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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan.))))	Case No. 08-920-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Accounting Methods.))))	Case No. 08-921-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., 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, Inc., for Approval to Amend its Tariff.))))	Case No. 08-923-EL-ATA

**INDUSTRIAL ENERGY USERS-OHIO'S
MEMORANDUM CONTRA APPLICATIONS FOR REHEARING**

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I. INTRODUCTION

The evidentiary record in this proceeding was completed on November 10, 2008. On November 17, 2008, initial briefs were submitted in this proceeding and reply briefs were filed on November 26, 2008. The Public Utilities Commission of Ohio ("Commission") issued its *Opinion and Order* modifying and adopting a proposed Stipulation and Recommendation ("Stipulation") on December 17, 2008. Applications for Rehearing were filed by the Ohio Environmental Council ("OEC") as well as jointly by the Office of the Ohio Consumers' Counsel ("OCC") and the Ohio Chapter of the Sierra Club ("Sierra Club"). In accordance with Rule 4901-1-35(B), Ohio Administrative Code

("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio") submits its Memorandum Contra for consideration by the Public Utilities Commission of Ohio ("Commission").

II. APPLICATION FOR REHEARING OF OEC

OEC first argues that reading Section 4928.66, Revised Code, to permit the narrowing of the mercantile customer exemption opportunity to only mercantile customers with a minimum demand of 3MW is not discriminatory.¹ However, the Commission did not ground its finding that the 3MW Threshold violates Section 4928.66, Revised Code, on a discrimination theory but rather based its determination on the plain language of Section 4928.66, Revised Code, and the legislature's intent.² OEC's attempt to create an issue where none exists should be denied.

OEC also claims the Commission misinterpreted the significance of the use of the word "may" in the statute. OEC objects to the Commission's conclusion that its discretion only stretches to whether an exemption reasonably encourages mercantile customers to commit their energy efficiency and peak demand reduction efforts to the EDU's benchmark compliance programs. The Commission should once again reject OEC's interpretation of Section 4928.66, Revised Code. As IEU-Ohio demonstrated and the Commission agreed, although Section 4928.66, Revised Code, does provide the Commission some discretion, that discretion does not extend to approval of a rider that bases the availability of an exemption on a different usage level than that approved in the definition of a mercantile customer.³ In fact, the Commission explicitly found that

¹ OEC Memo Contra at 4-6.

² Opinion and Order at 37.

³ *Id.*

the exemption opportunity, as modified by the Commission and consistent with Section 4928.66, Revised Code, "would reasonably encourage mercantile customers to commit their energy efficiency and peak demand reduction capabilities for integration into Duke's programs."⁴

OEC further asserts that its interpretation of Section 4928.66, Revised Code, is consistent with the fact that compliance with the energy efficiency and peak demand reduction benchmarks lies with the electric utility. As OEC overtly acknowledges, it has already "argued at length on brief" on this point in both its initial and reply briefs.⁵ OEC raises nothing new for the Commission's consideration and its arguments should once again be rejected by the Commission.

Finally, OEC complains that rejecting the 3MW provision is inconsistent with the legislative scheme of Senate Bill 221 ("SB 221") and evidences a fundamental misunderstanding by the Commission on how the exemption process is supposed to work. OEC also continues to claim that extending the exemption option to all mercantile customers will create an administrative burden. The Commission specifically addressed OEC's claims about administrative feasibility, noting they are not tenable and are mitigated by the requirement that a mercantile customer meet the EDU's applicable statutory benchmark in order to obtain an exemption.⁶ Finally, on these points, OEC raises no new arguments for the Commission's consideration.⁷

⁴ *Id.*

⁵ OEC Application for Rehearing at 7.

⁶ Opinion and Order at 36-37.

⁷ See OEC Initial Brief at 10-11, 13.

The Commission should deny OEC's Application for Rehearing. The Commission thoroughly considered OEC's claims in its Opinion and Order and OEC failed to produce any new arguments or legal authority demonstrating the Commission's Opinion and Order is unlawful or unreasonable.

