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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. 08-0920-EL-SSO
)	
In the Matter of the Application of Duke Energy Ohio for Approval to Amend Accounting Methods.)	Case No. 08-0921-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.)	Case No. 08-0922-EL-UNC
)	
In the Matter of the Application of Duke Energy Ohio for Approval to Amend its Tariff.)	Case No. 08-0923-EL-ATA
)	

**REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

I. INTRODUCTION

In the Stipulation and Recommendation filed on October 27, 2008 the parties carved out one issue for litigation.¹ Accordingly, the Office of the Consumer Counsel ("OCC") contests as unlawful under R.C. 4928.20(J) the position of the Staff of the Public Utilities Commission ("Staff") and Duke Energy Ohio ("Duke" or "Company") that residential governmental aggregation customers cannot bypass certain provider of last resort charges.² R.C. 4928.20(J)

¹ Stipulation at 32, fn. 11. "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 governmental aggregation customers."

² Post-Hearing Brief Submitted on Behalf of the Staff of The Public Utilities Commission of Ohio ("Staff Brief") at 13-14 and Duke Energy Ohio's Merit Brief ("Duke Brief") at 15.

directs the Commission to allow governmental aggregators to “elect not to receive standby service.” Also, because the Staff and Duke request that the Commission allow nonresidential governmental aggregation customers to avoid those charges, their position is unlawful within the anti-discrimination laws under R.C. 4905.33, 4905.35, 4928.02(A) and 4928.141(A). This position is not just unlawful but it also undermines, rather than encourages and promotes, the possibility of a governmental aggregation, and therefore, eliminates the competitive shopping position and leverage of the 610,000 electric residential customers in Duke’s Ohio service territory.

Making governmental aggregation more assessable to residential utility customers will provide competitive opportunities that might otherwise not exist for offering lower rates to customers (partly because of relatively low aggregation customer acquisition costs).³ Moreover, local governments are competent to evaluate that costs and benefits of either staying on Duke’s Standard Service Offer (SSO) or shopping for a competitive service provider. During this time of dropping fuel and energy costs, there will be less risk to shopping and more opportunities for aggregation in a service territory where there has been very little to date. Customers should be allowed to take advantage of this window of opportunity.

The assertions of Industrial Users-Ohio (“IEU”) that the limits imposed upon mercantile customers in applying for exemptions from the energy efficiency rider is not accurate. Rather the limits are practical and reasonable and therefore, Paragraph 13(b) of the Stipulation meets the Commission’s standards for approving partial stipulations.

Duke, the Staff, The Ohio Energy Group, The Ohio Environmental Council (“OEC”), OCC, and IEU filed Initial Briefs in this case on November 17, 2008 and Reply Briefs are due on

³ OCC Ex. 1 (Gonzalez Direct) at 4.

November 24, 2008. OCC responds to the briefs of Duke and the Staff in this Reply Brief on behalf of the residential electric customers in the Duke's Ohio service territory.

II. ARGUMENT

A. OCC Supports The Stipulation Because It Does Not Decide The Issue Of The Bypassability Of The SRA-SRT And The Receipt Of The 6% Shopping Credit By Residential Governmental Aggregation Customers But Rather The Stipulation Provides For The Litigation Of That Issue.

Duke inaccurately characterizes OCC's position as "OCC supports the Stipulation in every aspect but one."⁴ OCC does in fact support the Stipulation in its entirety because the Stipulation expressly allows OCC to "carve out for litigation the issue of bypassability of charges and shopping credits for residential government aggregation customers."⁵ Additionally, the Staff states "In sum, the Stipulation is the preferable course."⁶ But the Stipulation has not established a course with regard to this issue. For that reason, the Commission's standards for approving partial stipulations⁷ do not apply to this litigation. Rather, the standards for approving an ESP under R.C. 4928.143 apply. Specifically, Duke has the burden of proof to show that its ESP is lawful and consistent with S.B. 221⁸ and that its ESP is "more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."⁹

⁴ Duke Brief at 15.

⁵ Stipulation at 32, fn 11.

⁶ Staff Brief at 14.

