BEFORE
THE PUBLIC UTILITY COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates.	)))	Case No. 17-32-EL-AIR
In the Matter of the Application of Duke Energy Ohio, Inc. for Tariff Approval.	))	Case No. 17-33-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Approval to Change Accounting Methods.	)))	Case No. 17-34-EL-AAM
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
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4923.143, Revised Code, in the Form of an Electric Security Plan, Account Modifications, and Tariffs for Generation Service.	))))))	Case No. 17-1263-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)))	Case No. 17-1264-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Defer Vegetation Management Costs.	)))	Case No. 17-1265-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., to Establish Minimum Reliability Performance Standards Pursuant to Chapter 4901:1-10, Ohio Administrative Code.	))))	Case No. 16-1602-EL-ESS

APPLICATION FOR REHEARING OF THE RETAIL ENERGY SUPPLY ASSOCIATION

In accordance with R.C. 4903.10 and Ohio Admin. Code 4901-1-35, the Retail Energy Supply Association (RESA) respectfully submits this Application for Rehearing of the Order issued by the Commission on December 19, 2018 (Order). The Order is unreasonable and unlawful because:

1. **Duke has not shown that certain supplier fees are based on costs it incurs to provide the associated services. The Order approving these charges therefore violates R.C. Chapter 4909.**

2. **The Order failed to state findings of fact and reasons prompting its decision, and failed to address RESA's arguments that Staff is required to investigate all rates and fees charged in the test year whether or not Duke proposes alterations, in violation of R.C. 4903.09 and in contradiction to Supreme Court precedent.**

For these reasons, discussed more fully below, the Commission should grant rehearing.

Respectfully submitted,

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ATTORNEYS FOR THE RETAIL ENERGY SUPPLY ASSOCIATION

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MEMORANDUM IN SUPPORT OF THE APPLICATION FOR REHEARING OF THE RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

Cost allocation in a rate case should be a fairly simple concept: those responsible for causing costs should be equally responsible for paying them. But as has been explained ad nauseam by RESA[1] and others in this proceeding, the notion of cost allocation only seems to apply when the result favors the utility or SSO customers, and not when it could possibly favor shopping customers.

RESA joins IGS in its application for rehearing on the Commission's approval of the subsidization of SSO-related costs through distribution rates. RESA will not repeat those arguments, but instead incorporates IGS's arguments by reference, and will here focus on a single issue: The Order's failure to remove certain supplier fees from Duke's tariff despite the Company and Staff's utter failure to demonstrate justification or need for such charges.

The supplier fees at issue concern two distinct charges: a $32 charge levied on CRES suppliers for customer energy usage data, and a $5 switching fee. When Duke filed its application, it did not propose to change the amount of these fees. The Order disregards all arguments made to this point by RESA not only that these fees are unjust and unreasonable, but

[1] The comments expressed in this filing represent the position of the Retail Energy Supply Association (RESA) as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

that the lack of any record support or justification for these costs in the rate case demands that these fees be removed from the tariff; instead, the Order simply states that RESA bore the burden of proving that "circumstances have changed" since the fees were first approved, and that RESA failed to meet this burden.[2] Perhaps most notably, the Order does not engage RESA's arguments against Staff's assertion that because Duke did not propose to change the fees, there was no reason for Staff to determine whether the fees were cost-justified. This egregious decision not to address a material component of RESA's brief, that Staff failed in its duty to fully investigate Duke's rates, is reason enough to reverse the Order and direct Duke to remove the fees from its tariff. But the Order further fails by allowing Duke to continue recovering these fees not because they are cost-justified, but for the simple fact that the fees were approved in prior proceedings. Fees approved years ago in a non-rate case proceeding do not justify the Commission dodging its duty to fully investigate Duke's rates and fees here and now.

The Order disregards basic ratemaking principles and the statutory framework for setting rates. RESA does not have the burden of showing that Duke's supplier charges are unreasonable, Duke has the burden of proving that its charges are reasonable. *See* R.C. 4909.19(C). There is no evidence showing whether Duke's supplier fees are based on any underlying costs. Therefore, Duke has not met its burden of proof, and the Commission committed reversible error by allowing the fees to continue.

