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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 Tariffs	)))	Case No. 08-923-EL-ATA

DUKE ENERGY OHIO'S MEMORANDUM IN OPPOSITION TO THE APPLICATION FOR REHEARING OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE SIERRA CLUB OHIO CHAPTER

I. INTRODUCTION

On December 17, 2008, the Public Utilities Commission of Ohio (Commission) issued an Opinion and Order (Opinion) in which it approved, with modification, a Stipulation and Recommendation (Stipulation) submitted on October 27, 2008. The modifications made by the Commission concerned two limited issues – whether residential governmental aggregation customers could avoid certain charges and whether all mercantile customers had a statutory right to seek exemption from a utility sponsored energy efficiency mechanism.

With respect to the first issue, the Commission determined that residential governmental aggregation customers could avoid charges associated with DE-Ohio's obligation to maintain firm generation service but were obligated to pay those charges necessary to compensate DE-Ohio for providing customers with a first call on capacity.[1] In resolving the second issue, the Commission modified the Stipulation to eliminate the 3 MW threshold for exemption from DE-Ohio's energy efficiency mechanism – Rider DR-SAW.[2]

The Office of the Ohio Consumers' Counsel (OCC) and the Sierra Club Ohio Chapter (Sierra Club) now seek rehearing on the Commission's Opinion, claiming that it is unreasonable and unlawful. But to support their position, the OCC and the Sierra Club manufacture inconsistencies where none exist, rely on comparisons that are neither accurate nor appropriate, and misconstrue statutory language. And because the OCC and the Sierra Club have failed to properly substantiate their claims that the Commission erred, their application must be denied.

II. PROCEDURAL HISTORY

On July 31, 2008, DE-Ohio filed its Application to establish an Electric Security Plan (Application) with the Commission. On August 21, 2008, DE-Ohio held a technical conference further describing its electric security plan (ESP) and publicly invited all Parties to participate in settlement negotiations shortly thereafter. Settlement discussions commenced among all Parties, and this process ultimately yielded a Stipulation that was filed with the Commission on October 27, 2008.

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[1] *In the Matter of Duke Energy Ohio, Inc.'s Application for an Electric Security Plan*, Case No. 08-920, *et al.*, Opinion and Order at page 42 (December 17, 2008). Hereinafter, the case shall be referred to as "*In re: DE-Ohio's ESP*."
[2] Id.

The Stipulation resolved all issues among the signatory Parties, with the exception of a single issue reserved for litigation by the OCC. The signatory Parties represent all stakeholder interests and include all Parties that participated in the proceedings except as discussed below. The signatories include the Commission Staff, People Working Cooperatively, the Greater Cincinnati Health Council, Integrys Energy Services, Inc., National Resource Defense Council, Sierra Club, Citizens United For Action, Constellation NewEnergy, Inc., Constellation Energy Commodities Group Inc., Ohio Partners for Affordable Energy, the City of Cincinnati, the Ohio Environmental Council, The Kroger Company, the OCC, the Ohio Energy Group, the Village of Terrace Park, the Ohio Manufacturers Association, and the Commercial Group (including Wal-Mart, Sam's Club, and Macy's).

Industrial Energy Users-Ohio (IEU-Ohio) was the only Party participating in the settlement discussions that did not sign the Stipulation. IEU-Ohio neither supported nor opposed the Stipulation. Rather, it reserved the right to argue its position. In the Stipulation, the OCC expressly reserved the right to litigate "the limited issue of bypassability of charges and shopping credits for residential governmental aggregation customers."[3]

An evidentiary hearing was held on November 10, 2008, during which IEU-Ohio took issue with *one* paragraph of the Stipulation. Specifically, IEU-Ohio challenged (1) whether the Stipulation properly limited the exemption from DE-Ohio's energy efficiency mechanism to customers with an individual or aggregated load of 3 MW, instead of permitting all mercantile customers to seek exemption; and (2) whether a customer could receive exemption from DE-Ohio's energy efficiency mechanism if it

[3] *In re DE-Ohio's ESP*, Joint Ex. 1 at page 32, footnote 11 (November 10, 2008).

pledged to integrate only part of the energy efficiency DE-Ohio would otherwise attribute to its load, rather than the full amount of energy efficiency. IEU-Ohio did not express an opinion on the remainder of the Stipulation.[4] Similarly, although a signatory to the Stipulation, the OCC presented evidence on the *one* narrow issue it had reserved for hearing.

