

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE COMMISSION'S
CONSIDERATION OF A SETTLEMENT
AGREEMENT BETWEEN DIRECT ENERGY
SERVICES, LLC AND THE COMMISSION'S
STAFF.

CASE NO. 22-583-GE-UNC

ENTRY

Entered in the Journal on June 20, 2023

I. SUMMARY

{¶ 1} In this Entry, the attorney examiner denies the certification of the interlocutory appeal filed by Direct Energy Services, LLC, and establishes a procedural schedule.

II. PROCEDURAL HISTORY

{¶ 2} Direct Energy Services, LLC (Direct Energy or the Company) is an electric services company as defined in R.C. 4928.01 and a retail natural gas supplier as defined in R.C. 4929.01; is certified to provide competitive retail electric service (CRES) under R.C. 4928.08 and to supply competitive retail natural gas service (CRNGS) under R.C. 4929.20; and is subject to the jurisdiction of this Commission pursuant to R.C. 4928.16 and R.C. 4929.24. Accordingly, Direct Energy is required to comply with the Commission's minimum CRES standards set forth in Ohio Adm.Code Chapter 4901:1-21, as well as the minimum CRNGS standards set forth in Ohio Adm.Code Chapter 4901:1-29.

{¶ 3} Ohio Adm.Code 4901:1-23-04(A) provides that, if Staff and a CRES provider reach agreement regarding the violation of a rule within Ohio Adm.Code Chapter 4901:1-21, the violation of a Commission order, a proposed corrective action or remedy, or the amount of a forfeiture or other payment, the agreement must be reduced to writing in a settlement agreement and filed with the Commission for approval. Similarly, Ohio Adm.Code

4901:1-34-05(A) provides that, if Staff and a retail natural gas supplier reach agreement regarding the violation of a rule within Ohio Adm.Code Chapters 4901:1-27 through 4901:1-29, the violation of any provision of R.C. Chapter 4929, the violation of a Commission order, a proposed corrective action or remedy, or the amount of a forfeiture or other payment, the agreement must be reduced to writing and filed with the Commission for approval.

{¶ 4} On June 10, 2022, Direct Energy and Staff (Signatory Parties) filed a joint stipulation and recommendation (Stipulation). Attached to the Stipulation was a notice of probable noncompliance (Notice Letter) issued by Staff on June 9, 2021, to Direct Energy with respect to certain record keeping, marketing and enrollment practices, and billing issues. In its Notice Letter, Staff proposed corrective actions to address the issues of probable noncompliance. The Stipulation, as proposed, would resolve all of the issues identified by Staff in the Notice Letter. The Stipulation notes that the Signatory Parties engaged in numerous discussions to address the issues raised in the Notice Letter and reached a resolution after such discussions.

{¶ 5} On July 1, 2022, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene.

{¶ 6} July 18, 2022, Direct Energy filed a memorandum contra the motion to intervene. OCC filed a reply to Direct Energy's memorandum contra on July 25, 2022.

{¶ 7} By Entry dated September 16, 2022, the attorney examiner granted OCC's motion to intervene.

{¶ 8} On September 21, 2022, Direct Energy filed a request to certify to the Commission an interlocutory appeal of the decision to grant OCC's motion to intervene in the September 16, 2022 Entry.

{¶ 9} On September 26, 2022, OCC timely filed a memorandum contra Direct Energy's interlocutory appeal.

III. DISCUSSION

{¶ 10} The attorney examiner finds that Direct Energy’s interlocutory appeal, filed on September 21, 2022, should not be certified to the Commission. Ohio Adm.Code 4901-1-15 sets forth the standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission by the attorney examiner pursuant to paragraph (B) of the rule. The ruling in the September 16, 2022 Entry, which is the subject of the interlocutory appeal, is not one of the four specific rulings enumerated in Ohio Adm.Code 4901-1-15(A). Therefore, the interlocutory appeal should be certified to the Commission only if the interlocutory appeal meets the requirements of Ohio Adm.Code 4901-1-15(B).

{¶ 11} Ohio Adm.Code 4901-1-15(B) specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent and that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties should the Commission ultimately reverse the ruling in question. In order to certify an interlocutory appeal to the Commission, both requirements must be met.

