FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM CONTRA DUKE'S APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

On December 15, 2010, the Public Utilities Commission of Ohio ("PUCO" or "Commission") issued the Opinion and Order ("Order") in this case. In the Order, the Commission, among other things, determined that the Stipulation in the Electric Security Plan ("ESP") case of Duke Energy Ohio, Inc. ("Duke," "DE-Ohio" or "Company")[1] required Duke to conform its portfolio of energy efficiency and peak demand reduction programs ("EE/PDR Portfolio") to the PUCO's ESP rules, which were adopted after the PUCO approved the ESP Stipulation.[2] These rules, among other things, do not permit electric distribution utilities ("EDUs") to collect lost generation revenues from customers through their EE/PDR portfolio plans.[3] The PUCO ordered Duke to remove the

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[1] *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, Stipulation (October 27, 2008) ("ESP Stipulation").

[2] Order at 15.

[3] Ohio Adm. Code 4901:1-39-07(A) ("Rule 7(A)").

collection of lost generation revenues from its "Save-A-Watt" program rider ("Rider DR-SAW") beginning on the effective date of the new rules, December 10, 2009.[4]

On January 14, 2011, Duke filed an application for rehearing of the Order. Duke contends that the Order is unjust and unlawful because:

1. The Commission, without authority or jurisdiction, unreasonably ordered Duke to modify Rider DR-SAW to remove the collection of lost generation margin revenues from customers.

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

3. The Commission, in ordering Duke to amend Rider DR-SAW to remove the collection of lost generation revenues, failed to abide by the process set forth in and required by Ohio Adm. Code 4901:1-39-07 ("Rule 7").

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 ESP Stipulation in the ESP Case was a package of many agreements on many issues and that Rider DR-SAW included other terms.[5]

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of Duke's approximately 607,000 residential utility customers, submits this Memorandum Contra Duke's application for rehearing. R.C. 4903.10 provides that the Commission may modify or abrogate an order on rehearing "if, after such rehearing, the commission is of the opinion that the original order or any part thereof is in any respect unjust or unwarranted, or should be changed...." As discussed herein, Duke has not shown that the

[4] Order at 15.

[5] Application for Rehearing (January 14, 2011) ("Rehearing Application") at 1-3. The Rehearing Application does not have a page numbered as 2.

Order is unjust or unwarranted, or should be changed. The Commission should deny the Rehearing Application.

II. ARGUMENT

A. The Commission Acted Lawfully and Reasonably in Ordering Duke to Remove Collection of Lost Generation Revenues from Rider DR-SAW.

In this proceeding, intervenors, including OCC alone and in joint filings with the Natural Resources Defense Council ("NRDC"), raised the issue of Duke's need to conform Rider DR-SAW to the PUCO's ESP rules, as required by the ESP Stipulation. On brief, OCC and NRDC noted that a recent statement by the Commission in a case involving the true-up of Duke's DSM rider for the period July 1, 2008, through December 31, 2008 supports OCC's and NRDC's interpretations of Rule 7(A) and the ESP Stipulation.[6]

In the Order, the Commission confirmed OCC's and NRDC's position:

> With respect to cost recovery in general, Duke continues its argument that the cost recovery mechanism was approved in the Duke ESP Case and, therefore, it was not necessary for Duke to request approval within the context of this case. However, once again, the Commission finds Duke has disregarded its agreement in the Duke ESP Case to comply with the rules in Chapter 4901:1-39-07, O.A.C., which includes the requirement that, if the electric utility wishes to recover appropriate lost distribution revenues through an approved rate adjustment mechanism, it must submit such request for recovery with its proposed program portfolio plan.[7]

The Commission ordered Duke "to comply with its own stipulation, as well as Rule

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[6] See Initial Brief by OCC and NRDC (July 9, 2010) at 13-14, citing *In the Matter of the Application of Duke Energy Ohio for Recovery of Cost, Lost Margin and Performance Incentive Associated with the Implementation of Electric Residential and Non-Residential Demand Side Management Programs*, Case No. 09-283-EL-RDR, Opinion and Order (June 9, 2010) at 5.

[7] Order at 15.

