

**BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO**

Direct Energy Business, LLC,

Complainant,

v.

Duke Energy Ohio, Inc.

Respondent.

Case No. 14-1277-EL-CSS

**DIRECT ENERGY BUSINESS, LLC
MEMORANDUM CONTRA
MOTION TO DISMISS**

Pursuant to Ohio Administrative Code (O.A.C.) 4901-1-12(B)(1), Direct Energy Business, LLC (“Direct”) hereby submits its memorandum contra the motion to dismiss filed by Duke Energy Ohio, Inc., (“Duke”) and respectfully requests that the Commission deny the motion to dismiss.

I. OVERVIEW

On July 22, 2014, Direct filed its complaint in the above captioned proceeding. Direct alleged, *inter alia*, that Duke’s failure to correct certain metering errors in a timely manner caused Direct to be unable to both properly bill its customer and receive proper billing and settlement of PJM charges, in violation of statute, Commission rules, and Duke’s tariffs. Direct sought appropriate relief for those violations.

Duke filed its motion to dismiss this proceeding and memorandum in support (“Duke Memo”) on October 31, 2014. Throughout its pleading, Duke attempts to frame Direct’s

complaint as an attack on PJM Interconnection, L.L.C. in a brazen effort to deprive this Commission of jurisdiction over Direct's complaint.¹ Direct is not seeking an order from the Commission compelling PJM to do anything. Rather, Direct is seeking an order from the Commission compelling Duke and 35 of 39 other CRES suppliers to stop being a roadblock to Direct's recovery of overcharges that directly result from Duke's inaccurate metering practices. Alternatively, Direct is seeking restitution from Duke.

As discussed below, the Commission has jurisdiction over Duke's violation of its Supplier Tariff stemming from Duke's failure to provide accurate metering services. The "held harmless" provisions in Duke's Supplier Tariff offer Duke no relief because they are inapplicable, impermissibly vague and therefore unenforceable. Contrary to Duke's baseless assertions, the facts provided in Direct's complaint support each count in the complaint. Finally, the relief sought by Direct is squarely within the Commission's authority and is directly related to the causes of action.

II. ARGUMENT

A. The Commission has Jurisdiction over Duke's Violation of its Supplier Tariff

1. Duke violated its duty under the Supplier Tariff to provide accurate metering services.

Duke's tariff requires interval meters for customers of CRES suppliers that have "a maximum annual peak demand greater than or equal to 200 kW"² It is undisputed that Direct's customer Suncoke regularly has demand in excess of 200 kW. An interval meter was installed by Duke at Suncoke long before the January and February 2013 periods at issue in this proceeding. However, hourly interval data from the period January 2013 through May 2013 was

¹ See, e.g., Duke Memo at 7 ("the Commission lacks statutory jurisdiction over regional transmission organizations such as PJM.").

² Duke Energy Ohio P.U.C.O. Electric No. 20 ("Supplier Tariff"), Sheet No. 38.2.

not made available to Direct until June 21, 2013, and then only manually in Excel spreadsheet format. Direct relies on this data to properly bill its customer. PJM relies on this same data to properly bill Direct.

Section 9.2 of Duke's Supplier Tariff states, "The Company will own, furnish, install, program, calibrate, test, and maintain all meters and all associated equipment used for retail billing and settlement purposes in the Company's service area."³ This language requires Duke maintain these meters and all associated equipment in accordance with good utility practice. Direct submits that Duke's failure to make hourly interval data available to Direct for a major customer for a period of over five months is patently inconsistent with good utility practice and is unjust and unreasonable and therefore violates the Supplier Tariff.

This is true notwithstanding Duke's argument that "the Supplier Tariff delineates the time periods pursuant to which Duke Energy Ohio may generally act, but establishes no commitment on its part, either to perform by a time certain or with regard to the provision of data that underlies PJM billings."⁴ Duke's view appears to be that Duke can forego its metering responsibilities under the Supplier Tariff indefinitely. The Commission should not endorse that interpretation of the Supplier Tariff, as it is unfounded and wholly inconsistent with a properly functioning retail electricity market.

