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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Report of Duke)
Energy Ohio, Inc. Concerning its Energy) Case No. 09-1999-EL-POR
Efficiency and Peak Demand Reduction)
Programs and Portfolio.)

APPLICATION FOR REHEARING

BY

DUKE ENERGY OHIO, INC.

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Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35 of the Ohio Administrative Code (O.A.C.), Duke Energy Ohio, Inc., (Duke Energy Ohio) applies for rehearing of the Opinion and Order (Order) of the Public Utilities Commission of Ohio (Commission) issued in the above-captioned proceeding on December 15, 2010. The Commission's Order decided a number of issues related to Duke Energy Ohio's energy efficiency and peak-demand reduction programs and portfolio planning. Among other things, the Commission found that Duke Energy Ohio's save-a-watt rider (Rider DR-SAW), which was not part of Duke Energy Ohio's application in this proceeding, must be amended to delete the recovery of lost-generation revenues.

The Commission's Order is unjust and unlawful for the following reasons:

1. The Commission, without authority or jurisdiction, unreasonably ordered Duke Energy Ohio to modify Rider DR-SAW to remove the recovery of lost generation margin revenues.
2. The Commission, without authority, unreasonably ordered that the amendment of Rider DR-SAW to remove the recovery of lost generation revenues be effective more than a full year prior to the issuance of its Order.
3. The Commission, in ordering Duke Energy Ohio to amend rider DR-SAW to remove the recovery of lost generation revenues effective as of the date when

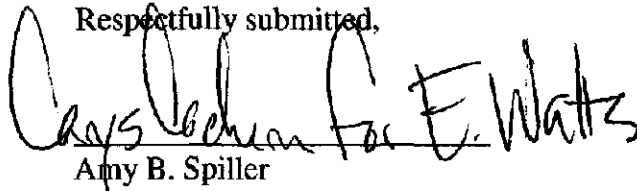
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O.A.C. 4901:1-39-07 was effective, failed to abide by the process set forth in and required by that same rule.

4. The Commission's modification of the recovery mechanism in this proceeding is barred by the doctrines of *res judicata* and collateral estoppel, and the Order inappropriately failed to consider those doctrines.
5. The Order failed to account for the fact that the Stipulation in the ESP Case was a package of many agreements on many issues and that Rider DR-SAW included other terms.

Duke Energy Ohio respectfully requests that the Commission reconsider and modify its Order, as more fully explained in the attached Memorandum in Support.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Amy B. Spiller for E. Watts". The signature is written over the typed name and title.

Amy B. Spiller
Associate General Counsel
Elizabeth H. Watts (Counsel of Record)
Assistant General Counsel
Duke Energy Business Services LLC
Counsel for Duke Energy Ohio, Inc.
Columbus Office:
155 East Broad Street, 21st Floor
Columbus, Ohio 43215
(614) 222-1331
Cincinnati office:
2500 Atrium II, 139 East Fourth Street
PO Box 960
Cincinnati, Ohio 45201
(513) 419-1871

MEMORANDUM IN SUPPORT

- I. The Commission, without authority or jurisdiction, unreasonably ordered Duke Energy Ohio to modify Rider DR-SAW to remove the recovery of lost generation margin revenues.**

This case concerns the Commission's approval of Duke Energy Ohio's energy efficiency and peak-demand reduction program portfolio, pursuant to the requirements of O.A.C. 4901:1-39-04. That rule required electric utilities to design a program portfolio and to file the plan for such portfolio by no later than January 1, 2010. The electric utility is required, under the rule, to demonstrate that the plan is cost-effective, in order to obtain Commission approval of its portfolio.

Duke Energy Ohio designed its portfolio of energy efficiency and peak-demand reduction programs before the promulgation of O.A.C. 4901:1-39-04, and that portfolio was approved as part of its electric security plan, in Case No. 08-920-EL-ESP (ESP Case). Hence, Duke Energy Ohio's application merely re-proposed those programs that had already received approval. No more was required by the rule.

