification and Application For Review electronically filed by Mrs. Tammy M. Meyer on behalf of Duke Energy Ohio Inc. and D'Ascenzo, Rocco and Akhbari, Elyse Hanson and Kingery, Jeanne and Vaysman, Larisa and Brama, Elizabeth and Verhalen, Kodi J.