

FILE

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of
Duke Energy Ohio, Inc. for Approval
of an Electric Security Plan.

Case No. 08-920-EL-SSO

In the Matter of the Application of
Duke Energy Ohio, Inc. for Approval to
Amend Accounting Methods.

Case No. 08-921-EL-AAM

In the Matter of the Application of
Duke Energy Ohio, Inc. for Approval
of a Certificate of Public Convenience
and Necessity to Establish an Unavoidable
Capacity Charge(s).

Case No. 08-922-EL-UNC

In the Matter of the Application of Duke
Energy Ohio for Approval to Amend its
Tariff.

Case No. 08-923-EL-ATA

**INDUSTRIAL ENERGY USERS-OHIO'S
INITIAL BRIEF**

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INDUSTRIAL ENERGY USERS-OHIO'S INITIAL BRIEF

I. INTRODUCTION

The evidentiary record in this proceeding was completed on November 10, 2008. In accordance with the schedule established by the Attorney Examiners, Industrial Energy Users-Ohio ("IEU-Ohio") submits its Initial Brief for consideration by the Public Utilities Commission of Ohio ("Commission").

II. BACKGROUND

A. Section 4928.66, Revised Code

Section 4928.66, Revised Code, as enacted in Amended Substitute Senate Bill 221 ("SB 221"), establishes energy efficiency and peak demand reduction benchmarks for Ohio's electric distribution utilities ("EDU"). Section 4928.66, Revised Code, requires

gradually increasing reductions in energy usage that culminate in an annual reduction in energy use of over 22% by 2025.¹ Section 4928.66, Revised Code, also requires EDUs to implement measures to reduce peak demand achieving a 1.0% peak demand reduction in 2009 and achieving an additional 0.75% reduction each year through 2018.²

Further, Section 4928.66, Revised Code, explicitly permits and encourages integration of customer-sited capabilities of consenting mercantile customers to the EDU's compliance plan.³ Section 4928.66(A)(2)(c), Revised Code, also gives the Commission discretion to help bring these customer-sited capabilities into the EDU's compliance plan. It provides that:

Any mechanism designed to recover the cost of energy efficiency and peak demand reduction programs under divisions (A)(1)(a) and (b) of this section may exempt mercantile customers that commit their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs, if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs. (Emphasis added).

Section 4928.66(A)(2)(c), Revised Code, states clearly that eligibility for this exemption is dependent on whether the exemption is for a "mercantile customer" in circumstances that cause the Commission to determine that the exemption will reasonably encourage mercantile customers to commit "... their demand-response or other customer-sited capabilities, whether existing or new, for integration into the electric distribution utility's demand-response, energy efficiency, or peak demand reduction programs." Section

¹ Section 4928.66(A)(1)(a), Revised Code.

² Section 4928.66(A)(1)(b), Revised Code.

³ Section 4928.66(A)(2)(c), (d), Revised Code.

4928.01(A)(19), Revised Code, defines a "mercantile customer" as "a commercial or industrial customer if the electricity consumed is for nonresidential use and the customer consumes more than seven hundred thousand kilowatt hours per year or is part of a national account involving multiple facilities in one or more states."

Section 4928.66, Revised Code, also provides legislative guidance as to how the Commission should implement SB 221, especially in regards to mercantile customer participation in an EDU's demand-response, energy efficiency, and peak demand reduction programs. An EDU's compliance with the energy savings benchmarks and the peak demand reduction benchmarks must be measured by including the effects of all demand-response programs for mercantile customers as well as all such mercantile customer-sited energy efficiency and peak demand reduction programs (adjusted upward by the appropriate loss factors).⁴ Further, Section 4928.66(A)(2)(d), Revised Code, requires the Commission to apply the compliance provisions of that section in ways that facilitate "...efforts by a mercantile customer or group of those customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code."

B. Paragraph 13 of the Stipulation and Recommendation⁵

On October 27, 2008, Duke Energy Ohio ("DE-Ohio") and several signatory parties ("Signatory Parties")⁶ submitted a Stipulation and Recommendation

⁴ Section 4928.66(A)(2)(c), Revised Code.