⁷ *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St. 3d 123 (1992).

⁸ R.C. 4928.143(C)(1).

⁹ *Id.*

First, Duke has not met the burden to show that absent including equal opportunities for residential government aggregators to avoid the SRT-SRA charge and receive the shopping credit, its ESP meets the statutory standard of being preferable in the aggregate. Duke's failure to provide governmental aggregators with an opportunity to elect against standby service or provider of last resort service on behalf of its residential customers is contrary to R.C. 4928.20(J). Duke has made no effort to demonstrate how it allows governmental aggregators to make that decision on behalf of their residential customers.

Secondly, Duke has made no effort to demonstrate how its ESP is more favorable in the aggregate than a market rate offer when its ESP does not permit significant competition between its ESP and governmental aggregation of residential customers. The Commission must consider whether the ESP without government aggregation is more favorable in the aggregate than an ESP that leaves the door open for a market option of government aggregation.

B. R.C. 4928.20(J) Authorizes Governmental Aggregators To Elect Not To Pay the SRA-SRT and Receive the 6% Shopping Credit On Behalf of Their Residential Customers And Provides the Commission No Discretion To Interfere With That Election.

Regardless of Duke's and the Staff's concerns about allowing residential governmental aggregation customers to avoid the SRA-SRT and to receive the 6% shopping credit in exchange for returning to the market price or 115% of the ESP during the ESP period,¹⁰ the Commission should allow them to elect those incentives to shop. The Commission did not permit residential

¹⁰ Staff Brief at 13-14; Duke Brief at 19.

governmental aggregation customers to bypass provider of last resort charges in the past.¹¹ But the law has changed since then. The Commission will be violating a new provision within S.B. 221, specifically R.C. 4928.20(J), if it does not allow residential governmental aggregation customers those shopping benefits:

On behalf of the customers that are part of a governmental aggregation under this section * * * 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 * * * Upon the filing of the notice, the electric distribution utility shall not charge any such customer to whom electricity is delivered under the governmental aggregation for the standby service.

Under this provision, S.B. 221 directs the Commission to allow governmental aggregators to make that choice on behalf of residential customers. This is different from what existed before S.B. 221 and decisions made by the Commission before S.B. 221 should have no impact on a decision made after R.C. 4928.20(J) was enacted.

The 6% shopping credit is the same as avoiding the SRA-DC. The SRA-DC is identical to the previously identified IMF.¹² The IMF was 6% of little g.¹³ The Commission has previously permitted nonresidential customers to avoid the IMF if they are willing to agree to not rely upon Duke's provider of last resort service.¹⁴ The

¹¹ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and To Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, Order on Remand (October 24, 2007) at 37.

¹² Application at 8.

¹³ *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and To Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, Order on Remand (October 24, 2007) at 37.

¹⁴ *Id.*

Commission permitted the same bypassability of the SRT under the same circumstances.¹⁵ Since that decision, S.B. 221 gave governmental aggregators the opportunity to elect against both the SRA-CD and the SRA-SRT and the Commission should now permit governmental aggregators to elect against the SRA-SRT and the SRA-CD on behalf of their residential customers.

C. Because of the Current Circumstances of Decreasing Fuel and Energy Prices Duke Has Been Unable to Demonstrate that the ESP is More Favorable Than A Market Rate Option As Required Under R.C. 4928.143(C) Without Allowing Residential Aggregation Customers the Opportunity to Receive Shopping Incentives.

Energy and fuel costs are decreasing¹⁶ and much of Duke's costs in the ESP do not move with the market.¹⁷ Duke's burden to demonstrate that its ESP without the market option that facilitates government aggregation is more favorable in the aggregate than an ESP that affords a market rate option through government aggregation is more critical than if the costs were stable or were increasing. Under these circumstances promoting governmental aggregation on behalf of residential customers by bypassing provider of last resort charges is necessary to ensure that the ESP is more favorable than a pure market rate option:

If Duke's prices under the ESP continue to escalate as they have under the RSP and the market prices continue to fall or levelize at their current rate, residential customers may be able to secure better rates through governmental aggregation during the ESP period.¹⁸

¹⁵ *Id.* at 32.

