

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Duke Energy Ohio, Inc., for Approval) Case No. 17-872-EL-RDR
to Modify Rider PSR.)

In the Matter of the Application of)
Duke Energy Ohio, Inc., for Approval) Case No. 17-873-EL-ATA
to Amend Rider PSR.)

In the Matter of the Application of)
Duke Energy Ohio, Inc., for Approval) Case No. 17-874-EL-AAM
to Change Accounting Methods.)

**DUKE ENERGY OHIO'S MEMORANDUM CONTRA
MOTION TO DISMISS OR STAY**

On March 31, 2017, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) filed an application (Application) with this honorable Public Utilities Commission of Ohio (Commission), seeking an order from the Commission (i) establishing the initial tariff amounts applicable to the Company's existing Price Stabilization Rider (Rider PSR); (ii) confirming the procedure pursuant to which Rider PSR will be periodically reviewed and adjusted; (iii) amending Rider PSR with regard to its effective period; (iv) approving the modification of the Company's accounting practices to establish a deferral, as of April 1, 2017, to account for the net costs related to the Company's contractual entitlement in generating assets owned by the Ohio Valley Electric Corporation (OVEC); and (v) authorizing the recovery of such deferred amounts via Rider PSR.

On May 9, 2017, a motion to dismiss the Application or, in the alternative, to stay its consideration for an indefinite period of time, (collectively with the Memorandum in

Support thereof, Motion) was filed by Industrial Energy Users-Ohio, the Office of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy, The Kroger Co., and Ohio Manufacturers' Association Energy Group (collectively, Movants). As Duke Energy Ohio demonstrates herein, both the motion to dismiss and the motion to stay should be denied.

I. INTRODUCTION

The Motion mischaracterizes the Company's Application. The Movants describe the Application as "nothing more than an untimely application for rehearing . . ."¹ They are mistaken; the Application is filed in direct response to the invitation of the Commission, as stated in its Opinion and Order in the Company's currently effective electric security plan (ESP).² And it does not violate either state or federal law, as confirmed by the Commission when approving Rider PSR.

The Motion misapplies the law. The Movants assert that a claim that the Commission may approve the Application "based on the Commission's general jurisdiction and traditional rate setting authority" is "legal unsound."³ They further state that the request is one pursuant to which Duke Energy Ohio is seeking compensation for electric generation service, in violation of both state and federal law.⁴ They are mistaken; such authority has been specifically found by this Commission, in an analogous situation relating to another Ohio electric utility.⁵

¹ Motion, at pg. 7.

² *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, et al. (ESP III), Opinion and Order (ESP III Order), at pg. 47 (April 2, 2015).

³ Motion, at pg. 8.

⁴ *Id.*, at pg. 8.

⁵ *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-

And the Motion inappropriately seeks to stay the Application until some point in the distant future, despite the current effectiveness of the Commission's ESP III Order as undeniably provided under Ohio law.

II. THE APPLICATION SIMPLY ASKS THE COMMISSION TO SET A RATE FOR A PREVIOUSLY AUTHORIZED RIDER

In its ESP III case, Duke Energy Ohio sought approval of a Price Stabilization Rider (Rider PSR), through which the Company would provide customers the net benefit of all revenues accruing to the Company as a result of its ownership interest and contractual entitlement in the Ohio Valley Electric Corporation (OVEC), less all costs associated with the entitlement. In addition, the Company proposed that additional contractual arrangements could be included in the PSR to increase the benefits available to customers.⁶ The purpose of Rider PSR was to mitigate anticipated volatility in the wholesale market.⁷

In its ESP III Order, the Commission found that it had the requisite statutory authority to approve Rider PSR, based on its conclusions that (1) Rider PSR would consist of a charge incurred by customers under ESP III,⁸ (2) as a financial hedging mechanism, Rider PSR was proposed to have the effect of stabilizing or providing certainty regarding electric service,⁹ and (3) Rider PSR would comprise a financial limitation on customer shopping for retail electric generation service.¹⁰ Although the Commission did not find sufficient evidence in the record in the ESP III proceeding to

1693-EL-RDR (AEP OVEC Case), Opinion and Order (AEP OVEC Order), at pg. 82 (March 31, 2016) and Second Entry on Rehearing (AEP OVEC Rehearing Order), Concurring Opinion of Chairman Haque, at pg. 2 (affirming adjustment of separate rider for recovery of OVEC costs, which placeholder rider was initially established in an ESP)(November 3, 2016).

⁶ See ESP III Order, at pg. 15.

⁷ See *Id.* at pg. 16.

⁸ *Id.* at pg. 43.

⁹ *Id.* at pg. 44.

