

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Commission's Review)	
of its Rules for Standard Service Offers for)	Case No. 18-1190-EL-ORD
Electric Utilities Contained in Chapter)	
4901:1-37 of the Ohio Administrative Code.)	

**INDUSTRIAL ENERGY USERS-OHIO'S
REPLY COMMENTS**

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ATTORNEYS FOR INDUSTRIAL ENERGY USERS-OHIO

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Industrial Energy Users-Ohio ("IEU-Ohio") submits these reply comments addressing issues raised in comments by The Dayton Power and Light Company ("DP&L"), Duke Energy Ohio, Inc. ("Duke"), and the Office of the Ohio Consumers' Counsel ("OCC"). The Public Utilities Commission of Ohio ("Commission") should adopt IEU-Ohio's clarification regarding OCC's proposed definition of unregulated service. The Commission should reject DP&L's proposal to allow the Commission to define additional services as noncompetitive retail electric services. Duke's proposed emergency waiver changes should either be rejected on grounds that Duke failed to provide a supporting rationale demonstrating a need for the changes or held in abeyance until Duke provides such an explanation and parties respond to the complete proposal. In any event, IEU-Ohio does not believe the Commission should look to emergency waivers of the corporate separation rules to address alleged threats of economic harm to customers. Finally, the Commission should reject Duke's proposed presumption of reasonableness.

I. OCC’S COMMENTS: DEFINITION OF UNREGULATED SERVICE

OCC’s comments address structural corporate separation and include a proposed definition of “unregulated service.”¹ OCC proposes that the term be defined as follows:

“Unregulated service” means a competitive service provided to a customer after the electric utility meter. These services include, but are not limited to, Distributed Energy Resources (including wind and solar generation and battery storage), electric vehicle charging stations and associated equipment, energy management services (including demand response), energy monitoring and control systems and devices, lighting and other smart controls, maintenance services, and warranty programs.²

Although IEU-Ohio does not generally take issue with the proposed definition, IEU-Ohio is commenting to ensure that the reference to “energy management services (including demand response)” is not extended beyond a reasonable interpretation. For example, IEU-Ohio agrees that customers with demand response capabilities should have the option to choose their Curtailment Service Providers (“CSP”) and should have the option to manage their peak loads. But that is not to say that the Commission does not and should not be able to take into account demand response capabilities when exercising its regulatory authority. The Commission clearly has jurisdiction to authorize interruptible tariffs for Ohio electric utilities, which rely on the demand response capabilities of customers.³ If the Commission adopts OCC’s proposed definition, the Commission should make clear that the proposed definition does not affect the current interruptible tariffs, the Commission’s ability to extend or adopt new interruptible tariffs, or the

¹ OCC Comments at 3 (July 12, 2019).

² *Id.*

³ R.C. 4905.31; R.C. 4928.143(B)(2)(i); *see also* R.C. 4928.02(A), (B), (D), (G), (J), (N).

Commission's ability to take customers' demand response capabilities into account when addressing other potential rate structures or options.

II. DP&L'S COMMENTS: ADDITIONAL NONCOMPETITIVE SERVICES

DP&L's comments assert that electric utilities "have a place in providing a regulated option from which customers may choose innovative products."⁴ To achieve this result, DP&L seeks to incorporate into the Commission's rules a process that would allow additional behind the meter services to be declared noncompetitive. DP&L's proposal is unlawful and unreasonable.

Initially, DP&L's two statements are contradictory. If a service is noncompetitive, then by law there is no choice in provider per the certified territory requirements.⁵ Customers would not be choosing a regulated option; it would be forced upon them.

Additionally, DP&L's proposal presumes, without explanation, that the Commission has authority to declare services as noncompetitive retail electric services in the context of an effective marketplace.⁶ While the Commission has some ability to act and declare competitive retail electric services noncompetitive, such a declaration requires the absence of effective competition.⁷ But where there is effective competition, the Commission's mission is to consider whether any noncompetitive retail electric services should be declared competitive.⁸ To foster effective competition, moreover, the

⁴ DP&L's Comments at 1 (July 12, 2019).

⁵ R.C. 4928.01(B) (defining noncompetitive services); R.C. 4933.83.

⁶ See DP&L's Comments at 1.

⁷ R.C. 4928.06(C)-(D).

⁸ R.C. 4928.06(C)

corporate separation requirements dictate that electric distribution utilities (“EDUs”) cannot participate in such competitive markets.

While R.C. 4928.17 generally prohibits electric utilities from providing both a noncompetitive retail electric service and either a competitive retail electric service or a product or service other than retail electric service, electric utilities may under certain circumstances avoid this complete prohibition under functional corporate separation.⁹ But, functional corporate separation is only permissible for an “interim period,” only upon a demonstration of good cause, and only pursuant to a corporate separation plan.¹⁰ Furthermore, interim functional corporate separation requirements must comply with state policy.¹¹ However, the Commission has already determined that EDUs offering new nonelectric products and services would not foster the state policies.¹²

What DP&L proposes here is essentially the same request Duke made in a prior corporate separation plan that was rejected by the Supreme Court and ultimately the Commission. In that case, Duke sought to amend its corporate separation plan to allow it to offer nonelectric products and services. Although the majority opinion remanded the issue of whether the plan could be approved as a functional corporate separation plan under R.C. 4928.17(C), the Court noted that it was “admittedly skeptical” of the lawfulness of the proposed functional corporate separate plan.¹³

⁹ R.C. 4928.17(A) & (C).