¹⁶ Tr. Vol. I (Gonzalez) at 160, lines 5-10 and lines 22-25.

¹⁷ PTC-BG and SRA-CD; Application at 7 and 13.

¹⁸ OCC Ex. 1 (Gonzalez Direct) at 6-7.

Accordingly, the Commission should require Duke to allow governmental aggregators to elect against provider of last resort charges in order to ensure that the ESP is more favorable in the aggregate than a market rate option.

Moreover, the potential for competition by governmental aggregators could help consumers not only by producing favorable rates for aggregation customers but also would help customers by constraining Duke from unreasonably increasing rates for fear of losing some of its customer base.¹⁹

Therefore, not only would residential governmental aggregation customers who elect to take the 6% shopping credit (or bypass the SRA-CD) and bypass the SRA-SRT have an opportunity to obtain lower rates by shopping but they may also contribute to keeping the rates paid by customers under the ESP at below market prices.

Finally, the benefits that would accrue from these shopping possibilities would contribute to the ESP's favorability by serving the policy of Ohio for "* * * reasonably priced retail electric service * * *." Therefore, for the reasons stated above, the Commission could better ensure that the ESP is more favorable in the aggregate than a market rate option by insisting that governmental aggregators have the option to elect against the provider of last resort charges on behalf of their residential customers.

D. Duke's and the Staff's Concerns That If The Residential Governmental Aggregation Customers Are Able To Bypass the SRA-SRT and Receive a 6% Shopping Credit The Residential Customers Will Be Harmed and Duke's System Reliability Will Be Threatened Are Not Valid.

The Staff and Duke ineffectively argue that allowing residential aggregation customers to avoid the provider of last resort charges would threaten Duke's system reliability.²⁰ Under R.C.

¹⁹ Id. at 9.

²⁰ Duke Brief at 17; Staff Brief at 14.

4928.143(C) Duke has the burden of proof to demonstrate that allowing residential aggregation customers to avoid the provider of last resort charges would threaten its system reliability.

Although Duke claims that it is short on capacity²¹ and that allowing residential governmental aggregation customers to avoid the SRA-SRT and get the 6% shopping credit is too risky, Duke has always been successful obtaining sufficient capacity for the system reliability tracker.

Moreover, Duke witness Paul G. Smith's testimony on the issue is inconsistent. In his direct testimony he stated that the 115% of the ESP price charged to returning customers is based upon a lack of notice when consumers return to the standard service offer:

As part of the active portfolio management process, DE-Ohio liquidates the related positions to serve such a consumer. If the consumers subsequently return **before their commitment date, DE-Ohio is compelled to secure the capacity and commodities often with very little advance notice.** Such procurement or capacity and commodities, if available at all, often costs significantly more than the average cost to serve the consumers that have remained. Consequently, the Stipulating Parties agreed, that a returning non-residential consumer that previously committed to remain off of DE-Ohio supply could avoid DE-Ohio's charges for system reliability but would pay 115% of the ESP-SSO price upon returning to DE-Ohio's supply service.

But during cross-examination he stated that notice is not the reason that a customer would have to return to the ESP at 115% of the ESP:

QUESTION

So even if a customer leaves the stand service offer the First year, say on January 1st, 2009, and after that first year tells Duke that it intends to return the third year or on January 1st 2011, that customer will have to pay 115 percent of the standard service offer price, correct?

ANSWER

You're exactly correct. That's the way it works today under RSP. That's the way it will continue tomorrow under the ESP.

²¹ Duke Brief at 17.

QUESTION

Okay. So does notice have anything to do with why a Customer would have to pay 115%.

ANSWER

No. The 115 percent is the market—the future market price, so **notice has nothing to do with it.**²²

Additionally, Mr. Smith's claim that the return of residential governmental aggregation customers at the same terms and conditions nonresidential governmental aggregation customers would return somehow imposes a greater burden on system reliability than the return of nonresidential customers makes no sense. If Mr. Smith believes that the 115% covers the cost to Duke for having to purchase replacement power for returning nonresidential customers, why doesn't Mr. Smith believe that 115% will cover the cost to Duke for having to purchase replacement power for returning residential customers?

