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

APPLICATION FOR REHEARING OF THE OHIO ENVIRONMENTAL COUNCIL

Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35(A), Ohio Administrative Code ("OAC"), the Ohio Environmental Council ("OEC") hereby applies for rehearing from the Commission's December 17, 2008 opinion and order in these dockets. OEC respectfully submits that the Commission's opinion and order is unreasonable and/or unlawful on the following ground:

> The Commission's rejection of the provision of the stipulation limiting the availability of the exemption from Rider DR-SAW 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 is based on erroneous interpretation of Section 4928.66(A)(2)(c), Revised Code, is inconsistent with the underlying legislative scheme, and is contrary to sound public policy.

Pursuant to Rule 4901-1-35(A), OAC, a memorandum in support more fully explaining this ground for rehearing is attached hereto.

WHEREFORE, OEC respectfully requests that its application for rehearing be granted, and that the Commission, after conducting such further proceedings as it may deem necessary, reconsider its finding with respect to the issue identified above and adopt the stipulated 3 MW eligibility threshold for exemption from Rider DR-SAW recommended by the applicant, the Commission staff, and the majority of the parties to these proceedings.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF THE OHIO ENVIRONMENTAL COUNCIL

I. INTRODUCTION

By its opinion and order in these dockets of December 17, 2008 ("Order"), the Commission, pursuant to Section 4928.143, Revised Code, approved an electric security plan ("ESP") for Duke Energy Ohio ("DE-Ohio") by adopting, subject to two modifications, the joint stipulation and recommendation ("Stipulation") submitted by a majority of the parties to these proceedings and endorsed by its staff. OEC respectfully submits that one of those modifications – the elimination of the stipulated 3 MW threshold for exemption from Rider DR-SAW – is

based on a flawed interpretation of the applicable statue and is inconsistent with the underlying legislative scheme and sound public policy.

II. BACKGROUND

In addition to the pricing of generation service, SB 221 addressed a broad range of other important matters, including energy efficiency and the reduction of peak demand. To promote these objectives, SB 221 created mandatory annual energy savings and peak demand reduction benchmarks, which, if not met, subject the state's electric distribution utilities ("EDUs") to financial penalties in the form of compliance payments. The relevant statute, Section 4928.66, Revised Code, requires the EDUs to implement programs designed to achieve these benchmarks and provides for annual PUCO review to determine compliance. The statute further provides that EDUs may implement tariffed rate mechanisms designed to recover the cost of their energy efficiency and demand response programs. However, division (A)(2)(c) of Section 4928.66, Revised Code, provides that such mechanisms may exempt mercantile customers that commit the capabilities of their own self-directed energy efficiency and demand reduction projects and measures for integration into an EDU's programs, if the Commission determines that the exemption "reasonably encourages such customers to commit those capabilities to those programs."

Paragraph 13.b of the Stipulation set out the terms and conditions under which mercantile customers could seek exemption from Rider DR-SAW, the rate mechanism designed to recover the cost of energy efficiency and peak demand reduction programs implemented by DE-Ohio pursuant to the requirements of Sections 4928.66(A)(1)(a) and (b), Revised Code. This paragraph provided that the exemption would be available only 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. Paragraph 13.b also imposed what has been styled as a "benchmark parity" requirement. This provision required that, to qualify for the exemption, the mercantile 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. Notwithstanding that these limitations were acceptable to various signatory parties representing a broad range of mercantile customer interests,[1] intervenor Industrial Energy Users-Ohio ("IEU-Ohio") contested these limitations on the availability of the exemption, and, as a result, these issues were ultimately litigated before the Commission.

In its December 17, 2008 Order, the Commission approved the benchmark parity requirement, but rejected the 3 MW threshold for exemption from Rider DR-SAW. *See* Order, 36-37. With respect to the benchmark parity issue, the Commission found this limitation on the availability of the exemption to be "reasonable and appropriate," citing the inequitable burden that would be imposed on other customers if a mercantile customer were exempted from the rider without making a meaningful contribution to DE-Ohio's ability to achieve benchmark compliance, as well as the burdens that would be imposed on DE-Ohio, the Commission, and other interested parties in attempting to administer and police a partial exemption from the rider to protect DE-Ohio's other ratepayers from being overcharged.[2] However, in rejecting the

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[1] The Ohio Energy Group, the Ohio Manufacturer's Association, the Commercial Group, and the Kroger Co. were all signatory parties.

