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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 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

**REPLY BRIEF
OF
THE OHIO ENVIRONMENTAL COUNCIL**

I. INTRODUCTION

Although the Joint Stipulation and Recommendation ("Stipulation") now before the Commission has been endorsed by its staff and a majority of the parties to these proceedings, two intervenors, the Office of the Ohio Consumers' Counsel ("OCC") and Industrial Energy Users-Ohio ("IEU-Ohio"), are contesting two separate elements of the comprehensive settlement embodied in the Stipulation. In accordance with the schedule established by the presiding attorney examiners at the hearing in this matter, The Ohio Environmental Council ("OEC") hereby submits its reply brief in response to the initial brief submitted herein by IEU-Ohio on November 17, 2008.

As the Commission well knows, IEU-Ohio, which neither supports nor opposes the balance of the Stipulation (*see* IEU-Ohio Ex. 1, at 4), takes issue with Paragraph 13.b, which sets out the terms and conditions under which mercantile customers can seek exemption from the rate mechanism designed to recover the cost of energy efficiency and peak demand reduction programs implemented by Duke Energy Ohio (“DE-Ohio”) pursuant to the requirements of Sections 4928.66(A)(1)(a) and (b), Revised Code. More specifically, IEU-Ohio objects to the provision of Paragraph 13.b of the Stipulation that limits the availability of the exemption to mercantile customers that have a minimum monthly demand of 3 MW at a single site or aggregated at multiple sites within DEO-Ohio’s service territory. In addition, IEU-Ohio also objects to the Paragraph 13.b requirement that, to qualify for the exemption, the customer must demonstrate 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 that are equal to or greater than the applicable annual percentage statutory energy savings and/or peak demand reduction benchmarks to which DE-Ohio is subject.

Much of IEU-Ohio’s initial brief simply parrots the testimony offered by IEU-Ohio witness Murray with respect to these issues. *See* IEU-Ohio Ex. 1, *passim*. OEC addressed this testimony in detail in its initial brief, and no useful purpose would be served by repeating that entire discussion here. However, there are certain arguments raised in IEU-Ohio’s initial brief that OEC cannot let pass without comment.

II. ARGUMENT

- A. ALTHOUGH SECTION 4928.66(A)(2)(d), REVISED CODE, PROVIDES GUIDANCE WITH RESPECT TO EXEMPTIONS FROM THE MECHANISM DESIGNED TO RECOVER THE COSTS OF EDU ENERGY EFFICIENCY AND PEAK DEMAND REDUCTION PROGRAMS, THIS PROVISION DOES NOT PRECLUDE THE ESTABLISHMENT OF REASONABLE ELIGIBILITY CRITERIA FOR THE EXEMPTION.

IEU-Ohio prefaces its arguments with the proposition that “Section 4928.66, Revised Code, permits and encourages integration of customer-sited capabilities of consenting mercantile customers to *[sic]* the EDU’s compliance plan.” IEU-Ohio Brief, 3. In support of this proposition, IEU-Ohio cites both Section 4928.66(A)(2)(c) and Section 4928.66(A)(2)(d), Revised Code. OEC has already parsed division (A)(2)(c) of the statute in its initial brief, and has demonstrated that limiting the availability of the exemption from Rider DR SAW is, in fact, consistent with the plain language of the statute and the underlying statutory scheme. *See* OEC Brief, 8-12, 14-17. Nothing in division (A)(2)(d) of the Section 4928.66, Revised Code, compels a contrary conclusion.

Section 4928.66(A)(2)(d), Revised Code, provides as follows:

Programs implemented by a utility may include demand-response programs, customer-sited programs, and transmission and distribution infrastructure improvements that reduce line losses. Division (A)(2)(c) of this section shall be applied to include facilitating efforts by a mercantile customer or group of mercantile customers to offer customer-sited demand-response, energy efficiency, or peak demand reduction capabilities to the electric distribution utility as a part of a reasonable arrangement submitted to the commission pursuant to section 4905.31 of the Revised Code.

The two sentences of this provision address two separate topics. The first sentence clarifies the nature of the programs the EDU may implement to meet its mandatory obligation to implement energy efficiency and peak demand reduction programs under Section 4928.66(A)(1)(a) and (b), Revised Code. The second sentence addresses facilitating efforts by

mercantile customers to offer the capabilities of their demand-response, energy efficiency, or peak demand reduction programs to the EDU through the application of the Section 4928.66(A)(2)(c), Revised Code, exemption from the mechanism designed to recover the cost of the EDU's energy efficiency and peak demand programs under divisions (A)(1)(a) and (b) of the statute. Although the second sentence provides guidance as to how the exemption is to be effectuated, it does not change the fact that the Section 4928.66(A)(2)(c), Revised Code, exemption from the cost-recovery mechanism is permissive – “(a)ny mechanism . . . may exempt mercantile customers” – as argued by OEC in its initial brief, as well as by DE-Ohio and staff in their initial briefs. *See* DE-Ohio Brief, 11; Staff Brief, 10. Indeed, this interpretation is confirmed by the fact that Section 4928.66(A)(2)(d), Revised Code, provides for effectuating the exemption through a Section 4905.31, Revised Code, reasonable arrangement. Obviously, there can be no reasonable arrangement unless the EDU agrees to the terms, which is precisely why Paragraph 13.b of the Stipulation provides for a joint application by DE-Ohio and the mercantile customer seeking the exemption.

B. THE STIPULATION IS SUPPORTED BY THE RECORD IN THIS PROCEEDING.

As anticipated by OEC in its initial brief (*see* OEC Brief, 17-18), IEU-Ohio argues that there is no evidentiary support for the limitations in Paragraph 13.b, and echoes the claim of its witness Murray that Mr. Murray's expert testimony opposing these limitations is the only evidence on which the Commission may rely in evaluating this provision of the Stipulation. *See* IEU-Ohio Brief, 12-13. The obvious flaw in this argument is that Mr. Murray's testimony on this subject is not actually evidence, but, rather, pure legal argument, albeit by a non-lawyer, regarding how the statute should be interpreted. Clearly, the signatories to the Stipulation cannot

be faulted for failing to produce a witness to respond to legal arguments. Legal argument is the subject for briefs, not testimony.

III. CONCLUSION

For those reasons set forth above and in OEC's initial brief, Paragraph 13.b of the Stipulation should be adopted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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


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