The first portion of the Order issued by the Commission appropriately reviews the portfolio submitted for re-approval. Although, during its second review, the Commission reached a different conclusion with regard to one of the programs, Duke Energy Ohio is not contesting that decision. However, after it had completed its review of the programs as required by O.A.C. 4901:1-39-04, the Commission went on, in its Order, to address an issue that was not included in Duke Energy Ohio's application and that was not required by the rule under which the application was submitted: cost recovery.

The Commission moved to O.A.C. 4901:1-39-07(A), which addresses cost recovery mechanisms. That rule provides that an electric utility "may submit a request for recovery of an approved rate adjustment mechanism . . . of costs" Duke Energy Ohio did not submit such a request, as it already had a cost recovery mechanism: Rider DR-SAW. Rider DR-SAW had been

adopted in the stipulated ESP Case, a case that set the mechanism for determining the rate structure for generation services provided by Duke Energy Ohio for a three-year period. Thus, Rider DR-SAW, when adopted, was part of a package of issues that were considered and agreed upon by numerous parties, which package stipulation was then approved (with modifications that are not relevant to this proceeding) by the Commission. Nevertheless, in the Order in the present proceeding, the Commission reviewed the substance of Rider DR-SAW under the parameters of O.A.C. 4901:1-39-07 and determined that it would order the modification of Rider DR-SAW to delete the recovery of lost generation margin revenues. This action was clearly beyond the application that was before the Commission for its consideration. Thus, the Commission had no jurisdiction, in this proceeding, over the cost recovery mechanism that was Rider DR-SAW.

In its determination to require amendment of Rider DR-SAW, the Commission based its decision on a minor provision within the stipulation that was approved in the ESP Case. The timing of the ESP Case is critical in understanding the events. Under Amended Substitute Senate Bill No. 221 (S.B. 221), much of Chapter 4928 of the Revised Code was modified, and electric utilities were required to have new standard service offers (SSOs) in place by the end of 2008. Thus, Duke Energy Ohio submitted its application in the ESP Case on July 31, 2008, such that its SSO could be in place by December 31. Discussions with parties led to a stipulation, filed on October 27, 2008.

Meanwhile, in Case No. 08-888-EL-ORD, the Commission was attempting to develop rules concerning renewable and alternative energy. In that case, during the October 2008 timeframe, the Commission was collecting comments on proposed rules. That proceeding did not culminate in effective rules until December 10, 2009, more than a year after the filing of the stipulation in the ESP Case.

Apparently because certain rules were still under development, the stipulation in the ESP Case included the following provision:

Pursuant to R.C. 4923.143, and subject to DE-Ohio's legal rights, including but not limited to the right to comments, apply for rehearing, and appeal, DE-Ohio shall conform to the Commission's ESP rules as set forth in Case Nos. 08-777-EL-ORD and 08-888-EL-ORD.

The Commission, in the Order in the present proceeding, summarized the provision as providing that Duke Energy Ohio "agreed to conform to the Commission's rules established in 08-888." A few sentences later, the Commission described this provision as an agreement "to comply with the rules in Chapter [sic] 4901:1-39-07, O.A.C." These statements are neither accurate nor reasonable.

An accurate statement would have been the Duke Energy Ohio agreed to conform to the Commission's ESP rules established in 08-888. If Duke Energy Ohio is to be held to its stipulation, which is reasonable, then it must be held to no more nor less than it actually agreed to. The Commission seeks to require amendment of Rider DR-SAW, which was a part of that stipulation that was to be "conformed" to the ESP rules, on the basis of the content of O.A.C. 4901:1-39-07. A close reading of that rule, or, for that matter, the purpose and scope rule in O.A.C. Chapter 4901:1-39, reveals absolutely nothing that would result in a conclusion that this rule is an "ESP rule":

(A) With the filing of its proposed program portfolio plan, the electric utility may submit a request for recovery of an approved rate adjustment mechanism, commencing after approval of the electric utility's program portfolio plan, of costs due to electric utility peak-demand reduction, demand response, energy efficiency program costs, appropriate lost distribution revenues, and shared savings. Any such recovery shall be subject to annual reconciliation after issuance of the commission verification report issued pursuant to this chapter.