¹⁰ R.C. 4928.17(C); see also *In re Application of Duke Energy Ohio, Inc., for Approval of its Fourth Amended Corporate Separation Plan*, 148 Ohio St.3d 510, 2016-Ohio-7535 at ¶ 26; *id.* at ¶ 33-50 (J. Kennedy concurring).

¹¹ R.C. 4928.17(C).

¹² *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Fourth Amended Corporate Separation Plan Under R.C. 4928.17 and Ohio Adm.Code 4901:1-37*, Case Nos. 14-689-EL-UNC, *et al.*, Order on Remand at 3-4 (June 14, 2017).

¹³ *In re Duke*, 2016-Ohio-7525 at ¶ 27.

In a concurring opinion, Justice Kennedy went further, explaining that Duke's request to offer customers nonelectric products and services is not permissible under R.C. 4928.17(C), as Duke's plan is neither temporary nor is it congruous with the state policies outlined in R.C. 4928.02.¹⁴ The intent of R.C. 4928.17(C) was not to allow an electric utility “to, in effect, ‘rebundle’ in order to provide new nonelectric products and services that are required to be offered through a fully separate affiliate.”¹⁵

On remand, the Commission adopted Justice Kennedy's view that R.C. 4928.17(C) does not allow attempts by utilities to rebundle services.¹⁶

DP&L's proposal seeks to achieve the same unlawful result. EDUs are required to move to structural corporate separation and are prohibited from providing competitive retail electric services and nonelectric products and services. DP&L's request to avoid this result by declaring such services as noncompetitive is neither lawful nor reasonable.

III. DUKE'S COMMENTS: EXPANSION OF EMERGENCY WAIVERS OF CORPORATE SEPARATION RULES

Duke proposes to expand upon the emergency waivers of the corporate separation rules by adding two new scenarios that would qualify as emergencies: immediate threats to a person's health or safety; and immediate threats of significant economic harm to a

¹⁴ *Id.* at ¶ 34.

¹⁵ *Id.*

¹⁶ *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of its Fourth Amended Corporate Separation Plan Under R.C. 4928.17 and Ohio Adm.Code 4901:1-37*, Case Nos. 14-689-EL-UNC, *et al.*, Order on Remand at 3-4 (June 14, 2017).

customer.¹⁷ Duke also wants any actions it takes under its expanded emergency definition to be subject to a rebuttable presumption of reasonableness.¹⁸

While IEU-Ohio supports Duke's efforts to protect the health and safety of its customers and the public, it is not clear how waiving the corporate separation requirements under a claim of an emergency will further that objective. Duke offers no rationale in support of its expanded definition of emergency.

Similarly, it is not readily apparent how a waiver of the corporate separation requirements will support Duke's ability to avert or reduce immediate and significant economic harm to a customer. Again, Duke offers no rationale in support. If this request is simply another attempt to allow Duke to offer nonelectric products and services, the Court and Commission have already spoken on the issue.

Furthermore, there are already other means to avoid significant economic harm. For example, the Commission has authorized a ladder and staggered Standard Service Offer ("SSO") in lieu of exposure to real-time market pricing for customers electing the SSO. Financial assistance programs are already available to many customers, such as the Percentage of Income Payment Plan ("PIPP"), Home Energy Assistance Program ("HEAP"), the benefits under the Commission's annual Winter disconnection orders, budget billing programs, among others. Shopping customers may also rely on a myriad of market options, such as fixed price contracts, to protect against risk of significant economic impact from utility service. If there is an additional need to insure against the risk of significant economic harm from a customer's utility bills, consistent with the state

¹⁷ Duke Comments at 2-4.

¹⁸ *Id.* at 3-4.

policies, the Commission should look toward fostering innovative market options to address those needs.

Again, because Duke offered no support for the proposed rule change, it is unclear exactly what perceived harm Duke seeks additional flexibility to address; and it is even less clear how an emergency waiver of the corporate separation rules would allow Duke to address any such immediate threat of economic harm to customers.

Duke also seeks a rule change that would allow actions it takes under its proposed expanded definition of emergencies to be accompanied by a rebuttable presumption of reasonableness. Again, Duke offers no support for why the rebuttable presumption is appropriate or necessary. The law requires electric utilities to comply with the corporate separation requirements; the burden should always remain on electric utilities to demonstrate compliance or demonstrate that due to some emergency situation temporary compliance with the corporate separation plan and rules had to be suspended.

IV. CONCLUSION

OCC, DP&L, and Duke have proposed some changes to the corporate separation rules. While OCC's proposed definition of unregulated services is generally reasonable, the Commission should adopt IEU-Ohio's clarification to ensure the definition is not stretched beyond its reasonable bounds. Duke and DP&L, however, propose rule changes without detailed or reasonable supporting rationales for the changes. IEU-Ohio urges the Commission to reject DP&L's proposed rule change and reject Duke's proposed changes to the definition of emergencies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission'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 *Industrial Energy Users-Ohio's Reply Comments* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 26th day of July 2019, via electronic transmission.

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