

FILE

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan)))	Case No. 08-920-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Approval to Amend Accounting Methods)))	Case No. 08-921-EL-AAM
In the Matter of the Application of Duke Energy Ohio 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 Tariffs)))	Case No. 08-923-EL-ATA

DUKE ENERGY OHIO'S REPLY BRIEF

INTRODUCTION

All but one of the Intervening Parties have recommended to the Public Utilities Commission of Ohio (Commission) that the Stipulation and Recommendation (Stipulation) submitted in this case be adopted. That one Party, the Industrial Energy Users-Ohio (IEU-Ohio) neither supported nor opposed the Stipulation. Rather, it reserved the right to argue its position. And, in doing so, IEU-Ohio took issue with *one* paragraph of the Stipulation. Similarly, although a signatory to the Stipulation, the Office of the Ohio Consumers' Counsel (OCC) reserved *one* narrow issue for hearing. But the limited issues reserved by IEU-Ohio and OCC are not established by the evidence. Thus, the

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Stipulation, which the Commission's Staff aptly notes is supported by a broad and diverse group of Intervening Parties, must be approved in its entirety and as filed.

DISCUSSION

I. The IEU-Ohio's position necessarily fails as it is based upon incorrect statutory interpretations and a complete disregard of the evidence.

IEU-Ohio opted out of the Stipulation to make an argument on behalf of two of its members, which might potentially dedicate energy efficiency benefits to be counted toward DE-Ohio's benchmark requirements under R.C. 4928.66.¹ Specifically, IEU-Ohio objects to Paragraph 13(b) of the Stipulation and argues that it is contrary to the public interest. What IEU-Ohio consistently fails to accept is that R.C. 4928.66(A)(2)(c) is permissive – there is no absolute right to an exemption. In this regard, the language clearly and unambiguously states that any “mechanism...*may* exempt mercantile customers.”² Furthermore, R.C. 4928.66(A)(2)(d) permits mercantile customers to apply to the Commission as part of a “reasonable arrangement” to offer their own demand response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility (EDU). There are no statutory guarantees upon which IEU-Ohio's members may rely and its arguments, therefore, fail as a matter of law.

IEU-Ohio asserts that there is no evidence of record that would permit the Commission to consider Paragraph 13(b). IEU-Ohio is mistaken. The Stipulation itself constitutes evidence in support of the settlement agreement, including Paragraph 13(b), among the Parties. The fact that the Parties collectively agreed upon this arrangement,

¹ *In the Matter of Duke Energy Ohio, Inc.'s Application for an Electric Security Plan*, Case No. 08-920, *et al.*, Tr. of Hearing at page 126 (November 10, 2008). Hereinafter, the case shall be referred to as “*In re: DE-Ohio's ESP*.”

² R.C. 4928.66(A)(2)(c). Emphasis added.

along with the factors that support the Commission's three-pronged test for acceptance of stipulations generally, is sufficient.

Additionally, DE-Ohio witness Theodore Schultz discussed Duke Energy Ohio's (DE-Ohio) proposal for allowing customers to opt-out of Rider SAW in his direct testimony.³ Although the opt-out threshold level was altered by the Stipulation, the testimony undeniably discussed and supported the opt-out provision of DE-Ohio's Electric Security Plan (ESP). And this opt-out provision was explained by DE-Ohio witness Paul G. Smith as a public benefit.

In his Second Supplemental Testimony, Mr. Smith affirmatively described the opt-out provision as one of the benefits of the Stipulation.⁴ On cross examination during the hearing, Mr. Smith was asked whether his testimony referenced Paragraph 13(b) of the Stipulation. Although Mr. Smith acknowledged that there is no express mention of that specific paragraph, he further noted that the objections raised by IEU-Ohio were addressed in the testimony of DE-Ohio witnesses Dr. Richard G. Stevie and Mr. Schultz as part of DE-Ohio's original application.⁵ Thus, although IEU-Ohio would prefer to overlook the evidence of record, it is plainly there and supports the content of Paragraph 13(b).