{¶ 12} The attorney examiner finds the interlocutory appeal should not be certified to the Commission because the interlocutory appeal fails to satisfy the requirements of Ohio Adm.Code 4901-1-15(B). Ohio Adm.Code 4901-1-15(B) requires that, for an interlocutory appeal to be certified, the attorney examiner must first find that the appeal either presents a new or novel question of law or policy or is taken from a ruling which represents a departure from past precedent. Direct Energy’s appeal does not satisfy this threshold.

{¶ 13} As an initial matter, the attorney examiner notes that the Supreme Court of Ohio has held that intervention should generally be “liberally construed in favor of intervention.” *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-

5853, 856 N.E.2d 940, ¶ 16 quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 656 N.E.2d 1277 (1995). Despite this liberal intervention standard, Direct Energy argues that the attorney examiner's decision to grant OCC intervention in the September 16, 2022 Entry departs from past Commission precedent. Direct Energy relies on *In re East Ohio Gas Co.*, Case No. 12-380-GA-GPS (*East Ohio*), in which the Commission denied a motion to intervene filed by OCC, stating that OCC could not establish statutory authority to participate in a gas pipeline safety enforcement case. *East Ohio*, Entry (Apr. 20, 2012). However, the attorney examiner finds that Direct Energy's reliance upon *East Ohio* is misplaced. Staff's enforcement action in *East Ohio* was initiated pursuant to R.C. 4905.91, which provides that the Commission may investigate any service, act, practice, policy, or omission by an operator to determine its compliance with R.C. 4905.90 through 4905.96 and the pipeline safety code. But there is no express statutory authority in R.C. 4911.02, R.C. 4911.14 or R.C. 4911.15 for OCC to intervene in gas pipeline investigations brought under R.C. 4905.91. This case, on the other hand, was initiated pursuant to R.C. 4928.16 and R.C. 4929.24, both of which expressly authorize OCC to appear before the Commission as the representative of residential consumers in actions brought under the statutes. The attorney examiner is not persuaded by Direct Energy's attempt to parse the language of R.C. 4928.16 and R.C. 4929.24 to limit OCC's authority to intervene in cases brought upon complaint by OCC or a residential customer as opposed to a proceeding brought "upon complaint or initiative of the Commission." Moreover, as the attorney examiner noted in the September 16, 2022 Entry, the Commission has granted OCC intervention in numerous Commission-ordered investigations brought under R.C. 4928.16 or R.C. 4929.24, some of which are factually nearly identical to the instant case. See, e.g., *In re RPA Energy dba Green Choice Energy*, Case No. 22-441-GE-COI (*RPA Energy*), Entry (July 6, 2022), Entry (Aug. 15, 2022); *In re XOOM Energy Ohio, LLC*, Case No. 22-267-GE-COI (*XOOM Energy*), Entry (May 20, 2022), Entry (Aug. 26, 2022); *In re SFE Energy Ohio, Inc., and Statewise Energy Ohio, LLC*, Case No. 20-1216-GE-COI (*SFE Energy*), Entry (Sept. 28, 2020); *In re PALMco Power OH, LLC dba Indra Energy & PALMco Energy OH, LLC dba Indra Energy*, Case No. 19-2153-GE-COI, Entry (Apr. 6, 2020); *In re PALMco Power OH, LLC dba Indra Energy & PALMco Energy OH*,

LLC dba Indra Energy, 19-957-GE-COI, Entry (Sept. 3, 2019); *In re Verde Energy USA Ohio, LLC*, Case No. 19-958-GE-COI, Entry (May 16, 2019). Accordingly, the attorney examiner finds that granting intervention to OCC in this proceeding does not represent a departure from past precedent. To find otherwise would render a nonsensical interpretation of R.C. 4928.16 and 4929.24 and would contradict the Commission's precedent on this very issue.