On December 17, 2008, this Commission issued its Opinion, approving a modified Stipulation. Significantly, the Commission found that:

> Duke's proposed electric security plan, as set forth in the application, modified through the stipulation, and further modified herein, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under Section 4928.142, Revised Code.[5]

Now, contrary to their positions reflected in the Stipulation, the OCC and the Sierra Club seek to convince this Commission to reject its prior conclusions. But as the OCC and the Sierra Club fail to properly support a claim for rehearing, their application must be denied.

III. STANDARD OF REVIEW

Pursuant to R.C. 4903.10, any application for rehearing must "set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful."[6] Here, OCC and the Sierra Club only dispute the modifications to the Stipulation as made by the Commission. As such, all other aspects of the Opinion remain unchallenged and excluded from subsequent review. As to the only

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[4] *In re DE-Ohio's ESP*, IEU-Ohio Ex. 1 at 4. See also, *In re DE-Ohio's ESP*, Tr. I at page 104) (November 10, 2008).
[5] *In re: DE-Ohio's ESP*, Opinion and Order at page 43 (December 17, 2008).
[6] R.C. 4903.10

disputed issues, the Commission's decision is neither unreasonable nor unlawful. On the contrary, it is properly supported by the evidence and established, binding precedent.

IV. ARGUMENT

A. The Public Utilities Commission of Ohio did not unreasonably or unlawfully restrict the rights of residential governmental aggregation customers.

1. The Public Utilities Commission of Ohio applied the correct legal standard in assessing whether to adopt the Stipulation as only one narrow issue was reserved for litigation by the Office of the Ohio Consumers' Counsel.

Despite the deliberate language used the Stipulation – with which OCC and the Sierra Club expressly agreed – these parties now contend that the Commission improperly applied to the Stipulation its firmly established standard of review. Indeed, the OCC and the Sierra Club suggest that DE-Ohio was required, pursuant to R.C. 4928.143(C)(1), to prove that the Stipulation reflected an ESP that was, in the aggregate, more favorable than the results expected under a market rate option. More curiously still, the OCC and the Sierra Club suggest that there was no stipulation on the issue of residential governmental aggregation because "no party to the Stipulation expressly took a position on" that issue.[7] The OCC and the Sierra Club erroneously intimate that all parties reserved the right to contest issues regarding residential governmental aggregation.[8]

Lest there be any question, only the OCC departed from the global position taken on the issue of residential governmental aggregation by deliberately and intentionally reserving one narrow issue for hearing; namely, the bypassability of charges and

[7] See *Application for Rehearing by the Sierra Club Ohio Chapter and the Office of the Ohio Consumers' Counsel*, Memorandum in Support at page 3 (January 16, 2009).
[8] Id.

shopping credits.[9] No other Party to the Stipulation joined OCC in its desire to contest this limited issue. On the contrary, all other Parties acknowledged that OCC alone was reserving the right to challenge this issue. And all Parties – including the OCC and the Sierra Club – did not thereafter ignore the terms applicable to residential governmental aggregation customers. Rather, all Parties – including the OCC and the Sierra Club – expressly stipulated that:

> Residential customers who have switched to a CRES provider on or after December 31, 2008, *including residential governmental aggregation customers*, shall have no minimum stay and may return to the ESP-SSO.[10]

All Parties – including the OCC and the Sierra Club – further stipulated that "DE-Ohio does not assess a separate charge for standby service or default service on residential customers," including governmental aggregation customers.[11] It is thus undeniable that a Stipulation was properly before this Commission for consideration.