4901:1-39-07(A), O.A.C., and remove the recovery of lost generation revenues, collected as part of Duke's lost margin revenues, from its Rider DR-SAW beginning on December 10, 2009, the effective date of Chapter 4901:1-39, O.A.C."[8]

1. The Commission acted lawfully in reviewing the Application under Rule 7(A).

Duke contends that the Commission acted unlawfully by ordering the Company to remove the collection of lost generation revenues from Rider DR-SAW. Duke asserts that because its application was brought under Ohio Adm. Code 4901:1-39-04 ("Rule 4") instead of Rule 7,

> [t]his 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.[9]

Duke also argued that Rule 7 is inapplicable to this proceeding in a May 3, 2010 motion to strike a portion of the testimony of OCC witness Wilson Gonzalez,[10] and once again in a broad motion to strike filed on June 1, 2010.[11] Both motions were denied at the June 3, 2010 hearing,[12] and the Company did not take an interlocutory appeal of the motions' denial. Duke's assertions are wrong now, as they were wrong then.

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[8] Id.

[9] Rehearing Application at 5.

[10] Duke's Motion to Strike the Testimony of Wilson Gonzalez and Motion, in the Alternative, for an Opportunity to File Rebuttal Testimony and Motion for Expedited Consideration (May 3, 2010) ("Duke's First Motion to Strike") at 8.

[11] Duke's Motion to Strike Those Portions of the Objections of the Ohio Consumers' Counsel, The Natural Resources Defense Council, Ohio Partners for Affordable Energy, and the Ohio Environmental Council That Relate to Matters Already Stipulated to and Resolved in Case 08-920-EL-SSO and Motion in Limine to Exclude Any Evidence of Matters Already Stipulated to and Resolved; and in the Alternative, Motion for Leave to File Rebuttal Testimony to the Testimony of Wilson Gonzalez (June 1, 2010) ("Duke's Second Motion to Strike") at 5-6.

[12] Tr. at 8-13.

The relevance of Rule 7(A) to this proceeding is not dependent on whether Duke raised it in the Application. The matter of relevance is generally construed broadly. The Ohio Supreme Court has stated that "[e]vidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[13] The federal system takes the standard for relevance even further: "Whether evidence is highly relevant or just a little relevant, it is relevant nonetheless."[14]

In this case, Duke itself brought the issue into this proceeding through the testimony the Company filed in support of its EE/PDR Portfolio. Rule 4(A) requires portfolio plans to be filed "with supporting testimony...." For this proceeding, Duke submitted the same direct and supplemental testimony of Mr. Theodore Schultz and the same direct and supplemental testimony of Dr. Richard Stevie that were filed in support of the programs in Duke's ESP case.

The direct and supplemental testimony of Mr. Schultz, which Duke moved into evidence at hearing and which was admitted as evidence at hearing,[15] includes extensive substantive discussion of Rider DR-SAW.[16] For example, Mr. Schultz's testimony states that Duke "requests that the Commission approve the replacement of Rider DSM with the energy efficiency rider, Rider DR-SAW, which will compensate the Company for delivering verified energy efficiency results."[17] In addition, Mr. Schultz's testimony

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[13] *State v. Nemeth* (1998), 82 Ohio St. 3d 202, 207, 1998 Ohio 376, 694 N.E.2d 1332.

[14] *Nilavar v. Mercy Health Sys. - W. Ohio*, 210 F.R.D. 597, 608-609 (S.D. Ohio 2002).

[15] Tr. at 79-80.

[16] See Duke Ex. 1 at 2-4, 6, 19, 25; Duke Ex. 2 at 2.

[17] Duke Ex. 1 at 3.

states that "[f]or the policy reasons set forth earlier in my testimony, DE-Ohio is seeking to be compensated for energy and capacity savings generated by the existing portfolio of programs using Rider DR-SAW."[18]

Duke placed Rider DR-SAW at issue in this proceeding, and therefore it is relevant for PUCO consideration. The Rider is a recovery mechanism, and as such is considered under Rule 7(A). Thus, it was appropriate – and lawful – for the Commission to apply Rule 7(A) in this proceeding.