¹⁰ *Id.* at pg. 45.

persuade it that Rider PSR's benefit would outweigh its cost,¹¹ it expressly "recognize[d] that there may be value for consumers in a reasonable PSR proposal . . ."¹² Therefore, the Commission authorized the Company to establish Rider PSR, as a placeholder, at an initial rate of zero and explained that the Company could establish a rate to be charged under Rider PSR through a future proceeding, setting forth a series of factors that the Commission would consider, among other things, in such a proceeding.¹³

The Movants claim that the Application in the present proceeding is merely a "repackaging" of previously "rejected" cost recovery related to OVEC.¹⁴ In doing so, they entirely misstate and ignore the facts that Rider PSR was unquestionably approved as part of Duke Energy Ohio's retail tariffs and that the Commission expressly recognized the Company's right to apply for permission to begin recovery under such rider. The Movants further disregard the Commission's orders relevant to the Application in these proceedings. Significantly, in the ESP III Order, the Commission found that it would consider, "but not be bound by" certain factors.¹⁵ It subsequently confirmed that its decision to adjust a placeholder rider, initially approved for the recovery of costs associated with a contractual entitlement in the OVEC-owned generating assets, would not be dictated solely by these articulated factors. As the Commission unequivocally stated, its "decision regarding any future cost recovery filing would not be limited to consideration of the factors."¹⁶ Consistent with the prior Commission determinations, Duke Energy Ohio has, in its Application, addressed the factors identified in the ESP III

¹¹ *Id.* at pg. 46.

¹² *Id.* at pg. 47.

¹³ *Id.* at pp. 47, 48.

¹⁴ Motion at pg. 8.

¹⁵ ESP III Order, at pg. 47.

¹⁶ AEP OVEC Rehearing Order, at pg. 66.

Order. Its Application, therefore, cannot be a resubmission of that which it proposed in May 2014, before the factors had been articulated. And any suggestion now by the Movants must be disregarded.

The Movants also claim assert that the Company has proposed a “new legal theory,” seeking the Commission’s approval of Rider PSR under the Commission’s general jurisdiction and rate setting statutes. Nothing could be further from the truth. Rider PSR has been approved. It currently exists as a part of the Company’s Commission-approved tariffs. In the above-captioned proceedings, the Company seeks to adjust the rate being charged under said rider. That Duke Energy Ohio seeks such an adjustment in a separate proceeding is consistent with the Commission’s ESP III Order and well-established regulatory procedure.

In the ESP III Order, the Commission approved Rider PSR, set at zero, for the term of the ESP, or through May 31, 2018.¹⁷ The Commission further directed Duke Energy Ohio initiate a separate filing for purposes of seeking to adjust this rider.¹⁸ In doing so, the Commission understandably did not identify its existing authority to adjust a rider outside of a base rate case or standard service offer proceeding and, notably, no intervenor challenged this authority on rehearing. Intending only to identify the statutory basis on which its Application was predicated, such basis in addition to the Commission’s ESP III Order, Duke Energy Ohio set forth controlling statutory provisions. These provisions undeniably confirm the Commission’s authority to adjust and modify the

¹⁷ ESP III Order, at pg. 47.

¹⁸ *Id.*

terms of a previously approved rider in a filing initiated for that limited purpose. And this conclusion has been repeatedly recognized by the Commission.¹⁹

Along this same line of thought, the Movants incomprehensively suggest that the Application is merely an untimely rehearing of the ESP III Order.²⁰ They are incorrect. With regard to Rider PSR, the ESP III Order approved Rider PSR at a rate of zero. Here, the Company seeks to adjust that rate, as invited to do, and to allow the continuation of such rider beyond the term of ESP III. The Application does not request reconsideration of the decision in the ESP III Order; rather, it fulfills the Commission's directive, as expressly set forth in that Order.

Indeed, if any party here appears to be seeking an untimely rehearing of the ESP III Order, it is the Movants. Throughout the Motion they argue the justification for Rider PSR, even though that issue is one that was addressed in the ESP III Order.

III. THE APPLICATION SEEKS RELIEF THAT IS WITHIN THE COMMISSION'S AUTHORITY TO GRANT

The Movants propose numerous ways in which the Application seeks an outcome that is outside of the Commission's authority. Ignoring indisputably relevant Commission precedent, as well as the unambiguously expressed request set forth in the Application, they claim that authorization of a charge under Rider PSR – the requested outcome of these proceedings – is beyond the Commission's authority,²¹ specifically that the

¹⁹ See, e.g., *In the Matter of the Application of The Cincinnati Gas & Electric Company for an Increase in Rates*, Case No. 01-1228-GA-AIR, *et al.*, Opinion and Order, at pg. 8 (May 30, 2002)(approving, in the context of a base rate proceeding, a mechanism to subsequently adjust Rider AMRP and finding that such mechanism “advances the public interest as it does not sanction cost recovery of all yet-to-be-incurred costs... [and] puts in place a workable process” for evaluating each year's expenses); *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in its Natural Gas Distribution Rates*, Case No. 12-1685-GA-AIR, *et al.*, Opinion and Order, at pg. 72 (approving, in the context of a base rate proceeding, a mechanism to subsequently adjust Rider MGP for recovery of environmental compliance costs).