(1) The extent to which the cost of transmission and distribution infrastructure investments that are found to reduce line losses may be classified as or allocated to energy efficiency or peak-demand reduction programs, pursuant to division (A)(2)(d) of section 4928.66 of the Revised Code, shall be limited to the portion of those investments that are attributable to and undertaken primarily for energy efficiency or demand reduction purposes.

(2) Mercantile customers, who commit their peak-demand reduction, demand response, or energy efficiency projects for integration with the electric utility's programs as set forth in rule 4901:1-39-08 of the Administrative Code, may individually or jointly with the electric utility, apply for exemption from such recovery.

(B) Any person may file objections within thirty days of the filing of an electric utility's application for recovery. If the application appears unjust or unreasonable, the commission may set the matter for hearing.

Thus, it is entirely inaccurate for the Commission to conclude that Duke Energy Ohio agreed, in October 2008, that it would conform its program portfolio cost recovery measure, Rider DR-SAW, to this future administrative rule.

It is also unreasonable to assume that such an agreement would have been intended. No reasonable party would sign any stipulation that was not clearly established with regard to substantive matters. Procedural requirements might be a different matter, of course, and hence Duke Energy Ohio did file for re-approval of its portfolio in this present proceeding. However, the economic issues inherent in the stipulation must have been understood by all of the parties in the ESP Case, or they would not have signed that stipulation. The stipulation cannot reasonably be read to have left open such an important financial issue as the recoverability of lost generation margin revenues.

Duke Energy Ohio did not agree, in the ESP Case stipulation, to "conform," or change, its stipulation to match future Commission rules that are not "ESP rules" and did not agree to leave open a substantive issue with financial impacts on the company.

II. The Commission, without authority, unreasonably ordered that the amendment of Rider DR-SAW to remove the recovery of lost generation revenues be effective more than a full year prior to the issuance of its Order.

In the Order, the Commission determined not only that Rider DR-SAW is to be modified but, also, that it was to be modified effective as of a date more than a full year prior to the issuance of the Order. While Duke Energy Ohio recognizes that the date chosen by the Commission is the effective date of O.A.C. 4901:1-39-07, it is entirely unreasonable and illegal. The Supreme Court of Ohio has clearly instructed that the Commission is not allowed to engage in retroactive ratemaking. *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254.

“[U]tility ratemaking by the Public Utilities Commission is prospective only.” *Lucas County Commissioners v. Pub. Util. Comm.* (1997) 80 Ohio St.3d 344, 348.

Thus, the statement in the Order that the modification of Rider DR-SAW must be effective on December 10, 2009, must be revised to eliminate the retroactive element of the decision.

III. The Commission, in ordering Duke Energy Ohio to amend rider DR-SAW to remove the recovery of lost generation revenues effective as of the date when O.A.C. 4901:1-39-07 was effective, failed to abide by the process set forth in and required by that same rule.

Consistent with the prohibition against retroactivity, O.A.C. 4901:1-39-07 itself includes a process for the consideration of cost recovery. As quoted above, paragraph (A) provides that a utility may request recovery. Paragraph (B) of that rule allows a thirty-day period for the filing of objections and a possible subsequent hearing. Then, most importantly, paragraph (A) clearly states that the recovery, after consideration, would commence “after approval of the electric utility’s program portfolio plan.

The Commission’s order seeks to modify Duke Energy Ohio’s pre-existing Rider DR-SAW, and the recovery thereunder, pursuant to this rule. Yet no thirty-day period was allowed for the filing of objections. No consideration was given as to whether the recovery might be unjust or unreasonable and, thus, no hearing was held. And now, the Order seeks to have the Commission’s new version of Rider DR-SAW be effective not only before Duke Energy Ohio’s program portfolio plan was actually approved but even before it could possibly have been approved. The Order would have the Commission-revised Rider DR-SAW be effective when the rule first became effective.