Instead there is evidence on the record that indicates that allowing residential governmental aggregation customers to avoid provider of last resort charges in exchange for returning at the lower of market rate or 115% of the ESP would not put constraints on the Duke system, particularly due to the state of the economy:

QUESTION

Mr. Gonzalez, you did not examine the potential reliability impact to residential governmental customers if there is a large scale governmental aggregation in Duke Energy-Ohio's certified territory, correct?

ANSWER

I did not specifically, but there's language in my testimony that speaks to the impending recession, and to the extent that impending recession will cut back the utility's demand and make the market more supply oriented, I think it speaks to that particular issue.

²² Tr. Vol. I (Smith) at 47.

QUESTION

You did not examine the potential financial impact to energy and capacity prices in MISO if there is large scale governmental aggregation in Duke Energy-Ohio's certified territory, correct?

ANSWER

No. But again, I would expect that given the trajectory of the economy, I think there's pricing—I would expect pricing over the term of the ESP to come down.

And the Staff agrees "There is little reason to believe that a supplier would fail at times of slack demand and low prices."²³

Duke and the Staff also fail to recognize that residential governmental aggregation customers can rely on their local government's expertise in determining the whether a supplier's deal is too risky or not. R.C. 4928.20(J) reflects the General Assembly's confidence in home rule power, similar to that established under the Ohio Constitution, Art. XVIII §4. In that provision, local governments are recognized as competent to make decisions on behalf of their residents. Local governments can always be held accountable for their actions through the election process and are not likely to make rash decisions that will result in a disastrous outcome for their citizens. Although the Commission obviously retains authority over governmental aggregations, Governmental aggregators are empowered to make decisions on behalf of their residents that have been provided for by the General Assembly and should not be potentially hindered in these actions by decisions of the Commission which could impose barriers.

Additionally, residential customers are far more able to deal with the risk of paying the market rate or 115% of the ESP than Staff and Duke believes.²⁴ In recent

²³ Staff Brief at 14.

²⁴ Staff Brief at 13-14; Duke Brief at 13-14.

years, residential customers have had to respond to monthly changes in the GCR²⁵ and to very volatile gasoline prices²⁶. Not to mention significant fluctuations and increases in the price of electricity over the past three years under the RSP. While the Commission should be concerned about whether residential customers can afford market prices, nonresidential customers may actually be more susceptible to catastrophic consequences because nonresidential customers may have a much larger percentage of their costs devoted to electric rates than residential customers.²⁷

For the reasons stated above, the Commission should recognize that allowing residential governmental aggregation customers better access to competitive alternatives is not as risky as Duke and the Staff believe. And the Commission should allow residential governmental aggregation customers to bypass the SRA-SRT and receive the 6% shopping credit in the same way that the nonresidential governmental aggregation customers do.

OCC's proposal protects both the customer's wallets and system reliability. Duke has already agreed that residential aggregation customers can return at 115 percent of market because, as Paul Smith points out, that is their assessment of the market price. Duke's position is unsupportable since both the future ESP price and the future market price are unknown. Duke's value of 115 percent is merely a (potentially inaccurate) proxy. But what if the *actual* market price is lower than 115 percent of the Standard Service Offer? This is a possibility given

²⁵ Tr. Vol. I (Gonzalez) at 164-165; Columbia Gas of Ohio residential customers faced a 16.35% increase in the GCR on October 28, 2008. Columbia Gas GCR Filing, 08-221-GA-GCR (October 14, 2008). Duke residential customers faced a 15.52% increase in the GCR on April 1, 2008. Duke GCR Filing, 08-218-GA-GCR (March 12, 2008). Vectren Energy of Ohio residential customers faced an 18.57% increase in the GCR on April 1, 2008. Vectren GCR Filing, 08-220-GA-GCR (March 17, 2008). Dominion East Ohio residential customers faced a 15.54% increase on May 16, 2008 natural gas standard service offer rate. DEO Standard Service Offer Filing, 05-474-GA-ATA (April 30, 2008).

²⁶ Id. at 165.