²⁰ Motion at pp. 27, *et seq.*

²¹ Motion at pg. 13.

Commission may not **establish** a mechanism for the recovery of OVEC-associated costs,²² that the Commission may not **establish** a mechanism for the recovery of costs associated with a competitive service;²³ that the Commission may not authorize transition revenue or its equivalent;²⁴ that the Commission may not authorize the recovery of an anticompetitive subsidy or a generation revenue through a distribution rate;²⁵ and that a Commission authorization of a wholesale rate is preempted by Federal law.²⁶

As discussed above, the Application in these proceedings asks the Commission to adjust the rate for a previously established rider. Movants make much of the Company's explanation that, for purposes of the Commission's concern about severability in the event of appeal of the ESP III Order, Rider PSR can continue, in a manner disassociated from ESP III. But that future disassociation has zero relevance to the fact that Rider PSR has already been approved. The Application here seeks no **establishment** of a recovery mechanism. The establishment has already been accomplished. The question in these proceedings relates to the rate at which the established rider should be set; not the merits of the Commission's decision to initially approve Rider PSR.

That the Commission has the authority under state law to adjust the rate of a rider that has been established for the purpose of creating a retail hedging mechanism and that uses OVEC-related costs to do so has already been determined, in a case that is painfully omitted from the Motion. In the AEP OVEC Order, the Commission specifically made the following finding:

²² Motion at pp. 14, *et seq.*

²³ Motion at pp. 18, *et seq.*

²⁴ Motion at pp. 21, *et seq.*

²⁵ Motion at pp. 23, *et seq.*

²⁶ Motion at pp. 25, *et seq.*

The Commission also notes that our approval of the PPA rider, as a retail hedge, is based upon retail ratemaking authority under state law, which does not conflict with or erode federal laws or the responsibility of FERC to regulate electricity at wholesale. Charges at wholesale are exclusively within the jurisdiction of FERC.²⁷

The AEP OVEC Case, like the present case for Duke Energy Ohio, was one in which the utility sought approval of an adjustment to a rider that is designed much like the Company's Rider PSR. And, similarly, such AEP rider had been approved at a zero rate in AEP's then-current ESP.

The AEP OVEC Case is further informative in that the Commission unequivocally determined therein that the approved rider mechanism did not provide the recovery of transition charges. As the Commission explained therein, "the purpose of transition revenue was to allow electric distribution utilities to recover the costs of generation assets used to provide generation service to customers prior to the unbundling of rates in S.B. 3 if such costs could not be recovered through the market."²⁸ The assets owned by OVEC and that form basis for the Application here did not provide generation service to Duke Energy Ohio's customers prior to the unbundling of rates. Thus, as the Commission has already conclusively determined, "the OVEC contract cannot be the basis for transition charges or their equivalent."²⁹

Although addressed *ad nauseam* in the written arguments of the parties to the ESP III proceeding, Rider PSR does not otherwise reflect an improper anticompetitive subsidy. Indeed, as the Commission has already found, Rider PSR "would not permit the recovery of generation-related cost through distribution or transmission rates... . [The]

²⁷ AEP OVEC Order, at pg. 82.

²⁸ AEP OVEC Rehearing Order, at pp. 99-100.

²⁹ *Id.*, at pg. 100.

PSR, whether a charge or a credit, would be considered a generation rate.”³⁰ As the Commission further found in approving Rider PSR, it is consistent with state policy.³¹

With regard to the Movants’ federal preemption argument, although they reference the recent decision by the United States Supreme Court,³² they fail to recognize either the factual differences between the situation under consideration there and the facts at hand in these proceedings and they fail to reference important points made by the Court. In *Talen*, the Court rejected a state program that disregarded the interstate wholesale rate required by the Federal Energy Regulatory Commission, as the program guaranteed a rate other than the clearing price for the utility’s interstate capacity sales to PJM Interconnection L.L.C. These facts are entirely unlike the Duke Energy Ohio’s Rider PSR. Rider PSR does not set a wholesale rate and, thus, does not contravene the “division of authority between state and federal regulators.”³³ The Court specifically limited the holding in *Talen* the specific facts in front of them:

We reject Maryland’s program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ...³⁴

IV. THE APPLICATION SHOULD NOT BE STAYED, AS THE COMMISSION’S ESP III ORDER IS CURRENTLY EFFECTIVE

The Movants propose in the alternative that the Commission stay this proceeding until such time as the Commission rules on the pending applications for rehearing of the ESP III Order and the Ohio Supreme Court rules on any appeal thereof. The Commission should not be taken in by this frivolous argument.

