

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

**REPLY IN SUPPORT OF AN ORDER DISMISSING THE APPLICATION OR,
IN THE ALTERNATIVE, STAYING THE PROCEEDING,
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**

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I. INTRODUCTION

The Joint Movants¹ properly moved to dismiss the Application of Duke Energy Ohio, Inc. ("Duke") because the Public Utilities Commission of Ohio ("Commission") lacks the authority under state and federal law to grant the relief requested in the Application and because Duke is prohibited from pursuing an untimely application for rehearing to modify the Price Stabilization Rider ("PSR"). Alternatively, Joint Movants sought an order staying this proceeding pending the rehearing and appeals process in Case No.

¹ The Joint Movants are Industrial Energy Users-Ohio ("IEU-Ohio"), the Office of the Ohio Consumers' Counsel ("OCC"), Ohio Partners for Affordable Energy ("OPAE"), The Kroger Co. ("Kroger"), and Ohio Manufacturers' Association Energy Group ("OMAE").

14-841-EL-SSO (“*ESP III Case*”), in which the pending applications for rehearing demonstrate that the PSR is unlawful and unreasonable. In its memorandum opposing the motions, Duke claims that the Commission may authorize it to bill and collect above-market wholesale costs that Duke is incurring because it elected to retain an interest in Ohio Valley Electric Corporation (“OVEC”) generation plants. In support of that claim, Duke relies on the Commission’s April 2, 2015 Opinion and Order (“*ESP III Order*”) and a Commission decision approving a settlement in Case Nos. 14-1693-EL-RDR, *et al.* (“*AEP-Ohio PPA Case*”) involving Ohio Power Company (“AEP-Ohio”). Duke also claims that its new legal theory and request to modify the term of the PSR are not untimely requests for rehearing.

As described below, Duke’s arguments are without merit. The Commission should grant the Joint Motion to Dismiss or, alternatively, stay the proceeding until the Commission and the Supreme Court of Ohio (“Court”) address the Commission’s authorization of the PSR in the *ESP III Order*.

II. ARGUMENT

A. The Joint Motion to Dismiss demonstrates that the Application is unlawful and unreasonable

Through its Application, Duke seeks to collect the above-market wholesale-related costs associated with its interests in OVEC through 2040 through a nonbypassable charge, the PSR. Duke relies on R.C. 4905.04, 4905.05, 4905.06, 4905.13, and 4909.18 as the legal basis for the relief it seeks in its Application.² As demonstrated in the Joint

² Application at 2.

Motion to Dismiss, however, the Commission lacks the authority under state and federal law to grant Duke's requested relief.³

Initially, the statutes Duke relies upon do not provide the Commission with any authority to establish wholesale electric prices.⁴ The Commission is also preempted under federal law from providing the relief Duke seeks in its Application.⁵ Additionally, these statutes do not provide the Commission with any authority to establish rates for retail electric services deemed competitive.⁶ The relief Duke seeks is also barred because it would permit Duke to collect transition revenue or its equivalent.⁷ The Commission is further prevented from approving the Application because the Commission is prohibited from authorizing anticompetitive subsidies or authorizing Duke to collect generation-related costs through a distribution-like rate.⁸ Finally, Duke's Application amounts to an untimely request for rehearing of the ESP III Order.

For these reasons, Joint Movants requested that the Commission dismiss the Application. In the alternative, Joint Movants sought a stay of this proceeding until the rehearing and appeals process concluded in the *ESP III Case*.

³ Motions of 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 for an Order Dismissing the Application or in the Alternative Staying the Proceeding and Memorandum in Support, *in passim* (May 9, 2017) ("Joint Motion to Dismiss").

⁴ Joint Motion to Dismiss at 14.

⁵ *Id.* at 25.

⁶ *Id.* at 18-21.

⁷ *Id.* at 21-23.

⁸ *Id.* at 23-25.

B. Duke does not address the underlying merits of the Joint Motion to Dismiss

In its Memo Contra to the Joint Motion to Dismiss, Duke argues that Joint Movants' arguments have already been addressed and rejected. In support of this claim, Duke cites to the ESP III Order and the *AEP-Ohio PPA Case*.⁹ However, Duke does not address the underlying merits of Joint Movants' demonstration that the Commission is without authority under state and federal law to provide Duke with the relief it seeks in the Application. As discussed extensively in the Joint Motion to Dismiss, as well as the pending applications for rehearing in the *ESP III Case*, the applicable law simply does not provide a basis for the Commission to increase Duke's PSR rates to allow Duke to recover its above-market OVEC costs.

