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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 Charges.	:	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

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

There are only a limited number of issues presented. OCC argues against the requirement that government aggregation members must pay for the insurance of the SRT to protect them in the event that their provider fails and for a 6% shopping credit for rider CD. Curiously, OCC attempts to raise a number of arguments against positions to which it has already stipulated. These arguments should be ignored. IEU-Ohio argues that all mercantile customers should be able to opt out of the DR-SAW rider, in whole or in part, and into the utility's effort to meet its various statutory conservation requirements.

The Stipulation is reasonable, complies with the statutes, and should be approved without alteration. Neither IEU-Ohio nor OCC have raised any arguments with merit.

DISCUSSION

I. OCC

Consumers' Counsel argues that the treatment of bypassability of the SRT and the 6% shopping credit under the Stipulation is illegal, discriminatory, and also unreasonable because it does not support government aggregation. Further Consumers' Counsel appears to argue, against its own representation to the contrary, that this treatment would make the entire ESP fail the statutory test for approval. None of these assertions have merit. Each is considered seriatim below.

A. Standby Charges.

OCC bases its claim that the treatment of the avoidability of the SRT in the Stipulation is illegal on a misreading of the term "standby charge" in Title 49. The term appears in four places in Title 49. Consumers' Counsel correctly notes that the Code permits government aggregation groups to opt out of paying "standby charges". Specifically, the law provides:

> (J) On behalf of the customers that are part of a governmental aggregation under this section and by filing written notice with the public utilities commission, the legislative authority that formed or is forming that governmental aggregation may elect not to receive standby service within the meaning of division (B)(2)(d) of section 4928.143 of the Revised Code from an electric distribution utility in whose certified territory the governmental aggregation is located and that operates under an approved electric security plan under that section.

> Upon the filing of that notice, the electric distribution utility shall not charge any such customer to whom competitive retail electric generation service is provided by another supplier under the governmental aggregation for the standby service. Any such consumer that returns to the utility for competitive retail electric service shall pay the market price of power incurred by the utility to serve that consumer plus any amount attributable to the utility's cost of compliance with the alternative energy resource provisions of section 4928.64 of the Revised Code to serve the consumer. Such market price shall include, but not be limited to, capacity and energy charges; all charges associated with the provision of that power supply through the regional transmission organization, including, but not limited to, transmission, ancillary services, congestion, and settlement and administrative charges; and all other costs incurred by the utility that are associated with the procurement, provision, and administration of that power supply, as such costs may be approved by the commission. The period of time during which the market price and alternative energy resource amount shall be so assessed on the consumer shall be from the time the consumer so returns to the electric distribution utility until the expiration of the electric security plan. However, if that period of time is expected to be more than two years, the commission may reduce the time period to a period of not less than two years.[1]

Thus it is clear that government aggregators can avoid paying "standby charges" if they so choose, but the section does not define the term.

It is at this point that the OCC makes its error. It equates "standby charge" with any charge for a POLR requirement and cites R.C. 4928.143(B)(2)(d) as its basis. That section is not a definition at all, rather it is part of an extensive listing of things that can be included in an ESP. This is easy to see, when the section is placed in its context, specifically:

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[1] Ohio Rev. Code Ann. § 4928.20(J) (Anderson 2008).

> (B) Notwithstanding any other provision of Title XLIX of the Revised Code to the contrary except division (D) of this section, divisions (I), (J), and (K) of section 4928.20, division (E) of section 4928.64, and section 4928.69 of the Revised Code:
>
> (1) An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the commission if the commission terminates the plan as authorized under that division.
>
> (2) The plan may provide for or include, without limitation, any of the following:
>
> * * *
>
> (d) Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service;...[2]

Rather than defining the term, "standby" is merely one of many items which can be included in a plan. OCC's reading of this provision is simply wrong.