{¶ 14} The attorney examiner further finds that Direct Energy does not raise a new or novel question of law or policy in its interlocutory appeal. Direct Energy claims that its appeal presents a novel question of law or policy because it contests OCC's legal authority to participate in a case involving the Commission's consideration of a resolution to a notice of probable noncompliance against a CRES/CRNGS supplier. Direct Energy attempts to distinguish the instant case from *RPA Energy* and *XOOM Energy*, among other Commission Ordered Investigation (COI) cases, calling them irrelevant; however, despite the difference in case categorization, the circumstances of those cases are very similar to the circumstances of this case. In the aforementioned COI cases, Staff investigated the practices of the respondent party where it had received reports of deceptive and misleading enrollment and marketing practices. Such conduct is precisely to what Direct Energy admits here by agreeing to the conditions of the Stipulation, the first of which confirms that the Company provided Staff with a plan to come into compliance with Commission rules. The facts and circumstances underlying these cases are similar, despite Direct Energy's attempt to say otherwise based on the distinction in how the cases were opened. Notably, the case categorization at issue, whether it be COI, UNC, etc., is not one of the enumerated criteria the Commission is required to consider when determining whether intervention is appropriate. R.C. 4903.221; Ohio Adm.Code 4901-1-11.

{¶ 15} Moreover, Direct Energy contends that OCC cannot show where it has authority to represent consumers and utility customers in matters that involve the resolution of a notice of probable noncompliance. Direct Energy argues that R.C. Chapter 4911 sets out OCC's authority to participate in Commission proceedings, and that the matters enumerated in R.C. 4911.02 are those related to public utility rates and services,

contrasting with matters related to retail suppliers or marketers. Direct Energy concludes by arguing that R.C. 4928.16 and R.C. 4929.24 confer authority for OCC to participate in retail supplier matters before the Commission only upon complaint of OCC or by consumers, but not in a matter opened to consider a proposed resolution of a notice of probable noncompliance against a CRES or CRNGS supplier entered into pursuant to Ohio Adm.Code 4901:1-23-04 and/or 4901:1-34-05.

{¶ 16} While Direct Energy argues that it thus raises a novel question of law or policy, similar, if not identical, arguments regarding OCC's legal authority to intervene were raised in both *XOOM Energy* and *RPA Energy* and were ultimately rejected. In those cases, the attorney examiner granted OCC's motions to intervene in proceedings involving a CRES and CRNGS provider, rather than a public utility, that the Commission opened on its initiative. Direct Energy's argument, therefore, is not new or novel, as it was previously addressed in *XOOM Energy* and *RPA Energy*, both of which involved a competitive service provider under investigation for engaging in deceptive and misleading marketing and enrollment practices.

{¶ 17} Finally, Direct Energy argues that OCC's intervention will unduly delay the proceeding and will not result in expeditious resolution of the issues, about which Staff and the Company have already had discussions and reached a Stipulation. The attorney examiner does not agree with Direct Energy's argument; OCC regularly participates in complex cases before the Commission and understands the Commission's procedures and rules. Further, OCC brings expertise in the subject matter where the issues that arise in this case are directly related to practices that touch consumers.

{¶ 18} Accordingly, Direct Energy's request for certification of its interlocutory appeal should be denied, as it has failed to satisfy the requirements of Ohio Adm.Code 49011-15(B).

{¶ 19} Further, at this time, the attorney examiner finds that Direct Energy, Staff, and OCC should observe the following schedule for the filing of comments regarding the Stipulation:

- a. July 12, 2023 – deadline for filing initial comments.
- b. July 26, 2023 - deadline for filing reply comments.

IV. ORDER

{¶ 20} It is, therefore,

{¶ 21} ORDERED, That Direct Energy’s interlocutory appeal filed on September 21, 2022, not be certified to the Commission. It is, further,

{¶ 22} ORDERED, That Direct Energy, Staff, and OCC follow the schedule for filing comments set forth in Paragraph 19. It is, further,

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

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/ Patricia A. Schabo

By: Patricia A. Schabo
Attorney Examiner

NJW/dr

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in

Case No(s). 22-0583-GE-UNC

Summary: Attorney Examiner Entry denying the certification of the interlocutory appeal filed by Direct Energy Services, LLC, and establishing a procedural schedule electronically filed by Debbie S. Ryan on behalf of Patricia A. Schabo, Attorney Examiner, Public Utilities Commission of Ohio.