2. The "held harmless" provisions in Duke's Supplier Tariff are inapplicable, impermissibly vague and therefore unenforceable.

Duke argues that, "the Supplier Tariff unambiguously provides that Duke Energy Ohio will be held harmless while performing Meter Data Management functions."⁵ The Supplier Tariff does state, "The Company will be held harmless for any actions taken while performing

³ Supplier Tariff, Sheet No. 38.2.

⁴ Duke Memo at 8.

⁵ *Id.*

Meter Data Management Agent responsibilities.”⁶ However, by its terms, this provision is not applicable to Duke’s responsibilities under the distinct Metering Services and Obligations provisions of the Supplier Tariff.⁷ Further, the “held harmless” provision applies to actions, rather than inactions, such as the failure to provide meter data in accordance with the Supplier Tariff that is at issue here. Moreover, the Supplier Tariff provision is unenforceably vague in that it fails to identify the party that is expected to hold Duke harmless.⁸ CRES suppliers are allowed no bargaining power under the Supplier Tariff and under Supreme Court precedent this fact compels a narrow interpretation of the “held harmless” provision, such that it is ineffective against Direct.⁹ Finally, the Commission has a long-standing policy of refraining from determining the validity of exculpatory provisions in utility tariffs¹⁰ and has explicitly held that such exculpatory provisions are neither binding nor relevant in Commission proceedings.¹¹

B. The Facts Provided in Direct’s Complaint Support Each Count in the Complaint

Duke has not yet provided a cogent explanation of the precise reason for its inability to provide hourly interval data, much less accurate interval data, from the Suncoke meters in a timely manner in early 2013. Discovery in this proceeding has not yet commenced. Discovery

⁶ Supplier Tariff, Sheet No. 44.2.

⁷ Supplier Tariff, Sheet No. 38.2.

⁸ See, e.g., *Glaspell v. Ohio Edison Co.*, 29 Ohio St. 3d 44, 48 (1987) (Upholding indemnity provision where “the agreement before us is resolvable by its own terms, which are clear and precise in their allocation of the risk of doing business.”). The tariff provision at issue identifies no fewer than four (4) entities in the same paragraph that contains the “held harmless” provision, but does not identify the indemnitor; these entities are the Certified Supplier, the Transmission Provider, the Company, and the End-use Customers.

⁹ In *Worth v. Aetna Casualty & Surety Co.*, 32 Ohio St. 3d 238, 241 (1987), the Supreme Court upheld a “held harmless” provision where: “There [was] nothing to suggest that [the] agreements were negotiated in any context other than one of free and understanding negotiation.” This contrasts with the instant matter where the Supplier Tariff is non-negotiable.

¹⁰ E.g., *Edward J. Santos v. Dayton Power and Light Co.*, Case No. 03-1965-EL-CSS, Opinion and Order at 11 (Mar. 2, 2005) .

¹¹ *In the Matter of the Commission’s Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, and 4901:1-25 of the Ohio Administrative Code*, Case No. 06-653-EL-ORD, Finding and Order at 5-6 (November 5, 2008).

in this proceeding will likely lead to a better understanding of how Duke mismanaged the metering of Direct's Suncoke load. Accordingly, any attack on Direct based on an inability to precisely identify the root cause of Duke's meter data mismanagement in its complaint is wholly inappropriate.

1. The ANSI standards referenced in Duke's motion are not the sole criteria for establishing meter error and Direct has standing under the metering rules.

As noted by Duke,¹² O.A.C. 4901:1-10-05(B) states:

A customer's electric usage shall be metered by commercially acceptable measuring devices that comply with "American National Standards Institute" (ANSI) standards. Meter accuracy shall comply with the 2008 version of the ANSI C 12.1 standards. No metering device shall be placed in service or knowingly allowed to remain in service if it does not comply with these standards.