1. Duke's reliance on the ESP III Order ignores that the order is still pending rehearing and that subsequent legal authority confirm that charging customers under the PSR would be unlawful and unreasonable

As noted above, Duke claims in part that the Joint Motion to Dismiss should be denied because the Commission already addressed Joint Movants' arguments in the ESP III Order.¹⁰ Duke's reliance on the ESP III Order ignores important events subsequent to the issuance of that decision.

Shortly after the ESP III Order was issued, several parties, including many of the Joint Movants, sought rehearing of the ESP III Order, including the PSR, arguing that the placeholder PSR rider was unlawful and unreasonable. The Commission granted

⁹ Duke Energy Ohio's Memorandum Contra Motion to Dismiss or Stay, *in passim*, June 14, 2017) ("Duke's Memo Contra").

¹⁰ Duke's Memo Contra at 3-4.

rehearing to consider those arguments.¹¹ These legal challenges to the ESP III Order remain pending on rehearing. Thus, the ESP III Order has not cleared the Commission's own review process, let alone the appeals process that is likely to follow if the PSR survives rehearing.

Furthermore, during the two years that have elapsed since the Commission issued the ESP III Order, the legal landscape governing the Purchase Power Agreement ("PPA") proposal and nonbypassable generation-related riders has changed dramatically. The Court has struck down two nonbypassable generation-related riders because they permitted electric distribution utilities ("EDUs") to collect the equivalent of transition revenue.¹² The United States Supreme Court has also found unlawful a state-authorized PPA program that allowed a utility to collect above-market revenue because the state-sponsored programs effectively set wholesale electric prices.¹³ The Federal Energy Regulatory Commission ("FERC") has further found that PPA proposals, and associated nonbypassable retail recovery mechanisms, by two other Ohio EDUs created captive customers triggering additional federal scrutiny aimed at protecting customers from unreasonable affiliate transactions.¹⁴

¹¹ *Duke ESP III Case*, Entry on Rehearing (May 28, 2015).

¹² *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608; *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490.

¹³ *Hughes v. Talen Energy Marketing LLC*, 578 U.S. ___, 136 S.Ct. 1288, 1297 (2016) (citing *FERC v. EPSA*, 577 U.S. ___, ___, slip op., at 26 (2016)).

¹⁴ FERC's decisions did not explicitly address the OVEC-related portions of AEP-Ohio's and FirstEnergy's PPA proposals. See *Electric Power Supply Association v. AEP Generation Resources*, Docket No. EL16-33, 155 FERC 61,102, Order Granting Complaint (Apr. 27, 2016); *Electric Power Supply Association v. FirstEnergy Solutions Corp.*, Docket No. EL16-34, 155 FERC 61,101, Order Granting Complaint (Apr. 27, 2016). However, the facts FERC relied upon for its finding that AEP-Ohio's and FirstEnergy's customers were captive still remain in the context of an OVEC-only PPA.

In the aftermath of these court and FERC decisions, The Dayton Power and Light Company (“DP&L”) abandoned its PPA proposal and the Commission declined to adopt FirstEnergy’s modified PPA proposal on rehearing.¹⁵ While AEP-Ohio was able to reach a comprehensive settlement addressing its PPA proposal and a number of other matters before FERC’s decision, AEP-Ohio too abandoned much of its PPA proposal following FERC’s pronouncement that the PPA proposals resulted in captive customers.¹⁶ Moreover, AEP-Ohio has voluntarily proposed to end what remains of its PPA Rider and instead utilize its OVEC interests to serve standard service offer (“SSO”) customers, making its cost recovery bypassable.¹⁷

The Commission and the other three EDUs have all moved beyond the PPA proposals. Duke, however, continues to pursue nonbypassable wholesale cost recovery in this proceeding. Since Duke has not received the message that the PSR is unlawful under Ohio and federal law the Commission should deny Duke’s newest attempt to protect its earnings at the expense of its customers.

¹⁵ *In the Matter of the Application of The Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case Nos. 16-395-EL-SSO, *et al.*, The Dayton Power and Light Company’s Notice of Withdrawal of Reliable Electricity Rider Proposal (Sep. 23, 2016); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C., 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Fifth Entry on Rehearing at 43 (Oct. 12, 2016).