This still leaves the question of what is meant by "standby". This question is easily resolved by reference to the fourth use of the term in the Code, the reference that the OCC ignored, R.C. 4928.02(K). An examination of that provision makes it quite clear that the General Assembly was concerned about distributed generation, not

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[2] Ohio Rev. Code Ann. § 4928.143(B)(2) (Anderson 2008).

government aggregation, in its discussion of "standby". The section charges the Commission to:

> (K) Encourage implementation of distributed generation across customer classes through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering;...[3]

It is apparent that the General Assembly meant "standby" to refer to the charges that utilities sometimes impose on customer generators to compensate the utility for "standing by" to meet that customer's demand in the event that its equipment fails. This is not some broad POLR requirement. Instead this is a part of the more general focus on supporting small generation sources that is a part of the overall environmental emphasis of S.B. 221.

This construction of the statutes, in addition to being the only proper reading, eliminates a paradox created by the OCC's misreading.

The OCC correctly argues that the Commission is charged to consider the effects of non-bypassable generation charges on government aggregations. The law provides:

> (K) The commission shall adopt rules to encourage and promote large-scale governmental aggregation in this state. For that purpose, the commission shall conduct an immediate review of any rules it has adopted for the purpose of this section that are in effect on the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008. Further, within the context of an electric security plan under section 4928.143 of the Revised Code, the commission shall consider the effect on large-scale

[3] Ohio Rev. Code Ann. § 4928.02(K) (Anderson 2008).

> governmental aggregation of any nonbypassable generation charges, however collected, that would be established under that plan, except any nonbypassable generation charges that relate to any cost incurred by the electric distribution utility, the deferral of which has been authorized by the commission prior to the effective date of the amendment of this section by S.B. 221 of the 127th general assembly, July 31, 2008.[4]

If the OCC were right, and the General Assembly had already given government aggregators the unilateral right to avoid any POLR charge, there would be no nonbypassable charges for the Commission to consider. Any government aggregation could avoid the charges at its whim. Why would the General Assembly command the Commission to consider nonbypassable charges that do not exist? They would not. The OCC's reading is nonsense.

Under the proper reading of the Code, no paradox exists. The Commission must consider the effect of non-bypassable charges on government aggregation because there can be non-bypassable charges. Whether to impose them is a matter of Commission discretion. The Stipulation suggests that the Commission should and the record shows why.

B. Discrimination

As has already been discussed in the Post-Hearing Brief, it is not discriminatory to treat differently positioned persons differently. It is a matter of physical necessity that there is provision made for the return of residential customers in the event that their supplier fails. In the absence of these arrangements, and that is what the SRT pays for,

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[4] Ohio Rev. Code Ann. § 4928.20(K) (Anderson 2008).

those customers may return when there is no power or capacity available to serve them. Since service to residential customers cannot be suspended in a timeframe relevant to system stability, this situation puts all customers at risk. The OCC's position is risky for all customers.

C. Supporting Aggregation

The SRT is insurance against a real risk. Its presence is good for competition. Insurance allows more business to be done. The SRT allows government aggregations groups to shop secure in the knowledge that, if worst comes to worst, the residents will not be harmed. It assures that system reliability will be maintained even *in extremis*. While the OCC might prefer that risks have no cost and reliability is free, reality is to the contrary. The SRT provides a part of the necessary underpinning to be able to have a market at all. Far from being an impediment, it is a necessary prerequisite

D. Statutory Compliance R.C. 4928.143(C)(1)

The OCC seems to make a rather astonishing argument. It seems to suggest that, if it does not get what it wants, the ESP would not comply with the statutory requirement that the ESP be more favorable in the aggregate than an MRO under R.C. 4928.143(C)(1). Surely this must be a misunderstanding of the OCC's position.