2. The Commission acted reasonably in reviewing the Application under Rule 7(A).

In its Rehearing Application, Duke contends that the Commission unreasonably ordered the Company to remove lost generation revenues from DR-SAW. In so doing, Duke makes erroneous assertions about the ESP Stipulation. Duke first claims that the ESP Stipulation's requirement that the Company conform to the Commission's ESP rules is a "minor provision within the stipulation...." Nothing could be further from the truth.

Paragraph 32 of the ESP Stipulation states: "Pursuant to R.C. 4928.143, 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."[19] But the Commission had not yet adopted the ESP rules when the ESP Stipulation was signed by the parties and approved by the Commission. The parties to the ESP Stipulation thus included the conforming requirement of Paragraph 32 in order to ensure that the ESP Stipulation

[18] Id. at 18-19.

[19] ESP Stipulation at 37.

"violates no regulatory principle or precedent,"[20] and thus to help ensure the legality of the ESP Stipulation. This is no "minor provision."

Next Duke asserts that Rule 7(A) is not "an ESP rule," and therefore the ESP Stipulation's requirement that Duke conform to the ESP rules does not apply to Rule 7(A). Notably, this is the first time that Duke attempts to make such a distinction. Duke did not argue this in its initial brief or its reply brief. Duke's only discussion of Rule 7(A) in its briefs concerned the application of Rule 7(A),[21] not whether the rule is an "ESP rule" or some other type of rule. Thus, Duke apparently agreed that Rule 7(A) is an "ESP rule" in terms of the ESP Stipulation. Regardless, Duke's newfound position is wrong.

Paragraph 32 of the ESP Stipulation requires Duke to "conform to the Commission's ESP rules as set forth in Case Nos. 08-777-EL-ORD and 08-888-EL-ORD." At the time, the Commission had not yet issued the rules that were the subjects of the two proceedings. Nevertheless, the parties to the ESP Stipulation knew the general substance of the rules being considered in each proceeding. Thus, the ESP Stipulation's reference to "ESP rules" is collectively to the rules that were being considered in the two proceedings. The ESP Stipulation makes no distinction between the rules that were under consideration in Case No. 08-777 – the initial ESP rules – and the rules that were under consideration in Case No. 08-888 – the alternative and renewable energy rules. The ESP Stipulation's reference to "ESP rules" includes both sets of rules.[22]

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[20] See ESP Stipulation at 2.

[21] See Duke's Initial Brief (July 9, 2010) at [10]-[11], [15] (Duke's initial brief did not contain page numbers and thus citations to Duke's initial brief will contain bracketed page numbers); Duke's Reply Brief (July 23, 2010) at 3-5.

[22] See Tr. at 106-109.

The Company also claims that "[t]he stipulation cannot reasonably be read to have left open such an important financial issue as the recoverability of lost generation margin revenues."[23] The ESP Stipulation, however, did not leave open the issue of the collection of lost generation revenues, as Duke suggests. Instead, the ESP Stipulation allowed Duke to collect lost generation revenues through Rider DR-SAW until such time that the Commission adopted the rules in Case Nos. 08-777 and 08-888. At that point, the ESP Stipulation required Duke to conform to the new rules. The parties knew that lost generation revenues were not under consideration for inclusion in EE/PDR recovery mechanisms. Thus, Duke knew that conforming to the new rules would include the removal of lost generation revenues from Rider DR-SAW, pursuant to Rule 7(A).

The Commission acted lawfully and reasonably in ordering Duke to remove the collection of lost generation revenues from Rider DR-SAW. The Commission should deny Duke's application for rehearing.

B. The Commission Lawfully and Reasonably Ordered Duke to Remove the Collection of Lost Generation Revenues from Rider DR-SAW Effective on the Date that Rule 7(A) Was Effective.

In the Order, the Commission directed Duke to remove the collection of lost generation revenues effective on December 10, 2009, the effective date of Rule 7(A).[24] Duke asserts that the Commission acted unreasonably and illegally.[25] Duke is wrong.

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[23] Rehearing Application at 7, citing *Keco Industries v. Cincinnati and Suburban Bell Tel. Co.*, (1957), 166 Ohio St. 254.