¹⁶ *AEP-Ohio PPA Case*, Second Entry on Rehearing at 23, 27-29 (Nov. 3, 2016).

¹⁷ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 16-1852-EL-SSO, *et al.*, Ohio Power Company’s Application to Amend its Electric Security Plan at 4 (Nov. 23, 2016) (“*AEP-Ohio ESP IV Case*”).

2. Duke's reliance on the *AEP-Ohio PPA Case* ignores that the case was resolved through a comprehensive settlement and that AEP-Ohio has subsequently proposed to terminate its PPA Rider

Duke also relies on the Commission's order approving a settlement in *AEP-Ohio's PPA Case* for its claim that its Application is lawful and reasonable.¹⁸ Duke's reliance on this order is also misplaced.

Initially, Duke's reliance on the *AEP-Ohio PPA Case* ignores that the case was resolved by way of a contested settlement. The Commission authorized AEP-Ohio to charge customers for its net OVEC costs as part of a settlement that contained numerous other conditions.¹⁹ Duke's Application contains none of the other terms and conditions of the settlement in the *AEP-Ohio PPA Case*. Further, the Commission's order did not address a stand-alone PPA proposal; it reviewed and approved a settlement package. In the only two cases in which the Commission *has* been presented with a PPA unilaterally proposed by an EDU, the Commission has *refused* to allow the EDUs to collect any above-market wholesale costs arising out of the EDU's retention of an interest in OVEC.²⁰ Additionally, the stipulation itself recognizes that it is not to be treated as a binding precedent in future proceedings.²¹

Subsequent events to that stipulation also do not support Duke's reliance on the *AEP-Ohio PPA Case*. Following approval of the settlement in that case, AEP-Ohio proposed to end the nonbypassable PPA charge as part of its pending ESP application

¹⁸ Duke's Memo Contra at 4, 7-9.

¹⁹ *AEP-Ohio PPA Case*, Opinion and Order at 23-48 (Mar. 31, 2016).

²⁰ See ESP III Order at 47-48, *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 24 (Feb. 25, 2015).

²¹ *AEP-Ohio PPA Case*, Joint Stipulation and Recommendation at 34 (Dec. 14, 2015).

and instead utilize its OVEC entitlement to serve SSO customers and to include the OVEC costs as part of the bypassable SSO charges.²²

Like its reliance on the ESP III Order, Duke's reliance on the AEP-Ohio PPA Order ignores that the decision is still under review. Because the *AEP-Ohio PPA Case* was resolved by way of a comprehensive settlement, which by its own terms has no precedential effect, the Commission should give no weight to Duke's citation to and reliance on the Commission's order approving that the settlement in the *AEP-Ohio PPA Case*.

C. Duke's claim that its Application is not an untimely request for rehearing ignores the fact that Duke proposes to alter the previously approved terms and conditions of the PSR

In its Application, Duke seeks to alter the PSR in at least two material respects. First, Duke seeks authorization of the PSR under a new legal theory, the Commission's traditional authority over noncompetitive electric services (R.C. Chapter 4909) and its general supervisory authority. Second, Duke seeks to extend the term of the PSR beyond the three years authorized in the ESP, thereby severing the PSR from the term of its ESP and extending it through 2040. As discussed in the Joint Motion to Dismiss, these changes amount to an untimely request for rehearing and are otherwise unlawful and unreasonable.²³

In its Memo Contra, Duke asserts that its Application is not an untimely application for rehearing because it is simply fulfilling the terms of the ESP III Order and seeking to allow the continuation of the PSR beyond the ESP III term.²⁴ Expanding on its assertion

²² *AEP-Ohio ESP IV Case*, Amended Application at 4 (Nov. 23, 2016).

²³ Joint Motion to Dismiss, *in passim*.

²⁴ Duke's Memo Contra at 5.

that its Application is not an untimely request for rehearing, Duke claims that the Commission “understandably” did not identify in the ESP III Order any authority to adjust a rider outside of the ESP proceeding.²⁵ Duke further argues that it is not requesting the PSR be approved under a new legal theory because the PSR is already approved.²⁶ Duke’s position is without merit.