²⁷ Tr. Vol. I (Gonzalez) at 166-167.

that a government aggregator would not negotiate with a supplier if the market rate was higher than Duke's SSO rate. Statutory rights should not be foreclosed, and customers should be permitted to choose between the market rate or 115 percent of the SSO as set forth by Duke. If the market rate is chosen, it imposes no burden on system reliability since Duke's obligation will be to buy through to the market and pass on the market rate to the governmental aggregation customers. Finally, the fact that Duke is unwilling to fulfill its statutory duty and wants to instead charge customers a mandatory rate of 115 percent of the SSO is suspect. Going to market and passing on the cost to customers provides Duke with no profit. Likely, charging 115 percent of the SSO does provide profits.

E. Allowing Non-residential Governmental Aggregation Customers to Bypass the SRA-SRT and Receive the 6% Shopping Credit and Not Residential Governmental Aggregation Customers is Discriminatory and Contrary to R.C. 4905.33, 4905.35, 4928.141(A) and 4928.02(A).

S.B. 221 under R.C. 4928.141(A) charged the electric utilities to:

Provide consumers, on a comparable and nondiscriminatory basis within its certified territory, a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service.

The ESP is the standard service offer that Duke is proposing to provide consumers.²⁸ However, the ESP as proposed by Duke is not being provided on a comparable and nondiscriminatory basis. As OCC witness Gonzalez explained from an economics perspective:

Since an important determinant of whether a governmental entity proposes and adopts an aggregation is the potential generation savings compared to Duke's generation price, not allowing residential customers to avoid the Rider SRA-SRT charge and capture the shopping credit creates an unreasonable switching cost

²⁸ Application at 2.

which makes it highly unlikely that a residential governmental aggregation could overcome the economic hurdles in Duke's service territory.²⁹

Moreover, this lack of comparability between residential and nonresidential customer shopping opportunities creates a true hardship for residential customers:

It would be unfair to provide non-residential customers these tools to reduce their costs while denying residential customers the same opportunity and such a result that the Company proposes would be violative of the regulatory principle that rates should be nondiscriminatory.³⁰

Again, Duke has the burden of proof to support these non-comparable rates and to provide evidence that the discrimination is reasonable. The only justification that Duke and the Staff has been able to provide that the discrimination is reasonable was that residential customers are less capable of determining whether an offer is beneficial or not compared to nonresidential customers and that a return to a price that is 15 percent over the standard service offer would be too difficult for residential customers to pay.³¹ These concerns do not give residential aggregation customers sufficient credit.

As mentioned above, the rates, terms and conditions of a residential governmental aggregation program would be established by a local government on behalf of its citizens. Although a residential customer must decide to stay in or opt-out, the residential customers will be able to rely upon their local officials to determine the benefits and pitfalls of offers and frequently such local officials do hire expert consultants to assist them in negotiating rates, terms and conditions. Ultimately, the local governments will be held accountable for any mistakes they may make through the local election process so the local governments have sufficient

²⁹ OCC Ex. 1 (Gonzalez Direct) at 9.

³⁰ Id. at 6.

³¹ Duke Ex. 18 (Smith Second Supplemental) at 13-14; Staff Ex. 1 (Turkenton Direct) at 7.

incentives to look out for their constituencies.

Moreover, if Duke or the Staff are worried about the impact on residential customers of returning to a rate that is 15 percent above the standard service offer, this is all the more reason to give returning customers the choice of availing itself of the market rate if it is lower. For these reasons, the Commission should not be concerned about the shopping capabilities of residential customers under governmental aggregation programs.

F. Residential Aggregation Customers Should Be Permitted to Return to the Market Price as Provided for Under R.C. 4928.20(J) or to 115 Percent of the ESP, Whichever is Lower.

R.C. 4928.20(J) states that customers who return to the utility from shopping pay the market price:

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 the 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 consumers. 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.