⁵ IEU-Ohio does not support or oppose the balance of the Stipulation. See Supplemental Testimony of Kevin M. Murray at 4 and Tr. at 104. Mr. Murray's Supplemental Testimony was admitted as IEU-Ohio Exhibit 1 at the evidentiary hearing but will be cited to as "Supplemental Testimony of Kevin M. Murray" for ease of reference. See Tr. at 135. Additionally, for ease of reference, all other testimony admitted into the record will be cited to by witness name instead of exhibit number.

("Stipulation") containing their recommended resolution of certain issues which they assert were raised by DE-Ohio's electric security plan ("ESP") application.⁷ The Stipulation recommends that the Commission approve DE-Ohio's ESP application as filed, except as expressly modified by the Stipulation.⁸ DE-Ohio's witness sponsoring the Stipulation stated that the precise meaning of the Stipulation relative to the as-filed ESP application was not specifically addressed in his testimony.⁹ IEU-Ohio, among other "knowledgeable parties",¹⁰ did not sign the Stipulation. IEU-Ohio sponsored testimony contesting a specific provision in the Stipulation which is the focus of the remainder of this Brief.

Paragraph 13 of the Stipulation discusses DE-Ohio's proposed Rider DR-SAW indicating that the Rider will, if approved, collect costs associated with meeting the energy efficiency and peak demand reduction requirements under Section 4928.66, Revised Code.¹¹ Paragraph 13.b of the Stipulation recommends that the Commission adopt eligibility thresholds that would preclude mercantile customers from seeking, regardless of merit, a Section 4928.66(A)(2)(c), Revised Code, exemption from Rider DR-SAW.

Paragraph 13.b of the Stipulation unlawfully alters the exemption eligibility requirements. Regardless of merit, it forecloses mercantile customers with single site or aggregate demand of less than 3 megawatts ("MW") ("3MW Threshold") in DE-Ohio's

⁶ Stipulation at 40-47. The Stipulation was admitted as Joint Exhibit 1 at the evidentiary hearing but will be cited as "Stipulation" for ease of reference. Tr. at 96.

⁷ Stipulation at 32, FN 11.

⁸ Stipulation at 5.

⁹ Tr. at 48.

¹⁰ Tr. at 50.

¹¹ Stipulation at 18-27.

service territory from seeking an exemption, in whole or part, to Rider DR-SAW.¹² Second, paragraph 13.b also further constrains the eligibility opportunity preserved by Section 4928.66(A)(2)(c), Revised Code, by adding additional requirements to the 3MW Threshold. These additional requirements recommended by the Stipulation would, if adopted by the Commission, require a “qualifying” customer (i.e., a customer with single site or aggregate demand greater than 3MW) to provide energy efficiency and/or peak demand reduction savings “equal to or greater than” DE-Ohio’s benchmark requirement (“Customer Parity Requirement”) in order to be eligible for obtaining an exemption from paying Rider DR-SAW.¹³ Accordingly, paragraph 13.b of the Stipulation recommends that the Commission rewrite Ohio law to eliminate the exemption opportunity which has been established by the General Assembly. As explained below, the Stipulation conflicts with the criteria which the Commission uses to evaluate Stipulations. Also, and specifically with regard to paragraph 13.b, there is no data or evidence in the record to permit the Commission to consider or adopt paragraph 13.b and because of this legally significant fact, the Attorney Examiners erred by not sustaining IEU-Ohio’s objection to the admission of the Stipulation into the record.

III. ARGUMENT

A. The Stipulation, specifically paragraph 13.b, does not meet the Commission’s criteria for the evaluation of settlements.

When evaluating a stipulation, the Commission considers whether the settlement: (a) is a product of serious bargaining among capable, knowledgeable parties; (b) as a package, benefits ratepayers and the public interest; and (c) violates

¹² Stipulation at 19.

¹³ Stipulation at 20.

any important regulatory principle or practice.¹⁴ Although a stipulation is not binding upon the Commission, the terms of such agreements are afforded substantial weight.¹⁵ Despite the weight afforded a settlement, the Commission is a creature of statute and cannot approve settlements that exceed its statutory authority.¹⁶ A provision in a stipulation also cannot be adopted by the Commission if it is not supported by the evidence. Regardless of whether a stipulation is presented in a contested proceeding or not, the burden of showing that proposed changes to utility rates, service terms and conditions are reasonable and lawful rests with the party or parties proposing such changes.

1. The 3MW Threshold Violates the Law and Therefore Violates Important Regulatory Principles or Practice, Does Not Benefit Ratepayers and Is Not In the Public Interest.