IEU-Ohio further posits that a mercantile customer that wishes to commit less than the EDU's benchmark should also be considered by the Commission on a case-by-case basis. IEU-Ohio asserts that a parity requirement that customers provide their fair share of energy efficiency in exchange for avoiding payments for others to perform energy efficiency violates regulatory principles, does not benefit ratepayers, and is not in

³ *In re: DE-Ohio's ESP*, Direct Testimony of Theodore Schultz at pages 24-26.

⁴ *In re: DE-Ohio's ESP*, Second Supplemental Testimony of Paul G. Smith at page 9.

⁵ *Id.* at page 55.

the public interest. Given the aggressive benchmarks that DE-Ohio must meet, this argument is illogical. An EDU bears the burden of complying with the statutory benchmarks and the consequences if it does not. Because the purpose of the exemption is to develop a means by which the EDU may meet its mandate, allowing all mercantile customers to opt out without committing their equivalent share of energy efficiency would leave DE-Ohio at risk. And to the extent the mercantile customer falls short, other customers would then bear the costs of meeting the mandate. Such an arrangement creates a cross-subsidy in violation of R.C. 4928.02(H).

IEU-Ohio witness Kevin Murray suggested that each potential mercantile customer's opt-out arrangement should be examined on a case-by-case basis.⁶ But the absence of a threshold for exemption creates an unworkable regulatory problem for the Commission. Indeed, as Mr. Murray admitted upon cross examination, he did not know how many customers qualify as mercantile customers in DE-Ohio's territory.⁷ Nor did Mr. Murray consider costs associated with measurement and verification associated with the opt out.⁸ Furthermore, Mr. Murray admitted that there is no statutory mandate that would require DE-Ohio to integrate a mercantile customer that wishes to commit its energy efficiency to DE-Ohio's benchmarks.⁹ Mr. Murray's reading of the statute was that it merely "facilitate[d] efforts by mercantile customers to commit their energy efficiency." It did not provide a mandate.

Mr. Murray was at a loss to supply a standard by which the Commission would determine whether less than a full commitment would be acceptable. Thus, IEU-Ohio's

⁶ *In re: DE-Ohio's ESP*, Tr. at pages 129-130.

⁷ *Id.* at pages 111 and 122.

⁸ *Id.* at page 111.

⁹ *Id.* at page 127.

“half a loaf” argument is impractical, provides no benefits to customers, and would provide a regulatory burden for the Commission. The threshold opt-out of 3MW, contemplated in Paragraph 13(b) of the Stipulation, represents a reasonable and well considered resolution for all the Parties and the Commission and should be adopted with the balance of the Stipulation.

II. The Office of the Ohio Consumers’ Counsel has not established that its misguided initiative is preferred over the agreed-upon provisions concerning governmental aggregation.

It is undeniable that serious consideration was given to the issue of governmental aggregation. It is also undeniable that this consideration was specific to the customer classes served by DE-Ohio. And, as a result, the Parties to the Stipulation agreed that residential governmental aggregation customers who leave and then wish to return to DE-Ohio may do so at the standard service offer (SSO) price of its ESP. Significantly, these residential customers will *not* be charged a higher price upon their return to DE-Ohio during the term of its ESP. In contrast, nonresidential governmental aggregation customers that return to DE-Ohio during the term of its ESP must pay 115% of the ESP-SSO.

As discussed more fully below, these different arrangements properly account for the ability of different customer classes to manage risk and DE-Ohio’s system reliability. Yet despite the careful deliberation of and provision for these matters, the OCC initially suggests that, to prevent alleged discriminatory treatment, residential customers must be afforded the same opportunities as nonresidential customers. But as the OCC simultaneously advocates for different treatment of residential governmental aggregation customers, it is apparent that not even the OCC finds the stipulated terms for

governmental aggregation to be discriminatory. And an examination of the deficiencies in the OCC's position confirms that it cannot prevail here.

