

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke )  
Energy Ohio for Authority to Establish a )  
Standard Service Offer Pursuant to Section ) Case No. 14-841-EL-SSO  
4928.143, Revised Code, in the Form of an )  
Electric Security Plan, Accounting )  
Modifications and Tariffs for Generation )  
Service. )

In the Matter of the Application of Duke )  
Energy Ohio for Authority to Amend its ) Case No. 14-842-EL-ATA  
Certified Supplier Tariff, P.U.C.O. No. 20. )

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**CONSTELLATION NEWENERGY, INC.  
AND  
EXELON GENERATION COMPANY, LLC'S  
MEMORANDUM CONTRA  
THE APPLICATION FOR REHEARING  
OF  
DUKE ENERGY OHIO, INC.**

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**I. Introduction**

Pursuant to Rule 4901-1-35(B), Ohio Administrative Code, Constellation NewEnergy, Inc.<sup>1</sup> and Exelon Generation Company, LLC<sup>2</sup> (jointly, "Constellation") submit this memorandum contra to the application for rehearing filed by Duke Energy Ohio, Inc. ("Duke") with respect to

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<sup>1</sup> Constellation NewEnergy, Inc. provides competitive retail electric service ("CRES") to approximately 150,000 businesses and 1,000,000 residential customers in open-market states, including Ohio. Constellation's predecessor, AES NewEnergy, Inc., was certified by the Commission to provide CRES in Ohio in 2000, making it one of Ohio's oldest CRES suppliers. *See In the Matter of the Application of AES NewEnergy, Inc., for a Certificate of Public Convenience and Necessity*, Case No. 00-1717-EL-CRS. Today, Constellation actively provides CRES to retail customers in Ohio, including customers in Duke's service area where it has offers posted on the Commission's Apples-to-Apples chart.

<sup>2</sup> Exelon Generation Company, LLC is one of the largest competitive power generators in the United States, dispatching roughly 35,000 megawatts ("MWs") of generation from a diverse portfolio of generation plants utilizing nuclear, fossil, hydroelectric, solar, landfill gas, and wind technologies. Exelon's generation fleet is one of the nation's cleanest and lowest cost. Exelon is an active supply bidder in the wholesale standard service offer ("SSO") auction conducted by the Commission and has sold power to Duke (and other EDUs) pursuant to the SSO auctions.

the Opinion and Order issued in these proceedings on April 2, 2015. Specifically, Constellation requests that the Public Utilities Commission of Ohio (“Commission”) deny Duke’s first three assignments of error regarding the Price Stabilization Rider (“Rider PSR”) and the divestiture of Duke’s entitlement in the Ohio Valley Electric Corporation (“OVEC”). The Commission thoroughly considered and properly concluded that Duke’s Rider PSR proposal should not be approved and that further relevant evidence must be presented and evaluated before Duke can actually charge customers under such a rider.<sup>3</sup> Moreover, inasmuch as the evidence in the record establishes that Duke did not divest or transfer its entitlement in OVEC by the end of 2014 as called for in the ESP II final order, the Commission was well within its authority to direct Duke to “pursue transfer of the OVEC contractual entitlement or to otherwise pursue divestiture of the OVEC asset.”<sup>4</sup>

**II. Duke raises no new issues and the Commission’s conclusion that Rider PSR should not be adopted as proposed by Duke was correct in light of the evidence in the record.**

In its rehearing application, Duke raised two interrelated assignments of error involving the Rider PSR:

Assignment of error #1: The Commission’s conclusion with regard to Rider PSR unreasonably prohibits the Company from offering its customers a hedge against volatile wholesale prices, even though the Commission agrees that the proposed rider would act as a hedge.

Assignment of error #2: The Commission’s conclusion that Rider PSR should be approved, but that it should remain at zero until such time as the Company provides additional evidence, is unreasonable, in that sufficient evidence is currently available in the existing record.

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<sup>3</sup> Opinion and Order at 46-47. Constellation has previously argued that Duke’s proposed Rider PSR is contrary to both state and federal law. Moreover, Constellation has argued that the Rider PSR provides Duke with a hedge against market risk (as opposed to a ratepayer price stabilizer) and that the Rider PSR will not and cannot stabilize retail customer rates but instead cause repeated price fluctuation. Nothing in this Memorandum Contra is intended to diminish or otherwise change Constellation’s position on the placeholder Rider PSR.

<sup>4</sup> Opinion and Order at 48.

Duke asserts that the Commission did not properly weigh the evidence Duke submitted into the record with respect to the Rider PSR. Considering that the Commission discussed the Rider PSR for more than 33 pages in its decision, with six pages devoted to analysis and conclusion, it is clear that Duke's assumption that the Commission paid insufficient attention to the Rider PSR issue has no merit. As to the quality of the Commission's analysis, even a cursory review of the Opinion and Order's Rider PSR section, demonstrates that the Commission fully weighted *all* the evidence and legal arguments.

Duke asserts in its first assignment of error that the "Commission agrees that the [Rider PSR] would act as a hedge."<sup>5</sup> That claim overstates the actual holding in the Commission's decision. While the Commission intimates that a purchase power agreement may act as a hedge, the Commission goes on to find that Rider PSR had not been shown to be able to effectively hedge retail customer's risks. At page 46 of the Opinion and Order, the Commission states "... that the evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the riders intended purpose as a hedge against market volatility." Moreover, the Commission reiterated that it "is not persuaded, based on the evidence of record in these proceedings, that Duke's PSR proposal would provide customers with sufficient benefit from the rider's financial hedging mechanism or any other benefit that is commensurate with the rider's potential cost."<sup>6</sup> Simply put, Duke's first assignment of error is based on the faulty premise that the Commission believed that Rider PSR would act as an effective hedge. An examination of the Opinion and Order shows that the Commission made no such finding. While the Commission did not take issue with the possibility that a power purchase agreement has the

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<sup>5</sup> Duke Application for Rehearing p. 2, 5.