III. APPLICATION FOR REHEARING OF OCC/SIERRA CLUB

OCC/Sierra Club first claim the Commission failed to apply its three-prong test for evaluating settlements to the 3MW Threshold provision in the Stipulation and object to the administrative burden imposed upon Staff by rejecting the 3MW Threshold. Second, OCC/Sierra Club laments the fact that the Opinion and Order (nor the Commission's rules) does not explicitly provide for parties to participate in and contest requests for exemptions from Rider DR-SAW. OCC/Sierra Club argue that the Commission must conduct an evidentiary hearing to consider each and every application it receives seeking a request for exemption from Rider DR-SAW. OCC/Sierra Club further complains that neither the Commission's Opinion and Order (nor the Commission's rules) provide for standards that mercantile customers must meet to obtain an exemption from Rider DR-SAW. OCC/Sierra Club also complains that the Commission's Opinion and Order (nor the Commission's rules) clarify the consequences of an exempted mercantile customer's failure to meet the energy efficiency savings it projected when obtaining an exemption from Rider DR-SAW.

The Commission was not required to apply its three-prong test to make its decision on the 3MW Threshold. The Commission correctly noted that it must first

"consider whether the paragraph at issue violates the face of the governing statute."⁸

IEU-Ohio directly challenged the legality of the 3MW Threshold. The Commission, interpreting the statute at issue, determined that the 3MW Threshold is illegal.⁹ The Commission could not and did not need to reach the reasonableness of the 3MW threshold, as applied in the Commission's three-prong test, inasmuch as the 3MW provision is illegal.

The Commission should also deny OCC/Sierra Club's requests for standards for mercantile customer exemption opportunities, its request to spell out the penalties applicable to a mercantile customer, and the request that the Commission, through this proceeding, determine that it will conduct an evidentiary hearing on every application it receives seeking an exemption from Rider DR-SAW. One need look no further than the OCC/Sierra Club's subheadings to recognize the proper place for these arguments is the Commission's rulemaking proceeding governing exemptions pursuant to Section 4928.66, Revised Code. OCC/Sierra Club had ample opportunity in the Commission's rulemaking in Case No. 08-888-EL-ORD to offer these arguments through their comments for the Commission's consideration.¹⁰ OCC's backdoor attempt to add substantive provisions to the Stipulation on these issues should be denied inasmuch as they are beyond the scope of the Stipulation and this proceeding. It is disingenuous for OCC/Sierra Club to raise these arguments for the first time in their application for rehearing. OCC, as a signatory party to the Stipulation, reserved a single issue for

⁸ Opinion and Order at 34.

⁹ *Id.* at 37.

¹⁰ OCC, as part of the Ohio Consumer and Environmental Advocates comments, did not make any of the recommendations contained in its Application for Rehearing in its initial or reply comments in Case No. 08-888-EL-ORD. The Commission should not entertain OCC/Sierra Club's collateral attempt to make comments regarding the Commission's proposed rules in Case No. 08-888-EL-ORD.

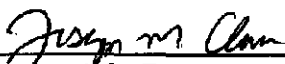
litigation and in all other respects agreed to support the Stipulation.¹¹ Paragraph 13.b. of the Stipulation does not even speak to, let alone address, any of the arguments that OCC/Sierra Club is now raising.¹² Therefore, the Commission should not consider these arguments.

The Commission should deny OCC/Sierra Club's Application for Rehearing inasmuch as OCC/Sierra Club has not demonstrated that the Commission's Opinion and Order is unreasonable or unlawful.

IV. CONCLUSION

The Commission should deny the Applications for Rehearing of OEC and OCC/Sierra Club inasmuch as neither OEC or OCC/Sierra Club have demonstrated that the Commission's December 19, 2008 Opinion and Order is unreasonable or unlawful.

Respectfully submitted,



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¹¹ 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.")

¹² The Sierra Club was a signatory party to the Stipulation but did not participate in the evidentiary proceeding to consider the Stipulation or file an initial or reply brief.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA APPLICATIONS FOR REHEARING* was served upon the following parties of record this 26th day of January 2009, via electronic transmission and United States mail, postage prepaid.



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