A. Duke Energy Ohio's Electric Security Plan is more favorable, in the aggregate, than a market rate offer.

Curiously, the OCC infers that DE-Ohio has not met its burden of proof on the issue of whether its ESP, in the aggregate, is more favorable than a market rate offer. But the OCC is a signatory to the Stipulation – the express terms of which confirm that the Parties believe the Stipulation should be approved and adopted by the Commission. Indeed, paragraph 27 of the Stipulation specifically recognizes that the signatory Parties, including the OCC, agree that the Stipulation is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.¹⁰ Furthermore, the Stipulation meets the legal requirements as prescribed by the Ohio Supreme Court.¹¹ It is thus improper and disingenuous for the OCC to now suggest that DE-Ohio's ESP is not more favorable, in the aggregate, than a market rate offer.

In further challenging the benefits of DE-Ohio's ESP, as compared to a market rate, the OCC argues that R.C. 4928.20(J) establishes the ability for governmental aggregators to avoid provider of last resort (POLR) charges. Thus, as the OCC claims, the Stipulation cannot preclude any governmental aggregation customer from avoiding POLR charges under DE-Ohio's Rider SRA-SRT. In advancing this argument, however, the OCC misinterprets the applicable statutory provisions and the terms of the Stipulation to which it agreed.

R.C. 4928.20(J) succinctly states that the legislative authority forming "governmental aggregation may elect not to receive *standby service* within the meaning

¹⁰ In re: DE-Ohio's ESP, Stipulation and Recommendation at para. 27

¹¹ *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123 (1992).

of" R.C. 4928.143(B)(2)(d).¹² Significantly, R.C. 4928.143(B)(2)(d) does not define standby service synonymous with POLR obligations. And this distinction is consistent with the terms of the Stipulation, wherein the Parties expressly acknowledged the lack of a charge specifically for standby service.¹³ The Parties also accepted that DE-Ohio's System Resource Adequacy (SRA) charge was intended to compensate DE-Ohio, in part, for its POLR obligations. If these charges were actually one and the same, as the OCC maintains, there would have been no need to specifically and separately address them in the Stipulation. That is, there would have been no reason to expressly identify the absence of a charge for standby service while recognizing the ability of certain customers to avoid Rider SRA-SRT. But the Parties rightfully did make provision for these charges because they are, in fact, separate. Thus, although governmental aggregators may avoid charges for standby service pursuant to R.C. 4928.20, they cannot similarly, and by statute, avoid charges for DE-Ohio's POLR obligations. Thus, the OCC cannot compel such a result here.

B. The provisions in the Stipulation for governmental aggregation customers are nondiscriminatory, and the Office of the Ohio Consumers' Counsel failed to present any evidence to contradict this conclusion.

The OCC devotes a significant portion of its Brief to explaining governmental aggregation under Am. Sub. Senate Bill 221 (SB 221) and asserting that its residential customers should be treated in the same manner as other governmental aggregators, except for one significant difference. That difference is the price to be paid by returning customers. Here, the OCC proposes that residential governmental aggregation customers avoid Rider SRA-SRT, receive a shopping credit equal to 6% of little "g", and if they

¹² R.C. 4928.20(J). Emphasis added.

¹³ *In re DE-Ohio's ESP*, Stipulation and Recommendation at para. 20(b) and 21(b).

return to DE-Ohio during the ESP period, do so at a price equivalent to *the lower of 115% of the standard ESP-SSO price or the market price.*¹⁴

Significantly, the OCC did not reserve for litigation the issue of whether residential customers should be permitted to return to DE-Ohio at one of two prices. In fact, it did not reserve for litigation any issue pertaining to price. And when challenged on this omission, OCC witness Wilson Gonzalez maintained that the issue of price was “implicit in the footnote” to his pre-filed testimony.¹⁵ But as Mr. Gonzalez criticized perceived “insinuations” in the testimony of Mr. Smith,¹⁶ the OCC cannot now enlarge the scope of Footnote 11 to the Stipulation through inference and innuendo. But should this Commission consider the OCC’s claim that residential governmental aggregation customers be allowed to return at market price, it is undeniable that the OCC has failed to substantiate this claim. Indeed, the OCC failed to properly support any aspect of those issues it reserved for hearing.