Duke latches onto the ANSI reference in this Commission rule but ignores the requirement of "commercially acceptable measuring devices." There may very well be violations of the applicable ANSI standards at issue in this proceeding. However, until discovery is obtained, only Duke will know. In any case, Direct intends to demonstrate at hearing that the measuring devices that precluded providing accurate interval meter data for five months are not commercially acceptable and therefore violate O.A.C. 4901:1-10-05(B).

Duke provides further obfuscation with the following statement:

Direct Energy does not, however, allege any facts to raise any reasonable inference that Duke Energy Ohio knowingly placed defective meters into service, or that if a meter was found to be defective, it did not take appropriate measures to repair the defect.¹³

The Commission should not entertain the extremely narrow construction of O.A.C. 4901:1-10-05(B) as implied by Duke that would limit application of the rule to "meters," to the exclusion of

¹² Duke Memo at 10.

¹³ *Id.*

“measuring devices” and “metering devices,” which are expressly referenced in the rule. At hearing, Direct will show that it is abundantly clear from Duke’s own admissions that Duke’s “measuring devices” provided erroneous data to Direct and PJM and, for a period of at least five months, Duke failed to take appropriate corrective action to resolve the matter. Discovery in this proceeding should identify precisely how long Duke knowingly allowed a defective metering device to remain in service.

Duke’s assertion that “Direct Energy has not set forth any factual allegations or reasonable grounds to demonstrate a violation of O.A.C. 4901:1-10-05(F)”¹⁴ is equally baseless. Duke takes the strained view that its responsibilities under this section of the rule are dependent upon a retail customer requesting that Duke test a particular meter. The rule certainly does address customer requests for verification of meter accuracy. But Duke ignores the more general mandate that “Metering accuracy shall be the responsibility of the electric utility.”¹⁵ The Commission should not allow Duke to dodge its responsibility for metering that Duke has admitted is grossly inaccurate simply because a formal request for a meter test may not have been made. Contrary to Duke’s deceptive assertion, no reference to the customer is made in relation to the more general prescription in the rule. Furthermore, Direct’s interest in obtaining accurate meter data in order to properly bill and be billed is obvious and therefore provides the requisite standing.

2. Duke itself has identified thirty-nine CRES providers who received preferential treatment in violation of Ohio Rev. Code §§ 4905.32 and 4928.35(C).

Duke erroneously alleges that “Direct Energy’s Complaint is entirely devoid of any factual allegations that Duke Energy Ohio failed to comply with its Supplier Tariff or that it

¹⁴ *Id.*

¹⁵ O.A.C. 4901:1-10-05(F).

unjustly discriminated against one CRES provider.”¹⁶ The factual allegations pertaining to Duke’s violations of its Supplier Tariff are discussed in the preceding section. In its complaint, Direct identified itself as the CRES provider Duke has unjustly discriminated against.¹⁷ This discrimination is readily apparent and was clearly alleged in the complaint.¹⁸ The overcharges against Direct resulted in undercharges to all other CRES providers in Duke’s service territory. As stated by Duke, “If one LSE received an invoice for energy supplied to one end-use customer that was too high, all other LSEs necessarily received invoices that were too low.”¹⁹ This demonstrates Duke’s violation of R.C. 4905.32 because, *inter alia*, Duke has extended to thirty-nine other suppliers the privilege of receiving undercharges, all at the expense of Direct, when all suppliers should be provided uniform services (*i.e.*, accurate metering services) under the Supplier Tariff.

Additionally, Duke incorrectly argues that “Direct Energy has not set forth any reasonable grounds for a violation of R.C. 4928.35(C).”²⁰ Direct’s complaint stated that R.C. 4928.35(C) “dictates that Duke make ‘the unbundled distribution components [of] . . . electric distribution service . . . available to all retail electric service customers in the electric utility’s certified territory and their suppliers on a nondiscriminatory and comparable basis on and after the starting date of competitive retail electric service.’ Duke’s provision of metering services under the Supplier Tariff has been discriminatory and non-comparable.”²¹

¹⁶ Duke Memo at 11.