[2] The Commission also noted that the governing statute makes no reference to the possibility of a partial exemption (*see* Order, 36), an omission which, in OEC's view, is, of itself, dispositive of IEU-Ohio's claim that requests for partial exemptions should be entertained.

stipulated 3 MW threshold on the availability of the exemption from Rider DR-SAW, the Commission blithely ignored these same concerns, and, instead, hung its hat on the nondiscrimination provision of Section 4928.02(A)(2), Revised Code, finding that the exemption could not be limited based on a consumption level other than the 700,000 kWh annual usage that defines a mercantile customer under Section 4928.01(A)(19), Revised Code. *See* Order, 35-37. As argued herein, OEC believes that the Commission's rationale for the rejection of the 3 MW threshold is wrong on several counts.

III. ARGUMENT

A. THE COMMISSION'S REJECTION OF THE PROVISION OF THE STIPULATION LIMITING THE AVAILABILITY OF THE EXEMPTION FROM RIDER DR-SAW 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 IS BASED ON ERRONEOUS INTERPRETATION OF SECTION 4928.66(A)(2)(a), REVISED CODE.

In reaching its decision on the paragraph 13.b issues, the Commission recognized that the second sentence of Section 4928.66(A)(2)(a) is controlling (*see* Order, 35). This sentence provides as follows:

> 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.

Consistent with the arguments advanced on brief by its staff, DE-Ohio, and OEC, the Commission correctly concluded that the use of the permissive "may" – as opposed to the

mandatory "shall" – means that the cost-recovery mechanism need not exempt any mercantile customer. Order, 35. So far, so good. However, the Commission, relying on the nondiscrimination provision of Section 4928.02(A), Revised Code, then went on to frame the issue as being "whether, because of the permissive tenor of the sentence, a rider may exempt some such mercantile customers while refusing to exempt others." *Id.* In answering this question, the Commission apparently bought into the IEU-Ohio argument that, in stating that the exemption may be made available to mercantile customers, the legislature foreclosed limiting the exemption to a subset of mercantile customers. Thus, the Commission concluded that its only role was to determine if the exemption reasonably encourages mercantile customers to commit their capabilities to the host EDU's energy savings and demand reduction programs. This logic suffers from several obvious flaws.

First, the 3 MW limitation on the availability of Rider DR-SAW does not run afoul of the nondiscrimination provision of Section 4928.02(A), Revised Code. As commonly understood, "discrimination" entails treating similarly situated customers differently. Clearly, the stipulated 3 MW limitation, by definition, does not do this. Rather, it draws a distinction between those mercantile customers with monthly demands of 3 MW or more and those with monthly demands of less than 3 MW based on the collective judgment of the signatory parties, arrived at through hard-bargaining during settlement negotiations, that the 3 MW threshold is reasonable under the circumstances. Indeed, this restriction is no different than the benchmark parity requirement, a requirement that the Commission found reasonable and appropriate without expressing any concern as to whether it was discriminatory and without second-guessing the signatory parties' judgment that there was a rational basis for this requirement. Would the Commission have found this provision to be discriminatory if the availability of the exemption had been limited to

mercantile customer that could demonstrate annual percentage energy savings and demand reductions of, say, 150% of the benchmarks applicable to DE-Ohio? Certainly, there is nothing in the Commission's decision on this issue that suggests that this would have been the case. Thus, the issue here is not whether the 3 MW threshold for the exemption is discriminatory, but whether the inclusion of this criterion is consistent with Section 4928.66(A)(2)(a), Revised Code.

