BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, 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 the Application of Duke Energy Ohio for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)	Case No. 14-842-EL-ATA

APPLICATION FOR REHEARING OF DUKE ENERGY OHIO, INC.

April 20, 2018

On May 29, 2014, Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) filed an application (Application) with the Public Utilities Commission of Ohio (Commission), seeking approval of a standard service offer (SSO), pursuant to R.C. 4928.141, in the form of an electric security plan (ESP), as set forth in R.C. 4928.143. Following a full hearing and the submission of briefs, the Commission issued its Opinion and Order (Order), on April 2, 2015.

Ohio law, in R.C. 4903.10, allows any party who has entered an appearance in a Commission proceeding to apply for rehearing in respect to any matters determined in the proceeding, within thirty days after the issuance of the order. Several parties, including the Company, did file applications for rehearing. The Commission issued its decision on those applications on March 21, 2018 (Entry).

Duke Energy Ohio is hereby filing its Application for Rehearing of that Order, pursuant to R.C. 4903.10 and Ohio Administrative Code (O.A.C.) 4901-1-35. Duke Energy Ohio asserts that the Commission's Entry is unlawful and/or unreasonable in the following respects:

1. The Commission's justifications for its shareholder-funded economic development program are unreasonable, and not based on evidence or law. (Assignment of Error 1)

2. The Commission's decision to grant an application for rehearing by Direct Energy Services, LLC, and Direct Energy Business, LLC (Direct Energy), is no longer appropriate in light of changed circumstances. (Assignment of Error 2)

Duke Energy Ohio respectfully requests that the Commission modify its Entry, as discussed herein.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF DUKE ENERGY OHIO, INC.

Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) submits the following memorandum to the Public Utilities Commission of Ohio (Commission) in support of its Application for Rehearing of the Commission's Second Entry on Rehearing (Entry) addressing the Company's third electric security plan (ESP 3) and related issues. The Company alleges two errors for the Commission's consideration and urges the Commission to reverse the conclusions referenced herein in its entry on rehearing.

Assignment of Error 1:

> **The Commission's justifications of its shareholder-funded economic development program are unreasonable, and not based on evidence or law.**

The Commission, in its 2015 Opinion and Order (Order), required the Company to establish an economic development program for the term of the ESP, and to fund that program

with $2 million of shareholder money for each year of the ESP.[1] The Commission attempted, at that time, to justify its decision by claiming that it is "consistent with our directives in the *ESP 2* Case, as well as our treatment of other EDUs . . .." Further, it specified that the costs of this program would not be recoverable from customers.[2]

The Company sought rehearing with regard to this requirement, which was established through one, single paragraph in the 100-page Order. The entirety of the Commission's rationale in the Order read as follows:

> The Commission notes that R.C 4928.143(B)(2)(i) authorizes the inclusion of economic development programs in ESPs, and we find it prudent to modify Duke's ESP to include an economic development program, which will 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. Accordingly, the Commission finds that Duke should implement an economic development fund, which will be funded by shareholders at $2 million per year, or a portion thereof, during the term of this ESP. This funding is consistent with our directives in the *ESP 2 Case*, as well as our treatment of other EDUs and shall not be recoverable from customers. *ESP 2 Case*, Opinion and Order (Nov. 22, 2011) at 43; *AEP ESP 3 Case*, Opinion and Order (Feb. 25, 2015) at 69-70; *DP&L ESP Case*, Opinion and Order (Sept. 4, 2013) at 42-43. Any funds that are not allocated during a given year shall remain in the fund and carry over to be allocated in subsequent years.[3]

In its application for rehearing, the Company pointed out that no economic development program had been proposed by the Company, and no evidence existed in the record to support the need for such a program, the potential terms of the program, or the rationale for using shareholders' dollars to fund it. It also argued that there is no law to allow the Commission to add such a mandate to the ESP. The Company demonstrated the ways in which the situation was not at all comparable to the Duke Energy Ohio ESP 2 and was in no way consistent with the Commission's treatment of other Ohio electric distribution utilities (EDUs). Furthermore, the

[1] Under its Order, partial years would be prorated.
[2] Order, pg. 91.
[3] Opinion and Order, pg. 91.

Company argued, demanding that the Company expend shareholder funds on this program is simply an unconstitutional taking of private property.

In its 2018 Entry, the Commission responded to the Company's arguments by rehashing what it previously said and by offering entirely new rationales, none of which suffices.