II. ARGUMENT

Ohio law requires that "[*a]ll* charges made or demanded for *any* service rendered, or to be rendered, shall be just [and] reasonable [.]" R.C. 4905.22 (emphasis added). No party disputes that supplier fees are a "charge" levied for a "service." Regardless of whether Duke's fees were

[2] Order at ¶ 241.

just and reasonable when first approved, neither Staff nor Duke has presented evidence that the fees are just and reasonable now.

Staff is responsible for reviewing the "cost to the utility of rendering the public utility service for the test period;" likewise, "the revenues and expenses of the utility shall be determined during a test period." R.C. 4909.15(A)(4) and (C)(1). The very premise of cost-based regulation is that rates and charges should recover the cost of service. The cost of a service dictates the just and reasonable charge for that service. If there is no evidence of cost, there is no basis for a charge.

A. Duke did not meet its burden of demonstrating that its supplier fees are just and reasonable, and the Commission failed in its duty to fully investigate.

The basic objective of a rate case is to determine test year revenue requirements. To figure out a utility's revenue requirement, the Commission must have a full accounting of costs and revenues incurred or collected during the test year. R.C. 4909.15(C)(1). "Costs" and "revenues" mean actual expenses and receipts. *Office of Consumers' Counsel v. Public Util. Comm'n*, 10 Ohio St. 3d 49, 50 (1984) (reversing Commission order permitting greater recovery of costs than actually expended in the test year); *Cincinnati Gas & Elec. Co. v. Pub. Util. Comm.,* 86 Ohio St. 3d 53, 53 (1999) (reversing Commission order imputing test year revenue the utility would not actually receive). The revenue requirement determination cannot be based on assumptions or guesswork. "A legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support." *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163, 166 (1996).

The Order is not based on evidence. The Order merely assumes a conclusion to the fact in dispute—that there *must* be a fact-based, cost-justified basis for the supplier fees because the

Commission previously authorized them. The Order is unlawful and must be corrected on rehearing.

Duke's choice not to file a revised Supplier Tariff with its application does not mean the fees contained in this tariff are off the table. When a utility files an application under R.C. 4905.15, all charges "related to" the rates at issue in the application are subject to review. *AT&T Communications of Ohio, Inc. v. Public Util. Comm'n*, 51 Ohio St.3d 150. The Commission must "cause an investigation to be made of the facts set forth in said application and the exhibits attached thereto, *and of the matters connected therewith.*" R.C. 4909.19(C) (emphasis added). A full accounting of costs and revenues is necessary, not simply the ones Duke chooses to present.

The Commission is not bound by the utility's application, and the Commission may change rates the utility proposed to leave unchanged. For example, in *AT&T*, GTE filed an application to increase rates to local exchange users while keeping its carrier common line charge at a previously approved level. The Commission ordered an increase to the carrier common line charge, and long-distance providers subject to the charge appealed. The appellants argued that because GTE did not apply to increase the line charge, the Commission could not raise it. *Id*. at 151. The Court disagreed. Under R.C. 4909.15, "the Commission had authority to alter GTE's rate structure and to increase the [line charge]. The revenue derived from the [line charge] helps satisfy GTE's total revenue requirements, and these revenues pay GTE for supplying telephone service. Thus, the [line charge] is related to the rates which are the subject of the instant application, and the commission could increase it." *Id*. at 152. *See also City of Cleveland v. Public Util. Comm'n*, 63 Ohio St.2 62, 66 (1980) (affirming Commission approval of fixed customer charge not proposed in rate case application).

As in *AT&T*, Duke's supplier fees are "related to" the rates at issue in its application. The supplier fees generate funds that contribute to Duke's overall revenue requirement. Ohio law required Staff to investigate these charges, and Staff failed to do so. The consequence of these failures must fall on Duke, not RESA. There is simply no evidence to support the continued collection of supplier fees.