The OCC’s only witness, Mr. Gonzalez, admitted that there are compelling reasons to treat different customer classes differently and that cost of service is a one of the strongest reasons for doing so.¹⁷ Mr. Gonzalez also agreed that the costs to serve residential customers are not the same as the costs to serve nonresidential customers.¹⁸ Despite these admitted differences, the OCC, through Mr. Gonzalez, insisted that different customer classes be extended similar offerings. But the evidentiary record is lacking in any support for this statement. Significantly, Mr. Gonzalez did not research the impact of the OCC’s proposal on DE-Ohio’s system reliability; nor did he examine or

¹⁴ *In re: DE-Ohio’s ESP*, OCC Exhibit 1 at pages 3-4.

¹⁵ *In re: DE-Ohio’s ESP*, Tr. at page 172.

¹⁶ *In re: DE-Ohio’s ESP*, Direct Testimony of Wilson Gonzalez at page 7, footnote 4.

¹⁷ *In re DE-Ohio’s ESP*, Tr. at pages 149-150.

¹⁸ Id.

assess the number of potential governmental aggregators within DE-Ohio's service territory.¹⁹ Mr. Gonzalez could not inform this Commission as to whether there are any residential customers interested in governmental aggregation. And Mr. Gonzalez could not speak to the costs of educating residential customers on the risks to which the OCC wishes to subject them.²⁰ In short, although the OCC urges this Commission to accept its proposal, it has not offered any basis on which the Commission should do so.

The inconsistency in the OCC's proposal is patently apparent in its post-hearing argument. The OCC first claims that the stipulated terms pertaining to governmental aggregation are discriminatory because residential customers are not afforded the same opportunities as non-residential customers. It then argues that residential customers should be afforded different and admittedly better options with respect to governmental aggregation.²¹ Grasping for *any* support for its position, the OCC next advocated for small business owners – the “mom and pop” companies. Without any evidentiary support, it now maintains that these companies may also be adversely affected from the failure to treat all governmental aggregation customers alike.

In contrast, and as confirmed by the record, DE-Ohio has consistently advocated for governmental aggregation provisions that are fair for *all* customers. DE-Ohio – and the other Parties to the Stipulation – seek provisions that better insulate from risk those who are not readily suited to respond to it. As the Staff correctly noted, larger and more

¹⁹ *Id.* at page 152.

²⁰ *Id.* at pages 152-153.

²¹ *Id.* at page 170 (As Mr. Gonzalez conceded, “I think it’s a better – it’s a better deal for residential customers”).

sophisticated customers are in a better position to assess risk.²² Residential customers are necessarily less sophisticated in making these kinds of choices.

DE-Ohio – and all other Parties to the Stipulation – also agree that governmental aggregation should not jeopardize DE-Ohio’s system reliability but should account for default by a large governmental aggregator. In such a situation, a large portion of returning load may put all customers at risk. As noted by Mr. Smith, “if the consumer subsequently returns before their commitment date, DE-Ohio is compelled to secure the capacity and commodities often with very little advance notice. Such procurement of capacity and commodities, if available at all, often costs significantly more than the average cost to serve... .”²³ As Mr. Smith continued, “if the capacity or commodities are not available to serve the incremental returning load, the ability to provide reliable generation supply to all consumers will be jeopardized.”²⁴ DE-Ohio’s risk puts the entire customer population at risk if capacity is unavailable under these circumstances. For these reasons, OCC’s untenable revisions to governmental aggregation terms as set forth in the Stipulation must be rejected.

²² Staff Initial Brief at page 14.

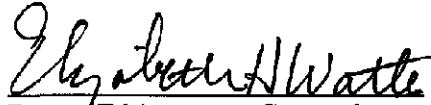
²³ *In re: DE-Ohio’s ESP*, Second Supplemental Testimony of Paul Smith at pages 13-14.

²⁴ *Id.* at page 14.

CONCLUSION

For the reasons set for in its Merit Brief and discussed above, Duke Energy Ohio respectfully requests that the Commission adopt the Stipulation in its entirety and reject the arguments of IEU-Ohio and OCC to the contrary.

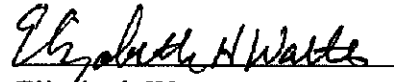
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Elizabeth Watts", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following parties this 26th day of November 2008, by electronic mail delivery.


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