³⁰ ESP III Order, at pp. 47-48.

³¹ *Id.*, at pg. 48.

³² *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288 (2016)(*Talen*).

³³ *Id.*, at pg. 1297.

³⁴ *Id.*, at pg. 1299.

As the Movants are well aware, Commission orders are effective immediately upon entry thereof upon the journal of the Commission, unless a different time is specified in the order or by law. The ESP III Order was entered upon the journal on April 2, 2015. Although rehearing is still pending, no statement in said order, or in any other Commission order, or in any law, results in such effective date being suspended. Rider PSR, until the Commission (or the Ohio Supreme Court, if that case is appealed to the Court) determines otherwise.

WHEREFORE, Duke Energy Ohio respectfully requests that the Commission deny the Movants' motion to dismiss and their request, in the alternative, to stay this proceeding.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s/ Jeanne W. Kingery
Amy B. Spiller (0047277) (Counsel of Record)
Deputy General Counsel
Jeanne W. Kingery (0012172)
Associate General Counsel
Elizabeth H. Watts (0031092)
Associate General Counsel
Rocco D'Ascenzo (0077651)
Associate General Counsel
139 E. Fourth Street
1303-Main
Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)
Amy.Spiller@duke-energy.com (e-mail)

Attorneys for Applicant

CERTIFICATE OF SERVICE

The undersigned certifies that notification of the filing of the foregoing document *Duke Energy Ohio's Memorandum Contra Motion to Dismiss or Stay* is being made upon the persons listed below via electronic mail, this 14th day of June, 2017.

/s/ Jeanne W. Kingery
Jeanne W. Kingery

William Wright
Section Chief
Steven Beeler
Assistant Attorney General
Public Utilities Section
Attorney General's Office
30 East Broad Street, 16th Floor
Columbus, OH 43215
William.wright@ohioattorneygeneral.gov
v
Steven.beeler@ohioattorneygeneral.gov

Counsel for the Staff of the Public Utilities Commission of Ohio

Frank P. Darr (Counsel of Record)
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
fdarr@mwncmh.com
mpritchard@mwncmh.com

Counsel for Industrial Energy Users- Ohio

Kimberly W. Bojko (Counsel of Record)
James D. Perko, Jr.
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
Bojko@carpenterlipps.com
Perko@carpenterlipps.com

Counsel for The Ohio Manufacturers' Association Energy Group

Angela Paul Whitfield
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, OH 43215
paul@carpenterlipps.com

Counsel for The Kroger Co.

Colleen L. Mooney
PO Box 12451
Columbus, OH 43212-2451
cmooney@ohiopartners.org

Counsel for Ohio Partners for Affordable Energy

Michael L. Kurtz
Jody Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
mkurtz@BKLawfirm.com
jkylercohn@BKLawfirm.com

Counsel for The Ohio Energy Group

Bruce Weston
William J. Michael (Counsel of Record)
Jodi Bair
Kevin Moore
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
william.michael@occ.ohio.gov
Jodi.bair@occ.ohio.gov
Kevin.moore@occ.ohio.gov

Counsel for the Ohio Consumers' Counsel

Richard L. Sites
Regulatory Counsel
Ohio Hospital Association
155 East Broad Street, 3rd Floor
Columbus, OH 43215-3620
Rick.sites@ohiohospitals.org

Counsel for The Ohio Hospital Association

Dylan F. Borchers
Devin D. Parram
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
dborchers@bricker.com
dparram@bricker.com

Counsel for The Ohio Hospital Association

Mark A. Whitt
Andrew J. Campbell
Rebekah J. Glover
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

Counsel for Retail Energy Supply Association

Joseph Olikier (Counsel of Record)
IGS Energy
6100 Emerald Parkway
Dublin, Ohio 43016
joliker@igsenergy.com

Counsel for IGS Energy

Kurt J. Boehm
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
kboehm@BKLawfirm.com

**Counsel for the City of Cincinnati
Co-Counsel for City Solicitor of the
City of Cincinnati**

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Summary: Memorandum Memo Contra Motion to Dismiss electronically filed by Ms. Emily Olive on behalf of Duke Energy Ohio and Spiller, Amy B. Ms. and Kingery, Jeanne W. Ms.