Section 4928.66(A)(2)(c), Revised Code, states the Commission may exempt mercantile customers that commit their demand-response, energy efficiency, or peak demand reduction capabilities to the EDU from mechanisms designed to cover those costs, if the Commission finds that an exemption would reasonably encourage such customers to commit those capabilities to the EDU's energy efficiency and peak demand reduction programs. The term "mercantile customer" is statutorily defined and, as explained by IEU-Ohio witness Kevin Murray, the 3MW Threshold significantly raises the exemption eligibility bar above the 700,000 kilowatt hour ("kWh") threshold contained in the definition of "mercantile customer."¹⁷ A mercantile customer is not

¹⁴ *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123 (1992).

¹⁵ *Id.*

¹⁶ *Discount Cellular, Inc., et al. v. Pub. Util. Comm.*, 112 Ohio St.3d 360, 2007-Ohio-53, ¶51.

¹⁷ Supplemental Testimony of Kevin M. Murray at 6-7.

guaranteed an exemption from a cost recovery mechanism. But the General Assembly has specified the eligibility which determines which customers may seek such exemption and neither the Signatory Parties nor the Commission may redraw the exemption eligibility lines established by the General Assembly.

As acknowledged by DE-Ohio witness Paul Smith and Commission Staff witness Tamara Turkenton, compliance with the law is an important regulatory principle and provisions in the Stipulation, to the extent they are unlawful, violate an important regulatory principle.¹⁸ The statutory definition of "mercantile customer" controls in this instance and the Commission cannot lawfully approve the 3MW Threshold which the Signatory Parties recommend the Commission adopt *via* paragraph 13.b of the Stipulation.

The Commission is without authority to approve the 3MW Threshold as it is in direct conflict with Ohio law.¹⁹ Paragraph 13.b asks the Commission to remove the right of a mercantile customer to seek an exemption which the Commission might otherwise find reasonable and cannot benefit ratepayers.

2. The Customer Parity Requirement Violates the Law and Therefore Violates Important Regulatory Principles or Practice, Does Not Benefit Ratepayers and Is Not In the Public Interest.

The Customer Parity Requirement also imposes a limitation on the exemption eligibility opportunity granted by Section 4928.66(A)(2)(c), Revised Code, does not benefit ratepayers and is not in the public interest. As in the case of the 3MW Threshold, this provision conflicts with the statutory scheme by which mercantile

¹⁸ Tr. at 55-56 (P. Smith); Tr. at 94 (Turkenton).

¹⁹ *Discount Cellular, Inc.*, 2007-Ohio-53 at ¶51.

customers may commit their customer-sited capabilities to an EDU. The limitations recommended by the Stipulating Parties also present the Commission with a poor policy choice at a time when the Commission should be encouraging, as the General Assembly directed; mercantile customers to bring their customer-sited capabilities forward to serve the public interest.

As demonstrated by the uncontested Supplemental Testimony of IEU-Ohio witness Kevin Murray, the Customer Parity Requirement in paragraph 13.b of the Stipulation does not benefit customers and is contrary to the public interest.²⁰ The Customer Parity Requirement sends the message that a mercantile customer's energy efficiency improvements that are less than the EDU's benchmark have no value at all and could also serve to discourage mercantile customers' energy efficiency efforts.²¹ Both Mr. Murray and DE-Ohio's witness Ted Schultz testified on the importance of retaining flexibility in the approach on energy efficiency efforts so that experience could better guide implementation efforts. Mr. Shultz warned about the consequences of making energy efficiency programs so prescriptive that they inhibit the ability that will be needed to customize and personalize offers that customers will value.²² Despite these common sense and practical insights, the Signatory Parties are recommending, through paragraph 13.b, that the Commission preemptively rewrite Ohio law to include more prescriptive terms.

The Commission has barely started to implement the energy efficiency and peak demand reduction provisions in Ohio's new law and there is no real world experience

²⁰ Supplemental Testimony of Kevin M. Murray at 9-12.

²¹ Supplemental Testimony of Kevin M. Murray at 11.