[24] Order at 15.

[25] Rehearing Application at 7. In the heading on that page, Duke asserts that the Commission acted "without authority...." Id. Unlike its argument in the previous section, the Company does not argue in that section of the Rehearing Application that the Commission had no jurisdiction to order the removal lost generation revenues from Rider DR-SAW on a retroactive basis.

Duke asserts that the removal of lost generation revenues from Rider DR-SAW effective on the effective date of Rule 7(A) amounts to retroactive ratemaking, in violation of the Ohio Supreme Court ruling in *Keco*.[26] This is not the case, however. Instead, the Commission is merely enforcing the ESP Stipulation and requiring Duke to abide by the PUCO's rules – something which Duke should have been doing since December 10, 2009. The Commission acted lawfully.

Further, it was reasonable for the Commission to order the removal of lost generation revenues from DR-SAW as it did. Otherwise, Duke would have been unjustly enriched through its bad-faith failure to follow the PUCO's rules and to abide by the ESP Stipulation.

The Commission acted reasonably in applying Rule 7(A) in this proceeding. The Commission should deny Duke's Rehearing Application.

C. The Commission Provided Ample Opportunity for Objections and a Hearing on Whether to Order Duke to Remove Collection of Lost Generation Revenues from Rider DR-SAW.

In its Rehearing Application, Duke asserts that the Commission failed to abide by the process for rate adjustment mechanisms set forth in Rule 7(A). Duke claims that no 30-day period was allowed for the filing of objections, as required by the Rule, and that no consideration was made regarding whether Rider DR-SAW is unjust or unreasonable and thus no hearing was held.[27] The Company also contends that the Order contravenes Rule 7(A) because revised Rider DR-SAW would be effective "not only before Duke

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[26] Id., citing *Keco Industries v. Cincinnati & Suburban Bill Tel Co.* (1957), 166 Ohio St. 254.

[27] Id. at 8.

Energy Ohio's program portfolio plan was actually approved but even before it could possibly have been approved."[28] Duke, however, is mistaken.

In fact, the Commission did follow the procedure set forth in Rule 7(A). As discussed above, Rider DR-SAW was addressed in the testimony Duke submitted to support its EE/PDR Portfolio, which was filed on December 29, 2009. On February 17, 2010, the Commission issued an Entry setting a deadline of March 1, 2010 – some two months after the EE/PDR Portfolio was filed – for the filing of objections to Duke's portfolio plans.[29] Although this deadline was less than two weeks after the Entry was issued, Duke cannot claim the Commission erred because Duke would not have filed objections to its own plan and thus was not harmed by any shortened notice on the Commission's part.

In objections filed on March 1, 2010, OCC and NRDC jointly objected to the collection of lost generation revenues in Rider DR-SAW and Ohio Partners for Affordable Energy ("OPAE") filed separate similar objections.[30] In addition, on March 25, 2010, OCC filed Mr. Gonzalez's direct testimony in which he discussed the need for the Commission to enforce the ESP Stipulation and remove lost generation revenues from Rider DR-SAW.[31]

Under Rule 7(B), a hearing on a rate adjustment mechanism is not required. Nevertheless, the Commission examined Rider DR-SAW at the hearing in this case on June 3, 2010.

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[28] Id.

[29] Entry (February 17, 2010) at 1.

[30] See OCC Ex. 2 at 2-3; OPAE Ex. 2 at 4, 6.

[31] See OCC Ex. 1 at 4-9.

At the hearing, Duke's two motions to strike anything related to Rider DR-SAW were denied. Mr. Gonzalez testified at the hearing, and Duke's counsel cross-examined him regarding Rider DR-SAW.[32] Mr. Gonzalez's direct testimony, OCC's and NRDC's joint objections and the objections filed by the other intervenors, including OPAE, were then admitted into evidence.[33] Although Duke had asked for the opportunity to file testimony rebutting Mr. Gonzalez's testimony,[34] the Company's counsel withdrew the request at the hearing.[35] The issue regarding Rider DR-SAW was also briefed. Duke's assertion that there was no hearing on the Rider is invalid.

