BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Direct Energy Business, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 14-1277-EL-CSS
	)	
Duke Energy Ohio, Inc.	)	
	)	
Respondent.	)	

MEMORANDUM CONTRA DUKE ENERGY OHIO'S APPLICATION FOR REHEARING OF DIRECT ENERGY BUSINESS, LLC

The Commission's April 10, 2019 Order finds that Duke Energy Ohio, Inc. (Duke) violated its Supplier Tariff and that this violation constituted "inadequate service" under R.C. 4905.22 and R.C. 4905.26.[1] Duke's application for rehearing explains why Duke disagrees with the decision, but it does not explain why the Order is unreasonable or unlawful. The application for rehearing should be denied.

I. ARGUMENT

This case involves Duke's Supplier Tariff. Duke charges fees to suppliers in exchange for performing certain tasks, including notifying PJM about load delivered to customers. Duke does not dispute that over a period of several months, it reported to PJM that Direct was serving nearly twice as much load as it actually served. Duke was well-aware that the metering set-up it allowed at SunCoke would cause this happen, yet Duke did nothing about it.

[1] Order ¶¶ 29, 30.

Perhaps Duke's errors could be excused if they arose from some calamity beyond Duke's control—a cyberattack, meter tampering, or something else unforeseen. None of these things happened. Duke has offered no defense for its actions—other than claim it does not have to provide adequate service because the Supplier Tariff is not a "real" tariff and Direct is not a "real" customer. This is essentially what Duke's arguments boil down to.

Duke's rehearing arguments offer nothing new. The Commission already considered these arguments and rejected them. The Court will not re-weigh the Commission's findings of fact on appeal. *Lycourt-Donovan v. Columbia Gas of Ohio, Inc.,* 2017-Ohio-7566, 152 Ohio St. 3d 73, 80, 93 N.E.3d 902, 910 ("Our function on appeal is not to reweigh the evidence or second-guess the PUCO on questions of fact."). And because "[t]he statutes authorizing tariffs have extensive scope and are an integral part of the state's public-utility laws," there is no error in finding that Duke's tariff violations render it liable to Direct under Ohio law. *In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 49, 134 Ohio St. 3d 29, 40–41, 979 N.E.2d 1229, 1240.

A. The Commission properly exercised jurisdiction.

Duke's "jurisdictional" argument seems to be addressed to Count I of the Complaint. That Count asked the Commission to order Duke to force other suppliers to resettle. Direct abandoned this claim. There is no longer any argument over whether "Ohio law gives the Commission the power to order resettlement under PJM's controlling documents."[2] The Commission has not ordered Duke to resettle—with Direct or anyone else.

Duke is also mistaken to claim that the Complaint is "based solely on the PJM resettlement process."[3] Duke has meter data management agent responsibilities under the

[2] Application for Rehearing (App. R.) at 5.

[3] App. R. at 5.

Supplier Tariff. The Supplier Tariff was submitted to and approved by the Commission. The Commission has exclusive jurisdiction to interpret this tariff. *Hull v. Columbia Gas of Ohio*, 2006-Ohio-3666, ¶ 20, 110 Ohio St. 3d 96, 99, 850 N.E.2d 1190, 1193 ("[I]t is readily apparent that the General Assembly has provided for commission oversight of filed tariffs [.]"),

B. The exculpatory clause offers no defense Duke's violations.

The Commission did not expressly "invalidate" the exculpatory language in the Supplier Tariff. The Order merely finds that this language does not bar Direct's claim of inadequate service:

> Here, Duke is the designated MDMA and certified suppliers have no choice but to accept the accompanying services. Thus, it would be against public policy to hold Duke harmless for all actions taken while serving as the MDMA. Accordingly, we find the hold-harmless language in the Supplier Tariff does not exempt Duke from providing adequate service in its role as the MDMA.[4]

It is not the least bit clear why Duke believes this finding is unreasonable or unlawful. Duke argues that "nothing in in the exculpatory clause addresses negligent [sic] actions,"[5] but what is the point: that Duke was "negligent" and therefore the exculpatory language does *not* apply? If the exculpatory language does not apply, then any claim of error in interpreting this language is irrelevant. To the extent Duke is arguing the exculpatory language *does* apply, then this merely concedes that meter data management services *are* covered by the Supplier Tariff.

Duke is also mistaken to claim that meter data management "is not a service that is cognizable under Ohio law or regulated under the jurisdiction of the Commission."[6] These

[4] Order ¶ 28.

[5] App. R. at 5.

[6] App. R. at 6.

services are covered by a Commission-approved tariff, and the Commission can certainly determine whether Duke performed a duty required under its tariffs.

The relevant provision of the Supplier Tariff says, "[t]he Company, acting as the designated Meter Data Management Agent for the Certified Supplier, will supply hourly load data to Transmission Provider, for the Certified Supplier. The Company will provide this data in accordance with the OATT, including estimates when necessary."[7] The Commission has not asserted jurisdiction to tell Duke how it must supply load data; the Order merely recognizes that Duke has a duty to report load data "in accordance with the OATT." Duke provided inadequate service because it failed to provide load data that was even remotely accurate. This finding does not intrude on PJM's authority in any way.

