

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF 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

IN THE MATTER OF APPLICATION OF
DUKE ENERGY OHIO, INC. FOR
AUTHORITY TO AMEND ITS CERTIFIED
SUPPLIER TARIFF, P.U.C.O. No. 20.

CASE NO. 14-842-EL-ATA

THIRD ENTRY ON REHEARING

Entered in the Journal on May 16, 2018

I. SUMMARY

{¶ 1} The Commission grants, in part, and denies, in part, the application for rehearing filed by Duke Energy Ohio, Inc.

II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric distribution utility (EDU) as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On May 29, 2014, Duke filed an application for an SSO, in the form of an ESP, pursuant to R.C. 4928.143.

{¶ 5} On April 2, 2015, the Commission issued its Opinion and Order approving Duke's proposed ESP, with certain modifications (ESP 3 Order).

{¶ 6} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for a rehearing with respect to any matters determined therein by filing an application within 30 days after the entry of the order upon the Commission's journal.

{¶ 7} On May 1, 2015, and May 4, 2015, applications for rehearing of the ESP 3 Order were filed by: Duke; Industrial Energy Users-Ohio (IEU); Ohio Energy Group (OEG); Ohio Partners for Affordable Energy (OPAE); Constellation NewEnergy, Inc. and Exelon Generation Company, LLC (ExGen) (jointly, Exelon); Ohio Consumers' Counsel (OCC); Ohio Manufacturers' Association (OMA); Retail Energy Supply Association (RESA); city of Cincinnati (Cincinnati); Environmental Law & Policy Center (ELPC) and Ohio Environmental Council (OEC) (the Environmental Advocates); Direct Energy Services, LLC and Direct Energy Business, LLC (Direct Energy); Interstate Gas Supply, Inc. (IGS); and Sierra Club (Sierra Club). Memoranda contra the various applications for rehearing were filed by: Duke; IEU; OEG; OPAE; the Environmental Advocates; Exelon; OCC; OMA; RESA; Miami University and The University of Cincinnati (Miami/UC); and IGS.

{¶ 8} By Entry on Rehearing dated May 28, 2015, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing. On March 21, 2018, and corrected on March 28, 2018, in a Second Entry on Rehearing (EOR 2), the Commission granted in part, and denied in part, the applications for rehearing. Specifically, the Commission granted Direct Energy's application for rehearing regarding language in the certified supplier tariff (CST) that applies to billing adjustments or resettlements with PJM Interconnection, LLC (PJM). All other applications for rehearing were denied.

{¶ 9} On April 20, 2018, Duke filed an application for rehearing. OCC responded with a memorandum contra on April 30, 2018.

III. DISCUSSION

{¶ 10} In its application for rehearing, Duke argues two points of error in the Commission's Second Entry on Rehearing. Duke first argues that the Commission wrongfully included an economic development program in its modifications to the ESP. In the ESP 3 Order, the Commission modified the ESP to include an economic development fund to be funded by Duke shareholders at \$2 million per year during the term of the ESP. The Commission authorized the program pursuant to R.C. 4928.143(B)(2)(i), stating that the fund would create private sector economic development resources to support and work in conjunction with other resources to attract new investment and improve job growth in Ohio. Duke notes that it originally filed an application for rehearing on this issue on May 1, 2015. There, Duke averred that the Commission's actions were improper. In the Second Entry on Rehearing, the Commission denied Duke's application for rehearing. In the entry, the Commission maintained that Duke's required contribution was lawful, as the Commission has authority to modify and approve an ESP pursuant to R.C. 4928.143(C)(1). EOR 2 at 46-47.

{¶ 11} In renewing its argument, Duke submits that the Commission lacks the authority to direct the Company to create an economic development fund. According to Duke, citing R.C. 4928.143(B)(2)(i), it was improper for the Commission to modify the ESP to create the economic development fund as only an ESP applicant can include provisions for economic development and, further, the costs of such provisions are to be provided by customers, not shareholders. The Company further states that the Commission wrongly compares the directive to support an economic development fund to similar funds associated with other EDUs. Duke avers that other economic development funds were the result of agreed-upon stipulations and that, at the least, the amount Duke contributes to a fund should take into consideration Duke's load size in Ohio as compared to other EDUs. Finally, Duke contends that the Commission's decision failed to properly consider *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 706 N.E.2d 1255 (1999) (*Tongren*). Duke states the Commission differentiated *Tongren* from these proceedings because, in an ESP case, the

Commission must consider state policy and weigh an MRO versus an ESP, and because an EDU has the ability to reject the Commission's modifications. Duke submits that this rationale is invalid because the Commission, in the ESP 3 Order, did not originally mention the economic development fund in consideration of state policy or the MRO versus ESP test. Further, according to Duke, the Company's ability to reject an ESP does not permit the Commission to include provisions that are not supported by record evidence.