Finally, Duke contends that requiring the Company to remove lost generation revenues effective on December 10, 2010 contravenes Rule 7(A) because the Rule states that recovery would commence "after approval of the electric utility's program portfolio plan...."[36] Duke misinterprets the Rule. This language makes clear that the utility may not *commence* recovery while the Commission is considering whether to approve the recovery mechanism.

Here, however, Duke's recovery mechanism – Rider DR-SAW – had been in existence since 2009. The issue in this case was not whether the Company should continue to collect revenues through the Rider; indeed, Duke would have strenuously objected if the Commission had ordered suspension of the Rider while it was under

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[32] Tr. at 100-110.

[33] Id. at 117-120.

[34] Duke's First Motion to Strike at 10; Duke's Second Motion to Strike at 6-7.

[35] Tr. at 118.

[36] Rehearing Application at 8.

consideration. Rather, the issue in this case was the removal of lost generation revenues from the already-existing Rider DR-SAW, as required by the ESP Stipulation.

In this proceeding, the Commission followed the process set forth in Rule 7(A). Duke's Rehearing Application should be denied.

D. The Commission Rejected Duke's Arguments Concerning *Res Judicata* and Collateral Estoppel.

On several occasions in this proceeding, Duke argued that the "relitigation" of issues regarding DR-SAW in this proceeding is barred by res judicata and collateral estoppel.[37] Both motions, and the arguments contained therein, were addressed at the hearing on June 3, 2010. The first motion, having proceeded under the PUCO's rules for filing and responding to motions,[38] was denied.[39] The second motion was filed just two days before the hearing and thus could not proceed under the PUCO's rules regarding motions before the hearing. Thorough oral argument on the second motion was conducted at the hearing and this motion was also denied at the hearing.[40] Duke did not seek an interlocutory appeal of these rulings.

Duke again argued *res judicata* and collateral estoppel in its brief,[41] and the Commission summarized Duke's argument in the Order.[42] Although the Commission did

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[37] See Duke's First Motion to Strike at 5-6; Duke's Second Motion to Strike at 4-5; Duke's Initial Brief at [12]-[14].

[38] Pursuant to Ohio Adm. Code 4901-1-12(C), OCC filed a Memorandum Contra the first motion on May 10, 2010 ("Memorandum Contra"). Duke had asked for expedited consideration of its motion and thus was not allowed to file a reply under the PUCO's rules.

[39] Tr. at 8.

[40] Id. at 8-13.

[41] Duke's Initial Brief at 10-14.

[42] Order at 14.

not specifically analyze Duke's argument, the Commission did order the Company to remove lost generation revenues from Rider DR-SAW.

In its Rehearing Application, Duke asserts that the Order "failed to analyze and determine whether re-litigation is so barred."[43] Duke contends that "[t]he 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."[44] This is just not the case.

The Supreme Court of Ohio has stated that "[t]he purpose of R.C. 4903.09 is to provide this court with sufficient details to enable us to determine, upon appeal, how the commission reached its decision."[45] The Order provides sufficient detail to show how the Commission reached its decision. First, the Commission not only acknowledged Duke's argument, but the Commission also noted that intervenors responded that "the rights of parties to review Duke's portfolio could not have been waived during the *Duke ESP Case* because those rights had not yet been finalized in the rules; therefore, the doctrines of *res judicata* and collateral estoppel cannot apply in this proceeding."[46] Thus, the Commission recognized that Duke's arguments concerning *res judicata* and collateral estoppel were not uncontroverted.

Second, the Commission agreed with the intervenors' interpretation of the ESP Stipulation: "As pointed out by the intervenors in the instant case, in accordance with

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[43] Rehearing Application at 9.

[44] Id.

[45] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.* (1983), 4 Ohio St. 3d 107, 110, citing *General Tel. Co. v. Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271, 59 O.O.2d 338.