The Commission first states that R.C. 4928.143(B)(2)(i) allows electric security plans (ESPs) to include provisions related to economic development. The Commission's statement is both immaterial and incomplete. It is immaterial because the referenced statutory provision identifies the terms that an applicant may include in an ESP filed before the Commission. The statute does not empower the Commission to mandate such a term or provision. Further, the Commission's statement is incomplete because it fails to take into account the entire subsection of the statute:

> Provisions under which the electric distribution utility may implement economic development, job retention, and energy efficiency programs, which provisions may allocate program costs across all classes of customers of the utility and those of electric distribution utilities in the same holding company system.[4]

No credible reading of the statute allows for the Commission to compel the inclusion of an economic development program which assigns the program costs to shareholders of the utility's holding company. Assuming, arguendo, that the Commission could anchor the authority to author an economic development component into an order approving an ESP, such authority would still have to be read in the context of the entirety of the statute, which would require allocation of program costs across all classes of customers. Nothing in the statute allows the Commission to mandate shareholder funding. By ignoring this apparently inconvenient portion of the statute, the Commission attempts to make legal what is not authorized by the General Assembly.

[4] R.C. 4928.143(B)(2)(i) (emphasis added).

The Commission next attempts to justify its illegal mandate by defining it as "voluntary," on the basis that the Company has the right not to accept a modified ESP. While that right under the law might have had some relevance to this discussion if the Commission had ruled on the Company's application for rehearing shortly after it was filed, it has no such relevance now. Duke Energy Ohio's ESP, as approved by the Commission in 2015, is currently scheduled to expire in approximately six weeks. By delaying the issuance of its final order in these proceedings for almost three years, the Commission has effectively stripped Duke Energy Ohio of its right to reject the altered ESP. Following this logic, the Commission could invoke any condition, any amount of shareholder funding, or any other legal or illegal provision in an ESP and then essentially challenge the EDU to "take it or leave it," regardless of how much time, effort, and expense was expended to litigate the ESP application. Shareholder funding of the Commission's economic development program is far from "voluntary."

It is also noteworthy, in this regard, that the Commission's reference to an ESP for The Dayton Power and Light Company (DP&L) is inapposite.[5] That case was one that was resolved through a stipulation, unlike the present proceedings. Furthermore, the Commission in that case based its decision on evidence of record. As will be discussed below, there was no such record here.

The Commission next attempted to justify its mandate by asserting that the funding was comparable to the treatment of other utilities. In its Order, the Commission had specifically stated that the mandate "is consistent with our . . . treatment of other EDUs," citing to ESPs for both DP&L and Ohio Power Company (AEP). On rehearing, the Company pointed out to the Commission the significant difference in size between Duke Energy Ohio and AEP. In the

[5] Entry on Rehearing, pg. 47, *citing In the Matter of the Application of The Dayton Power and Light Company to Establish a Standard Service Offer in the Form of an Electric Security Plan*, Case No. 12-426-EL-SSO.

Entry, however, the Commission simply re-referenced its decision in the DP&L case, entirely ignoring the fact that AEP is still more than twice the size of Duke Energy Ohio. Claiming that its treatment of Duke Energy Ohio is comparable to its treatment of DP&L does not change the fact that its treatment of Duke Energy Ohio is entirely disparate from the treatment of AEP. The Commission simply failed to address, in any way, its previous assertion that it was treating Duke Energy Ohio in a manner comparable to its treatment of AEP.

The Commission's sense of "comparability" is peculiar. For the provision regarding the economic development funding, the Commission deems its decision to have DP&L, AEP, and Duke Energy Ohio all provide $2 million of shareholder funding to be "comparable," despite the significant differences in size. DP&L's retail Ohio load is approximately 14 million MWh, AEP's is approximately 43 million MWh, and Duke Energy Ohio's is approximately 20 million MWh. Two million dollars equates to about 14 cents/MWh of retail sales for DP&L, 5 cents/MWh for AEP, and 10 cents/MWh for Duke Energy Ohio. It is unfair for the Commission to assert that the shareholder contributions to economic development it is requiring from each EDU are comparable when they clearly are not. Comparability must recognize the relative differences in size for each electric utility.

The Commission, in the Entry, almost three years after its issuance of the Order, also newly claimed that a purpose of its mandated economic development fund was to further state policy. No party to the proceedings, including the Staff, ever suggested that shareholder-funded economic development money was needed to further the state policy goals set forth in R.C. 4928.02, nor did the Commission make even a passing reference to such a need when it issued its Order. The Commission has simply added that justification now, on the eve of the conclusion of the ESP, and without any evidentiary support.