The OCC and the Sierra Club continue their attempts to mischaracterize the Stipulation by intentionally omitting the relevant testimony of DE-Ohio witness Paul G. Smith. In explaining the resolution of those issues surrounding residential governmental aggregation, Mr. Smith testified that:

> Ultimately the ability to bypass the Rider SRA-SRT and the shopping credit was resolved as part of the Stipulation, which represents a series of compromises from each of the party's litigation positions. The Stipulation states that each provision of the Stipulation is not specifically endorsed by each signatory party standing alone, but that as a package it is supported by all signatory parties. It was my intent simply to reference that for purposes of settlement, all parties are in agreement regarding the treatment of residential governmental aggregation customers as prescribed in the Stipulation except for OCC.[12]

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[9] *In re: DE-Ohio's ESP*, Stipulation and Recommendation at page 32, footnote 11 (October 27, 2008).
[10] Id, at page 33, para. 21(a) (October 27, 2008). Emphasis added.
[11] Id, at page 32, para. 21 (October 27, 2008).
[12] *In re: DE-Ohio's ESP*, Tr. at Vol. I, page 20 (November 10, 2008). Emphasis added.

Thus, Mr. Smith confirmed the existence of a Stipulation here.

In a final attempt to retreat from their prior positions, the OCC and the Sierra Club claim that the OCC did not actually agree with the conclusion that DE-Ohio's ESP, as proposed in its Application and as modified by the Stipulation, was not more favorable, in the aggregate, than the results under a market rate option. Rather, they suggest that the OCC would have agreed to that statement if and only if the Commission had resolved the limited issue surrounding residential governmental aggregation in the OCC's favor. This brazen statement is indeed misguided.

The final language in the Stipulation was unambiguous and precise; the narrow issue that the OCC reserved for litigation specific. The OCC *stipulated* that the ESP was more favorable, in the aggregate, than the market rate option. The OCC *stipulated* that it was contesting one narrow issue. Had the OCC been of the opinion that DE-Ohio's ESP, as proposed in its Application and as modified by the Stipulation, was not more favorable, in the aggregate, than the market rate option *unless* the Commission ruled in its favor, it should have refrained from signing the Stipulation. But it did not so refrain.

The OCC and the Sierra Club cannot now misconstrue the express and specific language of the Stipulation and transform it into something it is not simply because they disagree with this Commission's Opinion. The Commission correctly determined that the Stipulation existed and, as such, properly applied the three-part test for examining stipulations.

2. The Public Utilities Commission of Ohio has consistently and correctly interpreted the extent of avoidable charges for governmental aggregation customers in Ohio.

As discussed in Part 3, *infra*, the Commission did not unreasonably or unlawfully determine that DE-Ohio's Rider SRA-CD was outside the ambit of R.C. 4928.20(J). And although the Commission's assessment of the purpose of Rider SRA-CD should be limited to that rider, the OCC and the Sierra Club seek to gain rehearing with reference to riders drafted and intended for use by utility companies other than DE-Ohio. But the attempts by the OCC and the Sierra Club to blur the distinction between the components of DE-Ohio's ESP and those of FirstEnergy's proposal are improper and insufficient to support rehearing.

An accurate comparison cannot be made between DE-Ohio's ESP and FirstEnergy's proposed ESP. Indeed, an accurate comparison cannot be made between the two companies. FirstEnergy transferred all of its generation assets to an affiliate; its facilities are not dedicated to its customers. DE-Ohio, on the other hand, has generation assets dedicated to serve its customers. As a result, the Commission must reject the OCC's and the Sierra Club's invitation to make inaccurate and inappropriate comparisons. Assuming, *arguendo*, that the Commission elects to compare certain riders within these two different ESPs, it is evident that the OCC and the Sierra Club again rely upon incorrect conclusions.

The Commission did not reject FirstEnergy's Rider MDS because it improperly reflected an unavoidable charge for utility companies' obligations as providers of last resort (POLR). Rather, the Commission found that this rider was not sufficiently

supported by the record.[13] And an evidentiary deficiency in FirstEnergy's case necessarily precludes an accurate comparison between its proposed Rider MDS and DE-Ohio's uncontested Rider SRA-CD.

Similarly, the Commission did not render inconsistent findings when considering both FirstEnergy's proposed rider for standby charges for generation (Rider SBC) and DE-Ohio's Rider SRA-SRT. As the Commission found in both instances, these riders are intended to compensate the utilities for standby service. And, consistent with R.C. 4928.20(J), the charges associated with these riders are avoidable.[14] Thus, when consideration is given to the Commission's decisions as a whole, it is readily apparent that it has consistently interpreted those riders that are properly included in the scope of R.C. 4928.20(J).