There is no serious argument to be made against the Commission's authority to enforce a duty recognized in the Supplier Tariff. The footer of each tariff page indicates:

> Filed pursuant to an Entry dated November 22, 2011 in Case No. 11-3549-EL-SSO before the Public Utilities Commission of Ohio.

The very first substantive provision of the tariff states:

> A copy of the Certified Supplier Tariff, which contains these Service Regulations and the associated Tariff Rate Schedules under which the Company will provide Certified Supplier Services to Certified Suppliers, is on file with the Commission and is posted and open to inspection at the offices of the Company during regular business hours.[8]

The last substantive provision states:

> The supplying and billing for service and all conditions applying thereto, are subject to the jurisdiction of the Public Utilities Commission of Ohio, and to the Company's Service Regulations

[7] Supplier Tariff Section 14.1.

[8] Supplier Tariff Section 1.1.

> currently in effect, as filed with the Public Utilities Commission of Ohio.[9]

The tariff also recognizes the Duke cannot suspend or terminate a supplier without Commission approval: "Terminations or suspensions shall require authorization from the Commission."[10]

The tariff clearly and expressly conveys that it is subject to Commission oversight and enforcement. Rule 4901:1-10-02(G), O.A.C., simply does not permit a utility to avoid tariff enforcement with exculpatory language.

C. Duke offers no defense to the Commission's finding of inadequate service.

"'Inadequate service' is not defined in R.C. Title 49, that determination being left to the commission and dependent upon the facts of each case." *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 14 Ohio St. 3d 49, 50, 471 N.E.2d 475, 477 (1984). The Commission rendered its findings based on the facts of this case. Duke points to no facts demonstrating that this finding is unreasonable or unlawful. It raises two alternative arguments, but both are unsupported.

First, Duke suggests the Order creates bad precedent. "If the Commission chooses to define a billing adjustment in this proceeding, particularly one that involves coordination with PJM and that is limited under terms set forth in PJM's tariffs, as inadequate service, the precedent established will result in monumental changes in established utility law in Ohio."[11] If these "monumental changes" mean that utilities will exercise more care in discharging their responsibilities than Duke exercised here, then these changes should be welcomed.

[9] Supplier Tariff, Sheet 53.2.

[10] Supplier Tariff Section 19.2.

[11] App. R. at 7.

Second, Duke argues that it owes no responsibility to Direct because Direct "can in no way be deemed a consumer of electricity in this transaction."[12] Duke claims that R.C. 4905.22 and 4905.26 only require adequate service to a "customer," not suppliers. Yet Direct is a "customer" for meter data management services, and Ohio law does not limit Duke's duties to "customers" in any event. R.C. 4905.26 specifically authorizes complaints "by any person, firm, or corporation" pertaining to "*any* rate . . . schedule, classification, or service [.]" (Emphasis added).

Duke's assertion that Direct has no right to bring a claim under R.C. 4905.22 or R.C. 4905.26 is simply wrong as a matter of law.

D. Whether Duke "benefited" from providing inadequate service is irrelevant.

Duke's final argument appeals to the Commission to exercise "equitable" authority the Commission simply does not have. The Legislature imposed consequences for failing to render adequate service, and Duke must now face them.

Duke claims it is "important to recognize that Duke Energy Ohio did not benefit in any way with regard to the inability to resettle under PJM's resettlement processes."[13] Those who act negligently and harm others usually don't "benefit" from their negligence. Likewise, proving "inadequate service" does not require proof of intent to harm, or receipt of ill-gotten gains. The record contains ample evidence that Duke failed to performed duties owed to Direct under the Supplier Tariff and that Direct sustained harm as a result.

The purpose of R.C. 4905.61 is to compensate Direct as well as deter Duke from committing future violations. Whether Duke "benefited" from its violations is irrelevant. *See*

[12] App. R. at 7-8.

[13] App. R. at 8.

Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless, 2007-Ohio-2203, ¶ 18, 113 Ohio St. 3d 394, 399, 865 N.E.2d 1275, 1279 ("R.C. 4905.61 is very specific. It appears to be the only mechanism through which the legislature permits an injured party to obtain damages after liability is found by the commission. The statute thus furthers the legislature's goal of ensuring compliance with the statutes governing public utilities and with commission orders.")

II. CONCLUSION

Duke did not take its Supplier Tariff obligations seriously. One of its basic, fundamental responsibilities is to report accurate load data to PJM. That did not happen. Duke compounded the problem by rebilling Direct's customer the wrong amounts, dragging its feet to start the PJM resettlement process, and dropping the ball on the customer's enrollment in consolidated billing. There is ample ground to conclude Duke's services were inadequate and in violation of law. The Order should be affirmed and rehearing denied.

Dated: May 20, 2019

Respectfully submitted,

/s/ Mark A. Whitt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served by electronic mail this 20th day of May, 2019, to the following:

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Summary: Memorandum Contra Duke Energy Ohio Inc. Application for Rehearing electronically filed by Ms. Rebekah J. Glover on behalf of Direct Energy Business, LLC