²² Direct Testimony of Ted Schultz at 10-11; Tr. at 80.

with mercantile customers committing their efficiency or peak demand reduction capabilities towards an electric distribution company's portfolio obligations.²³ Limiting the exemption opportunity at this point, before the real world implementation experience better informs the Commission on this and other issues, is an imprudent choice regarding the implementation of the new law that would not benefit ratepayers and is contrary to the public interest. A better choice, one that would benefit ratepayers and the public interest and also be consistent with proposed Rule 4901:1-39-06 in Case No. 08-888-EL-ORD, would be to permit the mercantile customer exemption opportunities to develop on a case-by-case approach based on the merits of individual exemption requests.²⁴

Further, the Customer Parity Requirement is not provided for under Section 4928.66, Revised Code. Section 4928.66, Revised Code, is clear that specific energy efficiency and peak demand reduction benchmarks apply to EDUs. If the Ohio General Assembly had wanted to impose a similar obligation upon mercantile customers as a condition for seeking a waiver under Section 4928.66(A)(2)(c), Revised Code, they could have done so. The Ohio General Assembly chose not to and the Commission is obliged to respect the law as it has been enacted.

²³ Supplemental Testimony of Kevin M. Murray at 7-8.

²⁴ Supplemental Testimony of Kevin M. Murray at 12.

B. The Limitations in Paragraph 13.b are Unsupported by any Record Evidence and the Commission has no Evidentiary Basis Upon which to Approve such Limitations.

Section 4903.09, Revised Code, requires the Commission to resolve contested issues based on record evidence.²⁵ The Commission must show, in sufficient detail, the facts in the record upon which its order is based and the reasoning followed to reach its conclusion.²⁶ The Commission abuses its discretion if it renders an opinion on an issue without record support for the opinion.²⁷

There is no record support for the 3MW Threshold or Customer Parity Requirement. The testimony of Mr. Smith and Ms. Turkenton contains all the information in the record that is focused on the Stipulation.²⁸ Both Mr. Smith and Ms. Turkenton agreed that their respective testimonies did not contain any discussion of paragraph 13.b even though they were both aware of the legal and other objections to paragraph 13.b before drafting their testimony.²⁹ Additionally, DE-Ohio witnesses Ted Schultz and Richard Stevie, both of whom submitted direct and supplemental testimony on the energy efficiency and peak demand reduction components of DE-Ohio's ESP, admitted that their testimonies did not address the specific provisions found in

²⁵ Section 4903.09, Revised Code, states "In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."

²⁶ *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789, ¶23.

²⁷ *Id.*

²⁸ Although IEU-Ohio has focused its attention on paragraph 13.b of the Stipulation and has not used its litigation opportunity to contest other aspects of the Stipulation, the Commission should note the witnesses sponsoring the Stipulation also fail to discuss how the transfer of generation assets that were not previously used and useful (paragraph 26 of the Stipulation) as well as specified costs related to the Beckjord plant (paragraph 16 of the Stipulation) meet the Commission's criteria for the evaluation of settlements or comply with SB 221.

²⁹ Tr. at 50-51 (Smith); Tr. at 94 (Turkenton).

paragraph 13.b of the Stipulation.³⁰ IEU-Ohio witness Mr. Murray discussed the evidentiary gap related to paragraph 13.b.³¹ Mr. Murray's expert testimony offered in opposition to paragraph 13.b of the Stipulation is the only evidence on which the Commission may rely to evaluate the Stipulation's paragraph 13.b³² and that evidence will not permit the Commission to approve the Stipulation as presented by the Signatory Parties.

The Commission should reject paragraph 13.b of the Stipulation inasmuch as there is no evidentiary support for the eligibility limitations in paragraph 13.b.

IV. CONCLUSION

IEU-Ohio respectfully recommends that the Commission reject paragraph 13.b of the Stipulation and permit the mercantile customer exemption opportunity to develop on a case-by-case approach based on the merits of any exemption requests and in accordance with the rules ultimately adopted by the Commission.³³

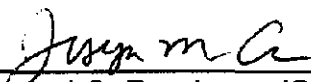
³⁰ Tr. at 81 (Schultz); Tr. at 84 (Stevie).

³¹ Supplemental Testimony of Kevin M. Murray at 8-9.

³² Tr. at 118-119.

³³ Supplemental Testimony of Kevin M. Murray at 12.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *INDUSTRIAL ENERGY USERS-OHIO'S INITIAL BRIEF* was served upon the following parties of record this 17th day of November, 2008, *via* electronic transmission, hand-delivery or first class mail, postage prepaid.



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