¹⁷ Complaint at ¶ 19 (“Duke has provided Certified Supplier Services to Direct that are unreasonable, unjust, unjustly discriminatory, and unjustly preferential.”).

¹⁸ Complaint at ¶¶ 19-21.

¹⁹ Duke Memo at 6.

²⁰ Duke Memo at 12.

²¹ Complaint at ¶ 21.

Duke erroneously asserts that because Duke has previously made its rate schedules available, R.C. 4928.35(C) is no longer operative and “cannot be used to establish the Commission's jurisdiction or a valid claim against Duke Energy Ohio.”²² Duke’s interpretation would eviscerate the substance of the statute by precluding any as-applied challenge to Duke’s implementation of the rate schedules required by R.C. 4928.35(C). Duke’s semantic argument is unsupported and should be ignored.

C. The Relief Sought by Direct Energy is Squarely within the Commission’s Authority and is Directly Related to the Causes of Action

1. The Commission has the authority to compel Duke to submit corrected meter data to PJM for purposes of resettlement.

Direct’s complaint sought an order from the Commission: “Directing Duke to immediately submit corrected meter data to Direct and to PJM with respect to Direct’s customer loads for the January 2013 through February 2013 period, [and] directing Duke to initiate resettlement with PJM for that period”²³ Duke’s rebuttal for this very reasonable request for relief is only to state that:

The Commission has no authority over PJM, and as such, cannot compel it to expedite its reconciliation procedures. Further, the Supplier Tariff contains no obligation on the part of Duke Energy Ohio to undertake any activity in respect of reconciliations.²⁴

As indicated previously, Direct is not seeking an order from the Commission compelling PJM to do anything, so Duke’s first objection is irrational. Duke’s assertion is further undercut by Duke’s own request in its current electric security plan case for Commission approval of a tariff

²² Duke Memo at 12.

²³ Complaint at p. 9.

²⁴ Duke Memo at 13.

provision that would require any CRES provider to assent to PJM resettlement if requested by Duke.²⁵

Additionally, Duke ignores the fact that the Commission's remedial powers are not constrained by the absence of any particular express remedy in Duke's Supplier Tariff. Moreover, Duke ignores Supplier Tariff section 9.2, which states, "The Company will own, furnish, install, program, calibrate, test, and maintain all meters and all associated equipment used for retail billing and settlement purposes in the Company's service area."²⁶ Duke's position appears to be that the Commission is hamstrung and cannot craft an appropriate remedy for Duke's failure to maintain the meters and associated equipment used for billing and settlement purposes related to Direct's Suncoke customer, the failure of which is manifest in Duke's inability to timely provide accurate interval meter data for a period of at least five months. That is simply not the case as the Commission's authority under R.C. 4905.26 is extremely broad.²⁷

2. The Commission has authority to award monetary damages under the circumstances of this case.

As stated in the complaint, Direct is a customer of Duke's consuming unbundled non-competitive retail electric services under Duke's Certified Supplier Tariff.²⁸ The complaint was properly brought pursuant to, *inter alia*, R.C. 4928.16(A)(2), which grants the Commission

²⁵ *In the Matter of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case Nos. 14-841-EL-SSO, *et al.*, Direct Testimony of Daniel L. Jones at Attachment DLJ-1, page 22 of 25 (May 29, 2014).

²⁶ Duke Energy Ohio, P.U.C.O. Electric No. 20, Sheet No. 38.2 (emphasis added).