Duke argues that because OCC has not proposed a specific market price to which residential governmental aggregation customers should return, the Commission should not consider allowing customers to return to the market price, even though that is the price ordered by S.B. 221.³² But even Duke witness Smith agreed that the market price “of anything varies

³² R.C. 4928.20(J).

from time to time depending on supply and demand.”³³ As OCC witness Gonzalez stated he could not propose a market price:

QUESTION

And, Mr. Gonzalez, you bring up this notion of returning to Duke Energy-Ohio’s system or to Duke Energy’s Ohio system at market price, but you have not proposed any specific calculation of what that market price might be, correct?

ANSWER

No. Any calculation would just be an estimate at this point subject to change.

The return price of 115 percent of the ESP is obviously not a market price because it does not vary from time to time in response to changes in power supply and demand. Rather the 115 percent is applied to administratively set generation costs (PTC-BG and SRA-CD) that do not reflect variations in supply and demand of generation markets. Accordingly, the 115 percent cannot be the market price required by R.C. 4928.20(J).

While the Stipulation sets forth a rate of 115 percent of the standard service offer which may be acceptable to the aggregator, if the aggregator finds that 115 percent of the standard service offer is higher than the market price, the governmental aggregator should be allowed to require that Duke go to market to procure the necessary power. By accepting a potential benefit under the stipulation, aggregators should not forfeit a statutory right. The truth of the matter is that unless and until a government aggregator must return its customers, there is no way to know which rate is preferable for the returning customers, whether it is 115 percent of the SSO or the market rate. In order to protect residential customers, their statutory rights should not be foreclosed.

³³ Tr. Vol. I (Smith) at 47-48.

For the reasons stated above, the Commission should allow residential governmental aggregation customers to return at either the market rate or 115 percent, whichever is lower.

G. The Commission Should Approve Paragraph 13b Of The Stipulation Because It Does Not Violate Any Important Regulatory Principal, It Benefits Ratepayers And Is In The Public Interest.

IEU has taken no position with respect to the totality of the Stipulation except that it unreasonably objects to paragraph 13(b), specifically with the provision that requires:

Pursuant to this statute, exemptions from Rider DR-SAW shall be available to customers that have a minimum monthly demand of 3 MW at a single site or aggregated at multiple sites with DE-Ohio's certified territory.

IEU believes that this provision is inconsistent with the statute and argues that the Commission should reject it as violating an important regulatory principal.³⁴ Additionally, IEU complains about another necessary limitation on the exemption:

To qualify for exemption, the applicant customer must demonstrate to the Commission that it has undertaken or will undertake self-directed energy efficiency and/or demand reduction programs that have produced or will produce annual percentage energy savings and/or peak demand reductions equal to or greater than the applicable annual percentage statutory energy savings and/or peak demand reduction benchmarks to which DE-Ohio is subject.

IEU believes that mercantile customers should not have to meet reductions equal to the annual percentage statutory energy savings to which DE-Ohio is subject. Rather IEU believes that it should be permitted to meet only part of the savings requirements and receive a partial exemption from the energy efficiency cost recovery mechanism.³⁵

³⁴ IEU Brief at 5.

³⁵ IEU Brief at 5-6.

1. Limiting Exemptions To The Energy Efficiency Rider Under Paragraph 13b Of The Stipulation Does Not Violate RC 4928.66(A)(2)(C) And Does Not Violate An Important Regulatory Principal.

IEU argued that R.C. 4928.66(A)(2)(c) requires the Commission to review all mercantile applications for exemptions from the energy efficiency cost recovery mechanism.³⁶ The relevant portion of R.C. 4928.66(A)(2)(c) states:

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.

The statute does not specifically state whether the Commission must entertain any or all mercantile applications for exemptions. The statute states that the Commission **may** consider any application “if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs.” But the Commission **may not** approve exemption applications if the commission does not determine that an “exemption reasonably encourages such customers to commit those capabilities to those programs.” Accordingly, the commission retains the maximum discretion in what exemptions it will consider. The law only limits the Commission’s discretion according to those that it may not approve. For that reason, IEU’s argument that Paragraph 13(b) of the Stipulation is unlawful and therefore violates an important regulatory principal is not correct.

³⁶ IEU Brief at 8 and Tr. Vol. I (Murray) at 129.