[46] Order at 14-15, citing OPAE Reply Brief at 3-4 and Ohio Environmental Council Reply Brief at 3 (emphasis in original).

paragraph 32 of the stipulation approved in the *Duke ESP Case* on December 17, 2008, Duke agreed to conform to the Commission's rules established in 08-888."[47] Thus, instead of relitigating the ESP Stipulation, this proceeding involved an enforcement of the stipulation. In finding that "Duke has disregarded its agreement in the *Duke ESP Case* to comply with the rules in Chapter 4901:1-39-07, O.A.C.,"[48] the Commission appropriately and lawfully enforced the ESP Stipulation.

The Commission did not violate R.C. 4903.09 by not providing a detailed analysis of the Company's stale res judicata and collateral estoppel arguments in the Order. The Commission should deny Duke rehearing on this issue.

E. In Enforcing the ESP Stipulation, the Commission Maintained the Balance That Resulted from the Negotiations in the ESP Case.

Duke claims that because the ESP Stipulation is a "package of many agreements" that was "the ultimate result of the give-and-take of negotiations," the Commission-ordered removal of lost generation revenues from Rider DR-SAW is "affecting the remaining balance of fairness."[49] Duke also contends that this was done "without even allowing the presence and participation of the parties who signed the stipulation that the Commission is now modifying."[50] Duke is wrong on both counts.

It is true that the ESP Stipulation, like most every stipulation, contains numerous agreements that resulted from the give-and-take of the parties involved. One of those agreements was that Duke would conform to the PUCO rules adopted in the 08-888 and 08-777 cases. This agreement was put into the ESP Stipulation as a compromise to other

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[47] Id. (emphasis in original).

[48] Id. (emphasis in original).

[49] Rehearing Application at 9.

[50] Id.

provisions that one or more parties objected to. Thus, many parties to the ESP Stipulation deemed Duke's conforming to the PUCO's rules as a benefit that replaced other proposed beneficial provisions upon which the parties and Duke were unable to reach agreement. By ordering Duke to conform to the ESP rules, the Commission has maintained – or even restored – the balance of fairness in the ESP Stipulation.

In addition, each of the intervenors in this proceeding was a signatory to the ESP Stipulation, and thus the Commission's action was done with "the presence and participation of the parties who signed the stipulation...." And although not all the signatory parties participated in this proceeding, it is safe to say that the only signatory party that would be adversely affected immediately by the removal of lost generation revenues from Rider DR-SAW is likely to be Duke.[51]

Finally, Duke argues that Rider DR-SAW is not the type of recovery mechanism envisioned in Rule 7 because "[t]he rider, by its terms, allows recovery only after benchmarks have been met; the rule assumes no such limitation."[52] Duke mischaracterizes the nature of the Rider and the benchmark provisions of the ESP Stipulation. The benchmarks relate only to the specific incentives mentioned in the ESP Stipulation.[53] Duke collects from customers through Rider DR-SAW regardless of whether the benchmarks are met. Nevertheless, Rule 7 does not *prohibit* such a recovery mechanism. Duke is grasping at straws with this argument.

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[51] Although Duke may eventually attempt to regain the lost generation revenues through some other means, it would likely need to seek PUCO approval, with the participation of any signatory party desiring to do so.

[52] Id at 10.

[53] ESP Stipulation at 24.

By requiring Duke to remove the collection of lost generation revenues from Rider DR-SAW, the Commission has helped to ensure that all parties receive the benefits they bargained for in the ESP Stipulation. The Commission should deny rehearing on this issue.

III. CONCLUSION

In ordering Duke to remove lost generation revenues from Rider DR-SAW effective on the effective date of Rule 7(A), the Commission acted lawfully and reasonably. The arguments Duke presents in its Rehearing Application do not support the abrogation or modification of the Order. The Commission should deny Duke's Rehearing Application in this proceeding.

Respectfully submitted,

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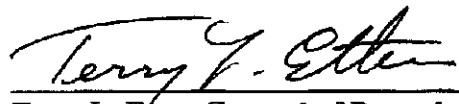

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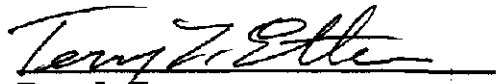
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra Duke's Application for Rehearing was served electronically on the persons stated below, and to the Attorney Examiners for this case, on this 24th day of January 2011.



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