²⁷ *See, e.g., City of Cincinnati v. Cincinnati Gas and Elec. Co.*, 1991 Ohio PUC LEXIS 798, * 8 (June 27, 1991) ("In *Western Reserve Transit v. Pub. Util. Comm.* (1974), 39 Ohio St. 2d 16, the Supreme Court found that Section 4905.26, Revised Code, is extremely broad and gives the Commission the authority to review matters already considered in a prior proceeding. In that case the Court stated that the language in Section 4905.26, Revised Code, permits what might be strictly viewed as a collateral attack in many instances. This position was followed in *Ohio Utilities Co. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 153, where the Court held that the Commission has the authority to initiate complaints under Section 4905.26, Revised Code, to investigate the continuing reasonableness of rates which it had previously established as just and reasonable.").

²⁸ Complaint at p. 9.

jurisdiction under R.C. 4905.26 “to determine whether an electric utility has violated or failed to comply with any provision of sections 4928.01 to 4928.15, any provision of divisions (A) to (D) of section 4928.35 of the Revised Code, or any rule or order adopted or issued under those sections.” R.C. 4928.16(A)(2). R.C. 4928.35(C) requires that Duke provide the unbundled components of electric service on a nondiscriminatory and comparable basis and Duke has failed to do so. Metering Service under the Supplier Tariff is retail electric service.²⁹ Accordingly, the Commission has authority to order “any other remedies provided by law,” including restitution under R.C. 4928.16(B)(1), which provides such restitution authority “in any complaint brought pursuant to division (A)(1) or (2) of this section.”³⁰

Additionally, the Commission has cited R.C. 4928.11 as statutory authority for its metering rules in Ohio Adm. Code 4901:1-10-05.³¹ Therefore, Ohio Adm. Code 4901:1-10-05 is a rule adopted under the sections specified in R.C. 4928.16(A)(2), the violation of which empowers the Commission to award restitution pursuant to R.C. 4928.16(B)(1). Accordingly, Duke’s violation of the Commission’s metering standards provides an alternative basis upon which the Commission may award restitution to Direct.

Direct cited *Edward J. Santos v. Dayton Power and Light Co.*³² in the complaint³³ for the statement by the Commission that in appropriate circumstances the Commission may award

²⁹ R.C. 4928.01(A)(27) (“‘Retail electric service’ means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following ‘service components’: generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.” (emphasis added)).

³⁰ See *Edward J. Santos v. Dayton Power and Light Co.*, Case No. 03-1965-EL-CSS, Opinion and Order at 8 (Mar. 2, 2005) (“In our review, we shall determine if DP&L’s action in this case constitutes a violation of any of these subdivisions or the Commission’s rules adopted pursuant to these subdivisions. Upon finding a violation, we may have grounds to award damages to the complainant.”).

³¹ See notes accompanying Ohio Adm. Code 4901:1-10-05.

³² Case No. 03-1965-EL-CSS, Opinion and Order (Mar. 2, 2005).

³³ Complaint at p. 9.

damages under R.C. 4928.16 and it is irrelevant that the Commission did not award damages in that particular case. In *Santos*, the Commission stated, “Where there is a power outage, assuming adequate preventive measures, we would not hold the company accountable for outages attributable to lightning strikes, animal activity, or extraordinary climactic conditions.”). Duke has not pointed to any similar acts as being responsible for its failure to provide appropriate metering service in the instant case. Moreover, the *Santos* order certainly does not support Duke’s proposition that damages under R.C. 4928.16 are only available in the case of distribution service disruptions.³⁴

Duke cites two Attorney Examiner orders in its memorandum for the proposition that the Commission is without authority to award monetary damages to Direct.³⁵ Neither of these provides any support for Duke’s position. One of these, *Wiley v. Duke Energy Ohio, Inc.*,³⁶ involved a complainant who argued Duke was responsible for her homelessness, among other things, after being wrongfully disconnected. In *Wiley*, the Attorney Examiner stated that “the complaint does allege claims which, if proven, may justify a ruling in complainant's favor regarding the adequacy of her service from the respondent. However, Duke Energy is correct that the Commission may not award monetary damages in this particular case.”³⁷ Duke has not and cannot provide a rational explanation of how this order is relevant to the instant case, as the Attorney Examiner’s order was expressly limited to the peculiar facts and circumstances of the *Wiley* case.