2. Limiting Exemptions To The Energy Efficiency Rider To Customers With Loads Over 3mws Is For All Practical Purposes Necessary, Protects Non-Mercantile Customers And Is In The Public Interest.

IEU also claims that paragraph 13(b) of the stipulation is not in the public interest and does not benefit ratepayers and violates an important regulatory principal because it discourages mercantile customers from energy efficiency efforts that could benefit the entire system. IEU asserts that the General Assembly's mere reference to mercantile customers under R.C. 4928.66(A)(1)(c) has set a threshold requiring the Commission to consider all applications by mercantile customers (defined to be those with loads of at least 700,000 kilowatt-hours per year)³⁷ no matter how impractical or wasteful such use of the Commission's time would be. Moreover, as OEC pointed out,³⁸ IEU witness Murray admitted that the Commission would not consider an application for an exemption if the customer offers to change one light bulb and in fact stated:

I think those types of applications would be dismissed pretty rapidly by the Commission.³⁹

But in order to dismiss those applications the Commission would have to open a docket, review the application and would have to write an Entry and file it in the docket. If every mercantile customer were to file for an exemption or a partial exemption, the Commission's docket could potentially be flooded with applications. The administrative burden to all involved - the utilities, the Commission, the OCC and other stakeholders would be enormous if a utility was required for each and every customer to make a calculation on an individual basis as to what that customer's share of DSM rider would be based upon its own contribution to the statutory energy efficiency

³⁷ R.C. 4928.01(A)(19).

³⁸ OEC Brief at 15.

³⁹ Tr. Vol. I at 129.

mandates. Would the cost of this extra work be absorbed by the utility or recovered from general ratepayers including residential customers? Consider too, the cost and administrative burden for the PUCO to verify each customer's partial compliance and if this is taken down to the level of a 600,000 kilowatt-hour customer, the commitment of administrative resources would be tremendous. This also would apply to OCC who would be compelled to review all this to protect residential customer interests. And what of the billing issues for a partially complying customer? Changes to the billing which would be *individually* calculated based on the customer's discreet set of facts would be necessary. Who does IEU recommend pay the costs of changing the billing system to accommodate partially complying customers? OCC posits that this cost should not fall on the shoulders of the residential customers but rather on the shoulders of those who are the cost causers. There may be other costs that the utilities put forth for recovery in addition to the significant administrative burdens. These factors clearly argue against any modification to the Stipulation. Because it is clear from the permissive rather than prescriptive language of R.C. 4928.66(A)(2)(c), the General Assembly intended the Commission to make the final determination as to which applications it would consider and those it would not based upon practical among other considerations.

Besides the practical problems with the Commission's consideration of a multitude of applications from mercantile customers, the more customers who would integrate their energy efficiency, demand response, or peak demand reductions into the utilities programs, the more complications utilities would have to incorporate into estimating and demonstrating actual reductions in programs. And as OEC pointed out, allowing too many mercantile customers to avoid the energy efficiency recovery mechanism may result in non-mercantile customers

carrying too heavy of a burden of the energy efficiency cost recovery mechanism.⁴⁰ For that reason alone, the limitations set forth in paragraph 13(b) of the stipulation is in the public interest and benefits ratepayers and without that limitation the exemption provision would not be in the public interest and would not benefit ratepayers. Non-mercantile customers will always have to pay the energy efficiency recovery cost mechanism, even if those customers implement their own energy efficiency measures. Moreover, without putting reasonable limits on the number of customers that can participate, there is no way for the utility to manage and for the Commission to oversee that there is a reasonable mix of energy efficiency programs for each customer class.

3. The Issue As To Whether R.C. 4928.66(A)(2)(c) Requires The Commission To Accept And Review Exemption Applications Filed By All Mercantile Customers Is Largely A Legal Or Statutory Interpretation Issue And IEU Witness Murray Provided Insufficient Factual Evidence On The Record To Support The Assertion That Paragraph 13(B) Violates An Important Regulatory Principal, Is Not In The Public Interest And Would Not Benefit Ratepayers.