Despite its claim that this Application is not an untimely application for rehearing of the ESP III Order, Duke concedes that it is seeking to revise the terms of the ESP III Order. At the outset of its Memo Contra, Duke states that it is seeking to change the terms of the ESP III Order: “On March 31, 2017 [Duke] filed an application (Application) with [the Commission], seeking an order from the Commission ... amending Rider PSR with regard to its effective period.”²⁷

Duke’s argument in its Memo Contra further ignores that it sought authorization of the PSR through 2040 in the *ESP III Case*, but the Commission rejected Duke’s request and instead authorized Duke’s PSR as a placeholder rider under R.C. 4928.143(B)(2)(d) for the three-year term of the ESP.²⁸ Faced with a Commission order rejecting its request, Duke did not seek timely rehearing of the term of the PSR.²⁹ In this Application, however, it now seeks to sever the PSR from the ESP and extend the term to 2040. Duke’s claim that its Application is an implementation of the ESP III Order does not withstand scrutiny

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 1.

²⁸ ESP III Order at 47.

²⁹ With respect to the PSR, Duke only sought rehearing to allow immediate authorization to bill and collect the above-market wholesale costs associated with its interest in OVEC and the Commission’s directive that Duke continue pursuing divestiture of its OVEC interests. *ESP III Case*, Application for Rehearing of Duke Energy Ohio, Inc. at 5-17 (May 4, 2015).

because its request to extend the PSR term through 2040 would require the Commission to modify its ESP III Order. Because Duke seeks an extension of the term of the PSR beyond what was previously authorized in the ESP III Order, Duke is seeking an untimely reconsideration of the very issue it previously presented and lost.

Duke's attempt to rewrite the ESP III Order through this Application, however, is not limited to the term of the PSR. Although Duke claims that it is not seeking authorization of the PSR under a new legal theory because the PSR is already approved, it now cites as "authority" for its Application the Commission's general supervisory jurisdiction, R.C. 4905.04 to 4905.06, the Commission's authority to authorize accounting changes, R.C. 4905.13, and the Commission's traditional ratemaking authority over noncompetitive electric services, R.C. 4909.18.³⁰ The Commission, however, approved the placeholder PSR based on its claimed authority under R.C. 4928.143(B)(2)(d).³¹ The Commission can only speak through its orders.³² If a certain statutory provision was not cited by the Commission in its order, it cannot serve as a basis for the authorization for

³⁰ Application at 1 (Mar. 31, 2017). Furthermore, as demonstrated in the Joint Motion to Dismiss, the Commission cannot rely on its general supervisory authority to bypass specific ratemaking statutes. Thus, the PSR rates could only be authorized under a ratemaking statute. The Commission only relied upon R.C. 4928.143(B)(2)(d). Even assuming the ratemaking provisions of R.C. 4909.18 apply to the PSR (which they do not), Duke and the Commission would have to comply with the extensive statutory requirements applicable to traditional ratemaking before the Commission could authorize an increase in Duke's PSR rates. It is apparent that if Duke's Application were approved, it would amount to an increase in the rates charged under the PSR. See, e.g. Memo Contra at 6 (Duke seeks to "adjust" the current PSR rate of zero to a positive rate); *id.* at 5 (Rider PSR has been approved at a rate of zero); see ESP III Order at 19, 26, 45-46 (Duke's projections of the PPA proposal indicate that the PSR would be a positive charge through 2018). In a somewhat similar context, the Commission rejected Duke's prior claims that adjusting a rate established in an ESP proceeding through a standalone application, had that application been approved, would not have amounted to an increase in rates. *In the Matter of the Application of Duke Energy Ohio, Inc., for Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case Nos. 12-2400-EL-UNC, *et al.*, Opinion and Order at 31 (Feb. 13, 2014) ("*Duke Capacity Case*").

³¹ ESP III Order at 47.

³² *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Rates*, Case Nos. 07-589-GA-AIR, *et al.*, Entry on Rehearing at 6 (July 23, 2008) ("it is well settled that the Commission speaks through its published opinions and orders, as provided by Section 4903.09, Revised Code.").

the charge. Thus, it is clear that Duke seeks authorization of the PSR under new statutory provisions. It is seeking revisions to the ESP III Order outside of the rehearing process.