Second, the Commission misinterpreted the significance of the use of the permissive "may" in the statute. Having correctly determined that the provision stating that cost-recovery mechanism "may exempt mercantile customers" means that there is no requirement that the cost-recovery mechanism exempt mercantile customers, the Commission then construes the stated condition – "if the commission determines that that exemption reasonably encourages such customers to commit those capabilities to those programs" – as a requirement that any such exemption be available to all mercantile customers that can satisfy this condition. Clearly, the statute says no such thing. As the Commission implicitly recognized in approving the benchmark parity requirement for exemption from Rider DR-SAW, an EDU's tariffed requirements for eligibility for exemption from the cost-recovery mechanism may include reasonable terms and conditions. Such terms and conditions are part of the "exemption." The Commission's job is to determine, *ab initio*, if the proposed "exemption" reasonably encourages mercantile customers to commit their demand response capabilities for integration into the EDU's own program. If that is the case, then the Commission must approve the "exemption" notwithstanding that not all mercantile customers are eligible for the "exemption" under its stated eligibility criteria. Thus, the question is not, as the Commission would have it, whether exempting any particular mercantile customer would encourage that customer to commit its capabilities to the EDU's own programs. Rather, the question is whether the proposed

"exemption" would encourage those mercantile customers eligible for the "exemption" to do so. Does the exemption encourage mercantile customers with monthly demands equal to or greater than 3 MW to commit their capabilities for integration to DE-Ohio's own programs? If that question is answered in the affirmative, the Commission's inquiry is at an end in the absence of a showing that the specific 3 MW threshold is itself discriminatory because it has no rational basis. As discussed above, there has been no such showing here.[3]

Third, as OEC argued at length on brief, the foregoing interpretation is entirely consistent with the fact that, under Sections 4928.66(A)(1)(a) and (b), Revised Code, the onus is on the EDU to achieve benchmark compliance. *See* OEC Brief, 4-5, 8-12; OEC Reply Brief, 3. Thus, the legislature's grant of the ability to exempt mercantile customers from the cost-recovery mechanism designed to recover the EDU's cost of benchmark compliance – a measure which imposes additional costs on other ratepayers – is clearly intended to assist the EDU in achieving benchmark compliance, not to provide rate relief to mercantile customers. If that were the intent, the legislature would have mandated that all mercantile customers be exempted by using the mandatory "shall" instead of the permissive "may." The Commission's interpretation simply reads this critical distinction out of the statute. With all due respect, it makes no sense to find that the language at issue provides the EDU with the option to refuse to exempt any mercantile customer from its cost-recovery mechanism, then, in the next breath, to find that, if the EDU

[3] Again, the 3 MW threshold represents the collective judgment of the stipulating parties as to a reasonable cut-off point for availability of the rider. Although it may have been desirable for the witnesses sponsoring the stipulation to explain the basis for the 3 MW standard, the Commission, in rejecting IEU-Ohio's argument that this provision of the stipulation could not approved because no witness specifically supported this term, found that there was no requirement that every provision of a stipulation be supported by a witness. *See* Order, 37. Further, the issue before the Commission was whether any minimum demand threshold was permissible, not whether the specific 3 MW threshold was reasonable. Moreover, as the Commission has long recognized, it is not its function to second-guess specific provisions of stipulations, but, rather, to evaluate the stipulation as a package.

does elect to offer an exemption, it must make the exemption available to all mercantile customers regardless whether the EDU needs the customer's capability to achieve benchmark compliance. To find otherwise is to assume that the legislature had no regard for the interests of the EDU's other ratepayers and cavalierly determined that they should subsidize mercantile customers demand-response efforts even if the EDU had no need for the capability they might provide.

B. THE COMMISSION'S REJECTION OF THE PROVISION OF THE STIPULATION LIMITING THE AVAILABILITY OF THE EXEMPTION FROM RIDER DR-SAW 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 IS INCONSISTENT WITH THE UNDERLYING LEGISLATIVE SCHEME AND IS CONTRARY TO SOUND PUBLIC POLICY.

Although OEC believes that the foregoing demonstrates that the Commission's interpretation of the governing statute was flawed and that rehearing should be granted on that ground, OEC is also concerned that certain elements of the Commission's decision may reveal a fundamental misunderstanding of just how this entire process is supposed to work. Clearly, the public interest is served by efforts by mercantile customers to reduce consumption and control demand. However, in attempting to support those efforts, it is important that the Commission recognize that, in the normal course, mercantile customers will make the business decision to undertake such efforts where it makes economic sense for them to do so. It is only when the payback period for investment in energy savings and demand response measures is too long to satisfy the mercantile customer's own internal rate of return calculus that additional incentives may be necessary to prompt the customer to proceed with a particular project.