In its application for rehearing, the Company also pointed out that there was no record evidence to support the Commission's economic development mandate, citing to a landmark case in which the Ohio Supreme Court found it to be reversible error for the Commission to render an opinion on an issue without record support.[6] In its Entry, the Commission finds the *Tongren* case to be inapplicable. It suggests that the holding in *Tongren* was limited to similar types of cases and, therefore, apparently, there is no need for record evidence. The Commission claims that its non-evidentiary mandate is justified because it was required to consider state policy and weigh the ESP against the expected results of a market rate offer (MRO), and because the Company had a statutory remedy. This astonishing rationale is wrong in four regards:

- The Court in *Tongren* did not limit its holding to similar cases. Indeed the Court stated that it had recently noted that "a legion of cases establish that the commission abuses its discretion if it renders an opinion on an issue without record support."[7] And, indeed, a myriad of cases have cited to *Tongren* since its issuance. The fact that the Commission is obligated to consider state policy or to weigh a proposed ESP against a theoretical MRO has nothing at all to do with the Commission's need to base its decisions on record evidence.
- The Commission attempted to distinguish these proceedings from the *Tongren* case by pointing out that, here; it had to consider state policy. Unfortunately, its justification for the economic development mandate, as expressed in the Order, said nothing about state policy; nor did the Commission mention the economic development mandate in its consideration of state policy.

[6] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87 (1999) (*Tongren*).
[7] *Tongren*, at pg. 90, *citing Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 163, 166 (1996)..

- The Commission also attempted to distinguish these proceedings from the *Tongren* case by pointing out that, here; it had to weigh the ESP against an MRO. Unfortunately, its justification for the economic development mandate, as expressed in the Order, said nothing about needing and economic development program in order to tip the scale toward the ESP; nor did the Commission mention the economic development mandate in its consideration of that test.
- Finally, the Commission argued that it did not need to abide by *Tongren* because the Company had the statutory right to reject the modified ESP. This ludicrous reasoning is not based on any law or precedent. The Commission must still base its decisions on record evidence, even if the applicant has a way to avoid the Commission's decision. In addition, even if the right to reject did support the Commission's ability to reach a decision on the basis of no evidence, it must be remembered that there is still no final order in these proceedings, with the ESP set to expire in six weeks. Duke Energy Ohio's "right" to reject the modification was effectively stripped away from it by the Commission's delay in addressing the issues raised in these proceedings.

The Commission's requirement is unreasonable, arbitrary, unconstitutional, and well outside the Commission's authority. The bases proposed in the Entry are insufficient. The Entry should be modified, either to eliminate the Commission-established economic development program or to modify it to more justifiable terms.

Assignment of Error 2:

The Commission's decision to grant an application for rehearing by Direct Energy Services, LLC, and Direct Energy Business, LLC (Direct Energy), is no longer appropriate in light of changed circumstances.

In its Application, Duke Energy Ohio proposed to add a provision to its supplier tariff to require suppliers to consent to requested PJM billing adjustments or resettlements. The Commission rejected this amendment in its Order. However, the issue was raised by Direct Energy in its application for rehearing, and the Commission granted rehearing on that ground.

However, during the years since Direct Energy's application for rehearing was filed, Duke Energy Ohio filed an application with the Federal Energy Regulatory Commission (FERC), seeking approval of an amendment of the PJM Transmission, L.L.C. (PJM), Open Access Transmission Tariff (OATT).[8] The goal of that amendment was to resolve, through FERC, the problem that the Commission's Order refused to resolve. Through the FERC filing, the PJM OATT now includes an Attachment M-2 for Duke Energy Ohio, effective May 13, 2016. That Attachment M-2 documents the process by which Duke Energy Ohio calculates and adjusts capacity peak load contributions, network service peak loads, and final hourly load obligations for entities with load within the DEOK Zone.

Therefore, the Commission's decision, through the Entry, to amend the supplier tariff to require suppliers to consent to billing adjustments or resettlements would now conflict with the FERC-approved PJM OATT. The Commission's directive is pre-empted and if implemented would result in Duke Energy Ohio being in the untenable position of the state Commission

[8] FERC Docket No. ER16-1150-00, March 14, 2016.

directing the Company to be in violation of the OATT. The Commission should rectify this situation by returning the supplier tariff language to its prior status.

CONCLUSION

Duke Energy Ohio respectfully requests that the Commission reconsider the Entry, grant rehearing, as outlined in Assignments of Error 1 and 2, above, and take action to correct the errors discussed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 20th day of April, 2018, to the parties listed below.

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