The OCC reserved one issue for litigation. The Stipulation is quite specific in this regard. It says:

> The Parties agree that OCC shall have the right to carve out for litigation the issue of bypassability of charges and shopping credits for residential government aggregation customers.[5]

Compliance with R.C. 4928.143(C)(1) would certainly appear to be something different than bypassability or shopping credits. OCC's argument is all the more astonishing as it appears to have stipulated to compliance with R.C. 4928.143(C)(1). The Stipulation that OCC signed provides:

> The Parties recommend that the Commission find that DE-Ohio's ESP-SSO, as modified by this Stipulation, including its pricing and all other terms and conditions, plus any deferrals and future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.[6]

This provision mimics the language of R.C. 4928.143(C)(1). It does not seem possible that the OCC would stipulate to compliance and now attempt to challenge that compliance particularly where it agreed to limit its issues and this topic is not one included for litigation.

Surely the Commission can rely on the written commitments of the Consumers' Counsel. It should do so here and reject OCC's curious argument.

As to the question of compliance with R.C. 4928.143(C)(1), this matter has already been discussed extensively in the Initial Brief. The arguments will not be restated here.

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5 Stipulation at 32, fn. 11.

6 *Id.* at 34, ¶ 27.

E. Market Price for Returning Customers

OCC devotes some argument in its Initial Brief to challenging the market price to be paid by returning customers. This is, of course, not an issue that the OCC reserved to litigate. As has been noted earlier, the issues reserved for OCC are:

> The Parties agree that OCC shall have the right to carve out for litigation the issue of bypassability of charges and shopping credits for residential government aggregation customers.[7]

It seems patently obvious that challenging the bypassability of a charge is different than challenging the level of the charge. Indeed it was clear to the OCC itself at one time, specifically when the OCC stipulated to the level of the charge at pages 29, 30, 31, and 32 of the Stipulation.

The issue is closed and the Commission need not be concerned with it.

F. OCC Summary

In sum, the OCC has raised no arguments that warrant Commission action. The Stipulation is reasonable and complies with applicable law. It should be approved as it is.

II. IEU-Ohio

IEU-Ohio argues against the provisions of paragraph 13b of the Stipulation. It argues that the provision violates statute, but this matter has already been disposed of in the initial brief. The Statute gives the Commission the discretion to allow mercantile customers to avoid this charge if it chooses. IEU-Ohio further argues there is no record

[7] Stipulation at 32, fn. 11.

support. Again this issue has been disposed of in the initial brief. The testimony of IEU-Ohio witness Murray, ironically, provides that very record support.

Disposing of the legal arguments is quite easy but that leaves the question of the actual merit of IEU-Ohio's proposals. That is a matter not so easily dismissed. IEU-Ohio's proposals may have merit in the future. Let us reassess them in the future. This plan is only for three years. There are no rules, procedures, experience, or guidance of any sort available to aid us in implementing these entirely new kinds of obligations. Let us not risk blocking the development of what may ultimately be a very useful initiative by trying to do too much too fast. If this initiative is made too broad before it can be managed, we risk preventing the benefits we are trying to foster. Let us learn what we are doing and how to do it before we make this initiative too large. Let us walk before we run. That is what the Stipulation does and it should be approved.

CONCLUSION

No reasons to change the Stipulation have been presented. The Post-Hearing Brief has already listed the voluminous reasons the Stipulation should be approved. The Commission should adopt the Stipulation without change.

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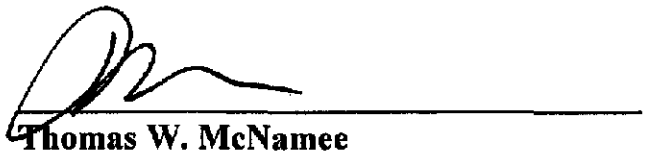

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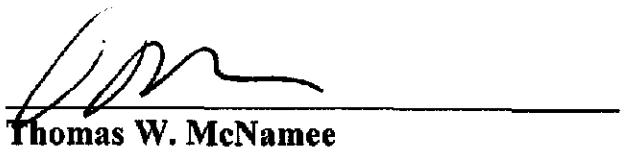
PROOF OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief, submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served via electronic mail, upon the following parties of record, this 26th day of November, 2008.



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