IEU claims that IEU witness Murray provided the only evidence on the record as to whether paragraph 13(b) meets the Commission's standards for approving a partial settlement and implies that for that reason the Commission must reject paragraph 13(b).⁴¹ But most of IEU witness Murray's testimony was an inaccurate interpretation of R.C. 4928.66 rather than factual evidence that paragraph 13(b) violates an important regulatory principal, is not in the public interest and would not benefit ratepayers.

The factual evidence IEU witness Murray provided is not sufficient to show that the limitation of the exemption opportunity to customers with over 3 megawatts of demand violates an important regulatory principal, is not in the public interest and would not benefit ratepayers.

⁴⁰ OEC Brief at 11.

Mr. Murray testified that the energy efficiency measures that different mercantile customers will find useful will vary a great deal.⁴² He argued that not permitting the mercantile customers with less than a 3 megawatt load, even when they cannot meet the electric distribution utility's benchmarks, to get a partial exemption is not in the public interest and will not benefit ratepayers.⁴³ But not permitting such exemptions to small mercantile customers is no less in the public interest or no less beneficial to ratepayers than not permitting residential customers to obtain such partial exemptions. The General Assembly did not require the Commission to consider partial exemption applications from either small mercantile customers or residential customers. Such requirements would simply be impractical creating a significant regulatory burden.

IEU witness Murray urged the Commission to provide flexibility for exemptions, otherwise the Commission would discourage mercantile customers from implementing energy efficiency measures.⁴⁴ Eventually, Mr. Murray did admit that mercantile customers have financial incentives to implement energy efficiency measures with or without the exemption.⁴⁵ Based on that fact, and the fact that R.C. 4928.66 places the ultimate burden on the utility to reach the energy efficiency savings benchmarks, OEC was correct to point out that the purpose of the exemption provision is not to provide already existing incentives to mercantile customers to implement energy efficiency measures but to provide some assistance to the utility to meet the savings benchmarks.⁴⁶ For that reason, IEU witness Murray's facts on the record do not address

⁴¹ IEU Ex. 1 (Murray) at 11.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Tr. Vol. I at 80.

⁴⁵ *Id.* at 131-132.

⁴⁶ OEC Brief at 14.

the public interest and ratepayer benefit intended under R.C. 4928.66(A)(2)(c). For the reasons stated above, the Commission should approve and adopt paragraph 13(b) of the Stipulation.

III. CONCLUSION

The Commission should recognize that the issue as to whether residential governmental aggregation customers should be permitted to receive shopping incentives was not resolved by the Stipulation, but was carved out and that the Commission's partial stipulation standards do not apply to this issue. Instead the R.C. 4928.143 standards apply.

In order to comply with R.C. 4928.20(J), the Commission should allow residential governmental aggregation customers to avoid standby service under R.C. 4928.143(B)(2)(d) or all provider of last resort riders applicable in this case. Because of decreasing fuel and energy costs, Duke's ESP is not more favorable in the aggregate than the market rate offer unless the Commission encourages and promotes large scale governmental aggregation by allowing residential governmental aggregation customers to receive shopping incentives. Moreover, allowing residential governmental aggregation to receive these incentives will not be too risky for the customers because the governmental aggregators are competent to assist in making the shopping decision. Nor will the shopping incentives lead to problems of system reliability, especially in these times of lower prices. Finally, residential governmental aggregation customers should be permitted to return to the ESP at either the market price as permitted under the statute or 115 percent of the ESP as permitted under the Stipulation.

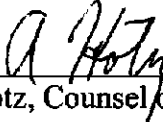
In these hard economic times, it is imperative that the Commission's decisions provide customers with tools to protect from paying more than they should for electricity. One of those tools, recognized by the General Assembly, is aggregation. If Duke's rates under the ESP exceed the market price, then residential customers -- like non residential customers -- should


have the option to go to a lower cost provider. Public policy and decision making should encourage, not stifle, government aggregation.

Paragraph 13(b) of the Stipulation meets the Commission's standards for partial stipulation, is contrary to the law, is practical and reasonable and therefore should be approved and adopted by the Commission.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief* was served vial electronic mail to the persons listed below, on this 26th day of November 2008 by 2:00 PM.



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