Because Duke's request for reconsideration of the ESP III Order is years late, it is unlawful.³³ A new legal basis supporting the authorization of the PSR can only be done through the rehearing process or a new ratemaking process. The rehearing process, however, is not an option because Duke failed to submit a timely request for rehearing in the *ESP III Case* seeking authorization of the PSR under the new legal authority it cites (and as discussed herein and in the Joint Motion to Dismiss, such a request would have been unlawful and unreasonable). And the ratemaking process does not work either because Duke's Application complies neither with the SSO ratemaking statutes nor the Commission's traditional ratemaking authority in R.C. 4909.18. Accordingly, the relief Duke seeks in its Application is either an untimely request for rehearing or a request that is beyond the Commission's authority.

D. The Joint Motion to Dismiss is not an untimely request for rehearing

In its Memo Contra, Duke characterizes the Joint Motion to Dismiss as an untimely request for rehearing. Duke is incorrect. In the *ESP III Case*, the Commission held that R.C. 4928.143(B)(2)(d) provided the Commission with the requisite authority to adopt the placeholder PSR. Here, however, Duke has presented an alleged "new" legal basis for populating the unlawfully authorized PSR. The Joint Motion to Dismiss demonstrates that there is no legal or reasoned basis for the Commission to approve Duke's Application made pursuant to R.C. 4905.04, 4905.05, 4905.06, 4905.13, and 4909.18. Accordingly, the Joint Motion to Dismiss is not an untimely application for rehearing.

³³ R.C. 4903.10; *Duke Capacity Case*, Opinion and Order at 32 (Feb. 13, 2014).

E. Duke's reliance on the current effectiveness of the ESP III Order provides no basis for denying Joint Movants' alternative motion seeking a stay until the Commission and Court have reviewed the ESP III Order

Duke also opposes Joint Movants' Motion to Stay this proceeding because the ESP III Order is currently effective.³⁴ Duke's argument is an extension of its claim that it is simply implementing the terms of the ESP III Order. If Duke is correct that it is seeking to implement the existing order (even though it also concedes that it is seeking to modify the ESP III Order as well), that assertion warrants a grant of the stay until the Commission and the Court resolve the lawfulness and reasonableness of the PSR.

As demonstrated in the Joint Movants' Motion to Stay, the Commission has ordered proceedings stayed when related issues in another proceeding may affect the outcome of the stayed proceeding. In those cases, the Commission has granted the stay to prevent a waste of its own resources and those of the parties while the Commission concludes the rehearing process in a related proceeding.³⁵ In this instance, the Commission has granted rehearing and is addressing whether it may legally authorize the PSR. Since granting rehearing of the ESP III Order, the Court (twice), the United States Supreme Court, and FERC have held that riders that allow an EDU to collect the above-market wholesale costs of generation facilities through a nonbypassable rider such as the PSR violate state law, are preempted by federal law, and trigger potential affiliate transaction rule violations. Under these circumstances, to proceed on Duke's Application in this case is to assure that time and effort are wasted, as they were in the *Duke Capacity*

³⁴ Duke's Memo Contra at 9-10.

³⁵ Joint Motion to Dismiss at 31 (*citing In the Matter of the Application of Ohio Edison Company to Amend its Residential Tariff Nos. 10, 12, and 17*, 1990 Ohio PUC LEXIS 974 (Aug. 30, 1990)).

Case.³⁶ To prevent such waste, Joint Movants again respectfully request that the Commission stay this proceeding pending the rehearing and appeal process of the ESP III Order.

III. CONCLUSION

As Joint Movants previously demonstrated in the Joint Motion to Dismiss, the Commission lacks the authority to grant the relief Duke seeks in the Application. Accordingly, the Commission should grant the Joint Motion to Dismiss. Alternatively, the Commission should stay this proceeding until the rehearing and appellate review process are completed for the *ESP III Case*.

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³⁶ See *Duke Capacity Case*, Opinion and Order, Concurring Opinion of Commissioner Lynn Slaby (Feb. 13, 2014) ("[E]xplaining that as Duke's appearance before the Commission can best be characterized as a request for reconsideration, or rehearing, of the *Duke ESP Case*, these cases should have been summarily dismissed ... [H]ad Duke's August 29, 2012 application been summarily dismissed as an untimely application for rehearing, it would have been unnecessary to consider the other arguments of the parties, as they would have been moot.") (emphasis in original).

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Reply in Support of an Order Dismissing the Application or, in the Alternative, Staying the Proceeding, 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* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 28th day of June 2017, *via* electronic transmission.

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