³⁴ Duke Memo at 14.

³⁵ Duke Memo at 13, n.21.

³⁶ Case No. 10-2463-EL-CSS, Entry (May 3, 2011).

³⁷ *Id.* at 3.

The other “precedent” cited by Duke is a non-dispositive order scheduling a hearing in *Cunningham v. Duke Energy Ohio, Inc.*³⁸ in a matter involving disputed charges of \$81.73 where the Attorney Examiner stated, “it should be noted that the Commission has no authority to award monetary damages. It is, however, within the jurisdiction of the Commission to determine whether a public utility has violated any specific statute, order, or regulation of the Commission. If the Commission finds a violation, a complainant may pursue treble damages before a court of common pleas in accordance with Section 4905.61, Revised Code.”³⁹ Clearly, the Attorney Examiner’s entry in this case was not intended to overturn R.C. 4928.16 and it cannot. The availability of treble damages to Direct under R.C. 4905.61 is discussed next.

3. To the extent the Commission declines to award monetary damages the Commission should still grant Direct’s complaint so that Direct may pursue treble damages in the Court of Common Pleas.

As demonstrated above, Duke has violated R.C. 4905.32 because, *inter alia*, Duke has extended to thirty-nine other suppliers the privilege of receiving undercharges, all at the expense of Direct, when all suppliers should be provided uniform services (*i.e.*, accurate metering services) under the Supplier Tariff. This violation supports a claim by Direct for treble damages. R.C. 4905.61 states:

If any public utility or railroad does, or causes to be done, any act or thing prohibited by Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4927. of the Revised Code, or declared to be unlawful, or omits to do any act or thing required by the provisions of those chapters, or by order of the public utilities commission, the public utility or railroad is liable to the person, firm, or corporation injured thereby in treble the amount of damages sustained in consequence of the violation, failure, or omission.

³⁸ Case No. 11-5584-GE-CSS, Opinion (Jan. 27, 2012).

³⁹ *Id.* at 3.

Once the Commission makes a determination that a violation of Chapter 4905 has in fact taken place, the Court of Common Pleas has jurisdiction to hear a complaint for treble damages.⁴⁰ Given that the statute requires a prior finding of a violation, a plaintiff in a claim brought pursuant to R.C. 4905.61 need only show causation and damages flowing from the adjudicated violation. Accordingly, a determination by the Commission that Duke violated R.C. 4905.32 is still warranted even in the event that the Commission itself declines to award monetary damages, because such a finding by the Commission would support Direct's eventual claim for treble damages in the Court of Common Pleas.

III. CONCLUSION

For the reasons set forth herein, Direct Energy Business, LLC respectfully requests that the Commission deny the motion to dismiss the above-referenced proceedings.

Respectfully submitted,

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Dated: November 14, 2014

⁴⁰ *Fed. Reserve Bank of Cleveland v. Purolator Courier Corp.*, 13 Ohio App. 3d 296, 300, 469 N.E.2d 542, 546 (1983) ("When a statutory violation has occurred, the proper procedure is to file a complaint with the Public Utilities Commission. The Public Utilities Commission is vested with the power and jurisdiction to regulate public utilities. Once the complainant has successfully prosecuted its complaint before the commission, the court of common pleas may then hear the action and assess treble damages. . . . But appellee asserts that the court of common pleas may only hear an action for treble damages when there has been a deviation from rates established pursuant to the statutes. We do not agree."). *See also Lahke v. Cincinnati Bell, Inc.*, 1 Ohio App. 3d 114, 117, 439 N.E.2d 928, 931 (1981) ("we conceive that the provision for private recovery of treble damages for statutory violations, far from interfering with PUCO's orders, aids in their enforcement by furnishing another incentive for the utility company to operate in accordance with PUCO's dictates.").

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing filing has been served upon the below-named person by electronic mail and regular U.S. Mail, postage prepaid, this 14th day of November, 2014.

/s/ Gerit F. Hull

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