SB 221 recognizes that, in such instances, the incentives provided under an EDU energy efficiency or demand reduction program may induce the customer to proceed with the

4928.66(A)(1)(a) and (b), Revised Code, benchmarks. Moreover, because the onus is on the EDU to meet the statutory benchmarks through its own programs, it is in the EDU's interest to develop cost-effective energy efficiency and demand reduction programs that are advantageous to mercantile customers.[4] In addition, the EDU has the opportunity to enter into a special arrangement with a mercantile customer that would include an incentive to the customer to participate in an EDU program specifically tailored to its needs. Because the transfer of revenue responsibility resulting from relief from a cost-recovery mechanism makes exemption from such a mechanism an extraordinary measure, the legislature clearly contemplated that it would be made available by the EDU only when these other incentives prove insufficient to generate the energy savings and demand reductions necessary for it to achieve benchmark compliance. Accordingly, the fact that DE-Ohio – the entity subject to financial penalties for failing to meet the statutory benchmarks – supports the stipulated 3 MW limitation should, of itself, demonstrate the reasonableness of this standard.

As the Commission observed, one of the principal objections of the stipulating parties to IEU-Ohio position that the exemption must be made available to all mercantile customers is the enormous burden this would impose on DE-Ohio, the Commission, and other interested parties in administering and policing whether mercantile customers receiving the exemption actually qualified for this relief. *See* Order, 36. However, notwithstanding that it cited this very concern in rejecting IEU-Ohio's position on the benchmark parity requirement, the Commission gave short shrift to this concern in the context of the 3 MW issue, characterizing it as untenable. *See* Order, 37. This reaction appears to ignore that the decision by a mercantile customer to commit

[4] Indeed, Paragraph 13.g of the Stipulation recognizes this very concept by providing for the establishment of a "Manufacturing Collaborative" funded by DE-Ohio to develop cost-effective energy efficiency programs targeted to manufacturers.

investment and thereby contribute to EDU achieving compliance with the Section 4928.66(A)(1)(a) and (b), Revised Code, benchmarks. Moreover, because the onus is on the EDU to meet the statutory benchmarks through its own programs, it is in the EDU's interest to develop cost-effective energy efficiency and demand reduction programs that are advantageous to mercantile customers.[4] In addition, the EDU has the opportunity to enter into a special arrangement with a mercantile customer that would include an incentive to the customer to participate in an EDU program specifically tailored to its needs. Because the transfer of revenue responsibility resulting from relief from a cost-recovery mechanism makes exemption from such a mechanism an extraordinary measure, the legislature clearly contemplated that it would be made available by the EDU only when these other incentives prove insufficient to generate the energy savings and demand reductions necessary for it to achieve benchmark compliance. Accordingly, the fact that DE-Ohio – the entity subject to financial penalties for failing to meet the statutory benchmarks – supports the stipulated 3 MW limitation should, of itself, demonstrate the reasonableness of this standard.

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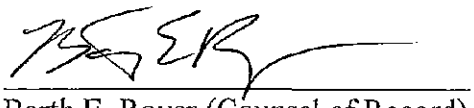
Order, 37. This reaction appears to ignore that the decision by a mercantile customer to commit its own capabilities for integration into the EDU's program involves much more than simply requesting an exemption from the EDU. Although final rules are not yet in place, it is clear that the customer will have to independently demonstrate compliance with the terms of the exemption and that the Commission will, in each instance, have to verify that the terms of the exemption have been satisfied. Indeed, although the Commission seems oblivious to the administrative burden this will impose, its staff is not, as evidenced by its endorsement of 3 MW threshold. Sound public policy requires that the Commission reconsider its finding regarding this issue.

IV. CONCLUSION

For those reasons set forth above, the Commission should grant OEC's application for rehearing, and, after conducting such further proceedings as it may deem necessary, should reconsider its finding with respect to the 3 MW eligibility threshold for exemption from Rider DR-SAW and adopt the stipulated 3 MW standard as recommended by the applicant, its staff, and the majority of the parties to these proceedings.

Respectfully submitted,



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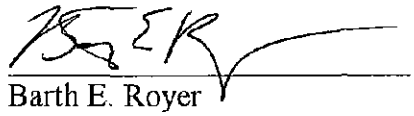
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following parties by US mail, postage prepaid, and/or by electronic mail this 16th day of January 2009.



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