The Commission’s action clearly contravenes the procedure established in its own rule. It should be reversed.

IV. The Commission's modification of the recovery mechanism in this proceeding is barred by the doctrines of *res judicata* and collateral estoppel, and the Order inappropriately failed to consider those doctrines.

Duke Energy Ohio, in its post-hearing briefs, raised the issues of *res judicata* and collateral estoppel. The Order correctly noted the existence of Duke Energy Ohio's argument that relitigation of the terms of Rider DR-SAW is barred under those doctrines. However, the Order failed to analyze and determine whether re-litigation is so barred. The failure of the Order to address this issue is a violation of R.C. 4903.09, which requires written opinions by the Commission, setting forth the reasons for the decisions.

Further, Duke Energy Ohio still contends that re-litigation of the terms of Rider DR-SAW is barred. In the ESP Case, the Commission "actually and necessarily litigated and determined" the substance and terms of Rider DR-SAW. In the present docket, with different parties present, the Commission is barred from re-opening this issue. *See, e.g., Superior's Brand v. Lindley* (1980), 62 Ohio St.2d 133.

V. The Order failed to account for the fact that the Stipulation in the ESP Case was a package of many agreements on many issues and that Rider DR-SAW included other terms.

As the Commission has recognized on innumerable occasions, stipulations in Commission proceedings are packages, setting forth not the preferred legal position of any party but, rather, the ultimate result of the give-and-take of negotiations. Thus, it is understood that no one provision can easily be removed or altered without affecting the remaining balance of fairness. The Commission, in attempting to require the modification of Rider DR-SAW through this Order, is doing just that, and without even allowing the presence and participation of the parties who signed the stipulation that the Commission is now modifying.

In addition, in attempting simply to strike the recovery of lost generation margin revenues from the rider, the Commission also ignores one other major difference between Rider DR-SAW

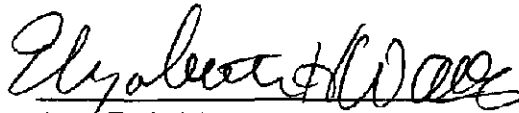
and the type of recovery mechanism that appears to be assumed by O.A.C. 4901:1-39-07. The rider, by its terms, allows recovery only after benchmarks have been met; the rule assumes no such limitation. Yet the Commission seeks only to strike the difference between the rider and the rule that would be beneficial to Duke Energy Ohio; not also the difference that would be detrimental to Duke Energy Ohio. Like the stipulation, the rider itself is a package of obligations and rights. It cannot and should not be altered in only one area, as the remainder of the package is then unbalanced.

The Commission's Order should not have altered one portion of a provision in the stipulation approved in another proceeding.

Conclusion

For the reasons discussed above Duke Energy Ohio respectfully requests the Commission grant this Application for Rehearing to modify Order issued in the above-captioned proceeding.

Respectfully submitted,



Amy B. Spiller
Associate General Counsel
Elizabeth H. Watts
(Counsel of Record)
Assistant General Counsel
Duke Energy Business Services LLC
Counsel for Duke Energy Ohio, Inc.
Columbus Office:
155 East Broad Street, 21st Floor
Columbus, Ohio 43215
(614) 222-1331
Cincinnati office:
2500 Atrium II, 139 East Fourth Street
PO Box 960
Cincinnati, Ohio 45201
(513) 419-1871

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on the following parties, this 14th day of January, 2011, via electronic mail and regular mail delivery, postage prepaid.


Elizabeth H. Watts

Robert Kelter
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601

Henry Eckhart
Natural Resources Defense Council
50 West Broad Street, Suite 2117
Columbus, Ohio 43215-3301

Will Reisinger
Trent Dougherty
Ohio Environmental Council
1207 Grandview Avenue
Columbus, Ohio 43212

Samuel C. Randazzo
McNees Wallace & Nurick, LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215

Terry Etter
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215

Thomas W. McNamee
Assistant Attorney General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, Ohio 43215

David C. Rinebolt
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, Ohio 45839-1793