B. The Commission does not need to alter any prior orders to eliminate the supplier fees.

The supplier fees were approved in a prior proceeding. A request to eliminate these fees prospectively is not equivalent to a request to change or modify these prior orders, as the Order here erroneously claims.

The Commission authorized the supplier fees based on then-existing facts and circumstances during Duke's second ESP proceeding in 2011. RESA is not asking the Commission to undo anything it previously did. The rates and charges at issue *in this proceeding* must be based on evidence of revenue and expenses in the test year. Whether the supplier fees *were* just and reasonable when initially approved is a totally different issue, and an irrelevant one at that. *See Cincinnati Gas & Elec. Co. v. Pub. Util. Comm*., 86 Ohio St. 3d 53, 53 (1999) ("If the revenues received by the utility *during the test year* are less than the gross annual revenues to which the utility is entitled, the commission is required to fix new rates that will raise the necessary revenue.") (Emphasis added.) A finding in this proceeding that the supplier fees are not just and reasonable would not contradict any issue heard and decided in the previous proceedings.

RESA has no burden to show that "circumstances have changed" since the Commission first approved the supplier fees. Duke has this burden, and the only relevant measure of whether "circumstances have changed" is the test year. Duke's rates should recover the company's test

year revenue requirement. If Duke incurs costs to store or provide interval data to CRES providers, Duke should recover these costs. To the extent Duke recovers these costs through base rates, there is no need for additional supplier charges. If base rates do not recover these costs, then additional supplier charges may be appropriate. The problem, again, is that neither Duke nor Staff have produced evidence showing which is the case.

Not only *may* the Commission alter or rescind previously-approved charges, it *must* do so when the evidence shows that a charge is no longer just and reasonable. The ratemaking formula does not permit Duke to raise one category of charges that are too low but freeze a separate category of charges that are too high—or may no longer be justified at all.

C. The Order's failure to address RESA's arguments violates R.C. 4903.09 and goes against Supreme Court precedent.

The Supreme Court has previously found that it is a violation of R.C. 4903.09 for the Commission to fail to address material arguments made by the parties.[3] In *Columbus Southern*, the Court stated that for an appellant to prevail under that statute, the party must show at least three things: "first, that the commission initially failed to explain a material matter; second, that [the appellant] brought that failure to the commission's attention through an application for rehearing; and third, that the commission still failed to explain itself."[4] The Court affirmed that statement when it remanded back to the Commission its decision on Duke's corporate separation application in Case. No. 14-689-EL-UNC,[5] stating that the Commission to fail to sufficiently explain a "material matter . . . despite numerous requests from IGS asking it to do so."[6]

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[3] *In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512, 519, 526-27 (2011).

[4] *Id*. at 527.

[5] *See In re Application of Duke Energy Ohio, Inc.*, 148 Ohio St.3d 510 (2016).

[6] *Id*. at 515.

Here, despite repeated instances of RESA pointing out Staff's failure to fully investigate Duke's supplier fees, as it is required to do in a rate case proceeding, the Order merely handwaves and summarily disposes of the matter in a single paragraph. This is a clear violation of R.C. 4903.09 as interpreted by the Supreme Court, and therefore the Order is unjust and unreasonable.

III. CONCLUSION

While the utility and Staff each play a significant role in the investigative process of a rate case, it is ultimately the Commission's obligation to approve *only* just and reasonable rates; that obligation is not limited by a utility or Staff's failure to address a portion of those rates. No evidence has ever been produced to show that these fees are cost-justified during the test year. The Commission cannot resolve this issue by ignoring Staff's failure to review these charges in the first instance. The Commission must do what the law demands when a utility fails to meet its burden of proving that a charge is just and reasonable: the Commission must remove these charges from the utility's tariffs.

Dated: January 18, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy the foregoing was served by electronic mail this 18th day of January, 2019 to the following:

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Summary: Application for Rehearing electronically filed by Ms. Rebekah J. Glover on behalf of Retail Energy Supply Association