3. The Public Utilities Commission of Ohio's Opinion and Order does not unfairly or unlawfully discriminate against residential governmental aggregation customers.

The OCC and the Sierra Club persist in their pattern of ignoring the entire record to suggest that the Commission's Opinion enables discriminatory treatment. Significantly, in arguing that the Commission's Opinion unreasonably or unlawfully discriminates against residential governmental aggregation customers, the OCC and the Sierra Club reference *one* sentence in the Opinion. Specifically, the OCC and the Sierra Club reference the Commission's one comment that "[r]esidential and nonresidential customers are not differently situated in any way to justify what would then be different return pricing provisions."[15]

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[13] *In the matter of the Application of FirstEnergy for an Electric Security Plan*, Case No. 08-935-EL-SSO, et al., Opinion and Order at page 27 (December 19, 2008).
[14] Id, at page 29.
[15] *In re: DE-Ohio's ESP*, Opinion and Order at page 28 (December 17, 2008).

But reviewing the Opinion in its entirety clarifies that this statement is immaterial to the one issue reserved by the OCC for litigation. This comment pertained to an issue that was not before the Commission as the OCC had failed to reserve it for hearing; namely, the price at which residential governmental aggregation customers would return to DE-Ohio's standard service offer. Thus, the Commission's dicta neither alters its Opinion nor renders it unreasonable or unlawful. Rather, it merely reflects the Commission's belief that there is no basis on which to afford residential customers better options for return pricing. And the OCC cannot now correct its prior oversight by suggesting that the Commission's Opinion functions to discriminate against residential governmental aggregation customers. This position is incorrect and unsubstantiated by the evidence.

The OCC's only witness, Wilson Gonzalez, admitted that there are compelling reasons to treat different customer classes differently and that cost of service is one of the strongest reasons for doing so.[16] Mr. Gonzalez also agreed that the costs to serve residential customers are not the same as the costs to serve nonresidential customers.[17] 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 assess the number of potential governmental aggregators within DE-Ohio's service territory.[18] Mr. Gonzalez could not inform this Commission as to whether there are any residential customers interested in governmental aggregation. And Mr. Gonzalez could

[16] *In re DE-Ohio's ESP*, Tr. at pages 149-150.
[17] Id.
[18] Id. at page 152.

not speak to the costs of educating residential customers on the risks to which the OCC wishes to subject them.

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.[19] And yet, the entire record, including the evidence offer by the OCC at hearing, undermines its dubious position.

In contrast, and as confirmed by the record, DE-Ohio sought governmental aggregation provisions that were fair for *all* customers. DE-Ohio – and the other Parties to the Stipulation – wanted provisions that better insulate from risk those who are not readily suited to respond to it. As the Commission's Staff correctly noted, larger and more sophisticated customers are in a better position to assess risk.[20] 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 other 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

[19] Id, at page 170 (As Mr. Gonzalez conceded, "I think it's a better – it's a better deal for residential customers").
[20] Staff Initial Brief at page 14.

more than the average cost to serve... ."[21] 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."[22] DE-Ohio's risk puts the entire customer population at risk if capacity is unavailable under these circumstances. For these reasons, the Commission must reject the OCC's and the Sierra Club's untenable argument that the Opinion is discriminatory.

4. The Public Utilities Commission of Ohio did not err in its interpretation of "stand-by service" as set forth under SB 221.

The OCC and the Sierra Club argue that this Commission improperly defined "standby service" by ignoring the *clear and unambiguous* statutory definition of that term.[23] In advancing this argument, the OCC and the Sierra Club rely only on R.C. 4928.143(B)(2)(d). Despite OCC's and the Sierra Club's insistence, R.C. 4928.143(B)(2)(d) does *not* set forth a clear and unambiguous definition of "standby service." Indeed, it contains no definitions at all. Thus, to correctly determine the intended meaning of standby service, this Commission correctly resorted to the applicable statutory language. Because R.C. 4928.20(J) provides that the legislative authority forming "governmental aggregation may elect not to receive standby service within the meaning of" R.C. 4928.143(B)(2)(d),[24] the Commission understandably resorted to this section for the needed definition. And as the Commission determined,

> Clearly, the legislature's intent was that the service for which the customers were not being charged was the electric utility's standing ready to serve those customers at the [standard service offer] price if they were

[21] *In re: DE-Ohio's* ESP, Second Supplemental Testimony of Paul Smith at pages 13-14.
[22] Id, at page 14.
[23] See *Application for Rehearing by the Sierra Club Ohio Chapter and the Office of the Ohio Consumers' Counsel*, Memorandum in Support at page 11 (January 16, 2009).
[24] R.C. 4928.20(J).