<sup>6</sup> Opinion and Order at 46.

potential to be a beneficial hedge, Duke's proposed Rider PSR has not been shown to have such potential.

Duke in the matter at bar had the burden of proof that the market risk associated with its aging Kyger Creek and Clifty Creek generation plants would provide ratepayers with price stability rather than exposing them to the variability of the wholesale electric power market. Duke presented nothing new in its application for rehearing which addressed the short comings of the Rider PSR articulated in the Opinion and Order. The rehearing petition reasserts previously addressed arguments in support of its first two assignments of error,<sup>7</sup> namely arguments as to the wholesale market, the structure of Rider PSR, the impact of the rider, and the currently existing mechanisms used to address price volatility.<sup>8</sup> The Commission was correct in concluding that Duke's Rider PSR should be rejected because it failed to meet its burden of proof and Duke provided no reason as to why the Commission should re-weigh the evidence or alter its conclusion. Modification to the Commission's Opinion and Order is unwarranted.

**III. The Commission's direction that Duke pursue divestiture/transfer its stock in OVEC was initiated in response to a question previously raised by Duke in this proceeding, was based on a proper weighing of the evidence, and Duke raises no new issues in its application for rehearing.**

In its application for rehearing, Duke also took issue with the Commission's directive regarding its OVEC entitlement:

Assignment of error #3: The Commission's direction, in *dicta*, that the Company must pursue divestiture of its stock in the Ohio Valley Electric Corporation (OVEC) is unreasonable, arbitrary, unconstitutional, beyond the scope of this proceeding, and outside the Commission's jurisdiction.

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<sup>7</sup> See, e.g., Duke Ex. 2 (Henning Direct Testimony) at 4-5, 8-11; Duke Ex. 6 (Wathen Direct Testimony) at 12-15; Duke Initial Brief at 21-24; and Duke's Reply Brief at 43-44, 54-55, 58, and 67.

<sup>8</sup> Duke Application for Rehearing at 6-11.

Duke's argument that divestiture of its OVEC holdings is beyond the scope of the hearing fails because it was Duke that raised the question of whether it had been obligated to divest the OVEC entitlement as part of the stipulated terms in its ESP II proceeding.<sup>9</sup> Specifically, Duke addressed the divestiture/transfer of its OVEC entitlement when proffering evidence in support of its ESP III Application and in its reply brief.<sup>10</sup> Since Duke raised the issue of the dictates of the ESP II Opinion and Order obligates Duke to divest OVEC, Duke should be estopped from claiming that the evidence and arguments on divestiture it raised is outside the scope of the proceeding. The ESP III Opinion and Order must flow from the ESP II final Order. The ESP II final order adopted a unanimous stipulation, which specifically called for divestiture of OVEC. Duke could not go from an existing obligation to divest OVEC to the position it advocated in the ESP III application, that it should no longer be required to divest, without making the divestiture an issue in the case. Further, if divestiture is an issue in the case and the Commission rules on it, such a ruling is a finding of fact and law, not dicta.

Duke also asserts that its due process rights were violated by the Commission and provides two reasons in support thereof. Duke's first basis for its due process claim is that the Commission did not explain in its Opinion and Order why it had intended in the ESP II proceeding to require Duke divest/transfer the OVEC entitlement. Duke's second basis for its due process argument is that the Commission's statement in its Opinion and Order is a new interpretation of the ESP II requirements. However, Duke raised the issue as to whether the ESP II required the OVEC divestiture/transfer, presented evidence thereto, and addressed the issue in its brief. Clearly, Duke's due process rights were not violated.

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<sup>9</sup> Duke Ex. 6 (Wathen Direct Testimony) at 11.

<sup>10</sup> Duke Reply Brief at 70-76.

Duke next argues that Ohio law does not require the divestiture/transfer of its OVEC entitlement. Moreover, Duke asserts that it would be illogical to require the OVEC divestiture/transfer when other generating assets are owned as well. These arguments are irrelevant and not compelling. The question of whether Duke was obligated to divest/transfer its OVEC entitlement directly stems from the Duke ESP II final order. Accordingly, there has been no “governmental taking” of private property and Duke’s due process rights have not been violated in this proceeding.

Duke’s remaining arguments in its third assignment of error are essentially reassertions of previously raised arguments related to whether the stipulated terms of the ESP II required Duke to divest/transfer its OVEC entitlement. However, the Commission has already analyzed and weighed these issues when preparing and issuing its Opinion and Order.<sup>11</sup> Duke is merely asking the Commission to re-weigh the evidence and arguments and, as a result, Duke has raised no new issues. The Commission’s ruling was not unreasonable, arbitrary, or unconstitutional. Moreover, the Commission’s ruling was well within its jurisdiction and not beyond the scope of this proceeding. The Commission should therefore reject Duke’s third assignment of error.

#### **IV. Conclusion**

The Commission should reject Duke’s first three assignments of error, which relate to Duke’s Rider PSR and its OVEC entitlement. Duke’s first three assignments of error have no merit and should be denied.

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<sup>11</sup> Opinion and Order at 36-38, 48.

Respectfully Submitted,



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### CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on 14<sup>th</sup> day of May 2015 upon all persons/entities listed below.



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