{¶ 12} In its memorandum contra, OCC requests that Duke's application for rehearing be denied. OCC avers that it is lawful for the Commission to include a provision for economic development as the Commission is expressly authorized to modify an ESP application. Additionally, OCC explains that the inclusion of the economic development fund factored into the Commission's review of whether the ESP application was more favorable than an MRO. Thus, submits OCC, if that provision is removed, the Commission would need to reconsider the ESP versus MRO test. OCC also maintains that the program furthers the state policy outlined in R.C. 4928.02 to facilitate the state's effectiveness in the global economy. OCC also states that R.C. 4928.143(B)(2)(i) specifically allows provisions for economic development and Duke submitted its own programs for economic development that were approved by the Commission.

{¶ 13} Duke's application for rehearing on this issue is denied. The Commission has established that it is improper to seek rehearing of a denial of rehearing on the same issue. The Commission directly addressed this question on numerous occasions, holding that R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon rehearing of the same issue. *Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing (September 13, 2006) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3). See also *In re Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (January 30, 2013) at 4-5. In EOR 2, the Commission addressed all of the issues that Duke is attempting to relitigate in its April 20, 2018 application for rehearing. Therein, the

Commission confirmed its authority to modify and approve an ESP application under 4928.143(C). In the entry, we discussed that 4928.143(B)(2)(i) explicitly permits an ESP to include provisions implementing economic development programs. We additionally explained how the unique aspects of an ESP application proceeding differentiates this case from *Tongren*. Specifically, the entry observed that, in an ESP proceeding, an EDU has the ability to withdraw an ESP application that has been modified by the Commission. Further, the Commission noted that in reviewing an ESP application the Commission must consider the state policies set forth under R.C. 4928.02 and weigh the ESP application against the expected results of an MRO. Regarding that review, we explained in EOR 2 that the modification to include an economic development fund furthered state policy and contributed towards the ESP being more favorable than an MRO. EOR 2 at 46-47. In its application for rehearing, Duke did not raise any novel arguments; instead, the Company put forth the same claims that were previously rejected by the Commission in EOR 2. Thus, Duke's application for rehearing on this issue is again rejected.

{¶ 14} Duke's second assignment of error concerns a provision originally proposed by Duke to require suppliers to consent to resettlements requested to PJM. The Commission denied Duke's request in the ESP 3 Order, but, upon review, granted Direct Energy's application for rehearing regarding the issue. In its application, Duke contends that after the Commission initially denied the Company's request, Duke filed an application with the Federal Energy Regulatory Commission (FERC) to amend its Open Access Transmission Tariff (OATT) at PJM. The Company states the situation was thus resolved at the federal level with FERC and that, at this juncture, the provision would now be in conflict with the amended OATT. Therefore, Duke asks that the CST language remain unchanged. No party opposed Duke's application.

{¶ 15} Upon review, the Commission grants Duke's application for rehearing on this issue. As described by Duke, its original predicament has been resolved at the federal level and its original request is now moot. As no party opposes the Company's request, the application should be granted and Duke's supplier tariff should not be amended.

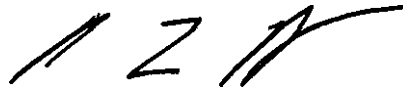
IV. ORDER

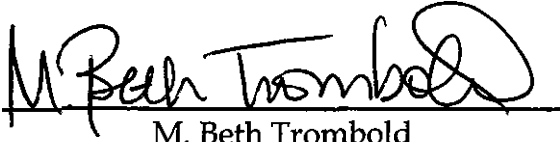
{¶ 16} It is, therefore,

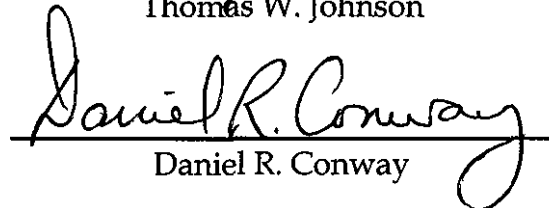
{¶ 17} ORDERED, That the application for rehearing filed by Duke be granted in part and denied in part. It is, further,

{¶ 18} ORDERED, That a copy of this Third Entry on Rehearing be served on all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO




Asim Z. Haque, Chairman
M. Beth Trombold
Thomas W. Johnson

Lawrence K. Friedeman
Daniel R. Conway

NJW/mef

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MAY 16 2018


Barcy F. McNeal
Secretary