> to choose to return. This statutory provision, then, must mean that governmental aggregations may elect to not to receive that service.[25]

Upon discerning the legislatures' intended definition of standby service under R.C. 4928.20(J), the Commission next determined whether the riders at issue (Rider SRA-SRT and Rider SRA-CD) pertained to standby service such that the charges thereunder could be avoided by governmental aggregation customers. As the Commission found:

> Rider SRA-SRT will compensate Duke for its 'purchase [of] capacity necessary to maintain an offer of firm generation service and [provision of] default service to all consumers in its certified territory;...whether switched or unswitched. The purchase of capacity to allow Duke to maintain default service for switched customers, we find, is clearly within the scope of the intent of Section 4928.20(J), Revised Code. Rider SRA-CD is quite different, however. That rider is intended to compensate Duke for providing customers with a first call on its capacity, foregoing the opportunity to sell capacity that is currently dedicated to its standard service offer, permitting customers to switch to competitive suppliers, and assuming the risk associated with maintaining a reasonably stable price during the ESP period.[26]

The Commission concluded that residential governmental aggregation customers could not avoid the charges associated with Rider SRA-CD as that rider did not compensate DE-Ohio for providing standby service under R.C. 4928.20(J).

Here, however, despite the Commission's detailed review, the OCC and the Sierra Club maintain that there are no material differences between the two riders at issue. Indeed, they gloss over the different purposes for and attributes of the riders and generalize them both as merely representing "standby power." But the Application unambiguously identifies the two separate riders as having separate purposes. Rider SRA-SRT is intended to "maintain an offer of firm generation service and to provide

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[25] *In re: DE-Ohio's ESP*, Opinion and Order at page 27 (December 17, 2008).
[26] Id.

default service to all consumers" in DE-Ohio's certified territory while Rider SRA-CD is intended to enable DE-Ohio to fulfill its POLR obligations.[27] Significantly, Rider SRA-CD is not intended to compensate DE-Ohio for providing standby service. And as confirmed by their participation in the Stipulation, both the OCC and the Sierra Club agreed that DE-Ohio's ESP reflected, among other things, these two separate riders. Both the OCC and the Sierra Club agreed that DE-Ohio would implement its ESP as set forth in the Application and as modified by the Stipulation. As such, they acknowledged that these riders were not synonymous. Thus, the Commission properly interpreted them, finding that only one fell within the purview of R.C. 4928.20(J).

B. The Public Utilities Commission of Ohio has not failed to provide the necessary standards for the administration of exemption requests under Duke Energy Ohio's energy efficiency mechanism, Rider DR-SAW.

The OCC and the Sierra Club suggest that the Commission's Opinion is unreasonably and unlawfully deficient in that it fails to incorporate protocol for the administration and management of applications for exemption from DE-Ohio's Rider DR-SAW. In response to this allegation, DE-Ohio submits that the development and implementation of the standards necessary to ensure due process for all interested parties can, and should, occur via the rules issued pursuant to Amended Senate Bill 221 (SB 221). As such rules would effect parties other than those involved in the present matter, the appropriate forum for their development would be a rule-making procedure. This would allow sufficient opportunity to the review and discussion of proposed rules and permit this Commission to give due consideration to those comments prior to issuing its rules.

[27] *In re: DE-Ohio's ESP*, Opinion and Order at page 14 (December 17, 2008).

V. CONCLUSION

For the reasons set for herein, Duke Energy Ohio respectfully requests that the Public Utilities Commission of Ohio deny the Application for Rehearing of the Office of the Ohio Consumers' Counsel and the Sierra Club Ohio Chapter and reaffirm its Opinion and Order of December 17, 2008.

Respectfully submitted,

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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 January 2009 via regular mail delivery, postage prepaid, and/or electronic mail delivery.

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