BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the 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 the 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

REPLY OF DUKE ENERGY OHIO, INC., TO JOINT MEMORANDUM CONTRA ITS MOTION TO CONTINUE RIDERS

In the face of a problem that was previously unforeseen, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) is offering a logical and straight-forward way solution – one that will allow it to continue to provide a standard service offer to its customers until such time as a new standard service offer is approved. The Ohio Manufacturers' Association and The Kroger Co. (Movants) are attempting to stand in the way. Their opposition should be deemed late-filed and should be denied.

Movants' Memorandum Contra Is Untimely

This case proceeded on a statutorily limited timeline. Under R.C. 4928.143(C)(1), the Commission had 275 days to rule on the Company's application. Knowing that limitation, the attorney examiner's first entry required parties to file memoranda contra any motions within seven calendar days.[1] Movants failed to comply. Duke Energy Ohio filed the Motion that precipitated Movants' Memorandum Contra on March 9, 2018. Under the previously ordered

[1] Entry, ¶5 (June 6, 2014).

and expedited procedural schedule, Movants' memorandum contra was due on March 16, 2018. They filed it on March 26, ten days late. As such, it should be ignored.

Movants argue that the attorney examiner's scheduling order should be ignored or deliberately misinterpreted to mean something other than the ordinary meaning of the written words. First, they suggest that the standard provisions of the Ohio Administrative Code should apply, simply because the entry was issued almost four years ago. They cite to no law, rule, or precedent to support such an outcome; indeed, none exists.

Second, they claim that a "straight-forward reading" of the scheduling order shows that the shortened deadlines for motion practice are no longer applicable. A "straight-forward reading" shows no such thing. In her entry, the examiner provided both a requirement and a rationale for that requirement:

> In light of the time frame for these proceedings, the attorney examiner requires that, in the event any motion is made in these proceedings, any memoranda contra shall be filed within five calendar days after the service of such motion, and a reply memorandum to any memorandum contra shall be filed within three calendar days.[2]

The requirement was to file a memorandum contra within five calendar days. The rationale behind that requirement was the time frame for the proceedings. The timing requirement is not obviated by a change in the circumstances that were the basis for the rationale. If the examiner had wanted the requirement only to be applicable until the Commission issued its opinion and order in the proceedings, she could have drafted the entry to so provide.

Furthermore, if Movants had believed that the accelerated schedule for motion practice was no longer reasonable, Movants could have sought a change in that schedule. Not having done so, the schedule remains as ordered.

[2] Entry, ¶5 (June 6, 2014).

Movants Have Failed to Show Good Cause for Leave

Movants, in the alternative, ask for leave for its late filing. Unfortunately, they provide no explanation for the tardy filing, other than their "reasonable" misinterpretation of the scheduling order. As shown above, however, that misinterpretation is nothing more than Movants' wishful thinking. No good cause has been shown; leave for the late filing must be denied.

The Commission Has Authority to Grant the Company's Motion

Movants argue that the Commission has no authority to extend a utility's electric security plan (ESP), based on an opinion issued by the Supreme Court of Ohio. Their reliance is misplaced.

Movants assert that the Court has "expressly rejected the Commission's authority" to extend an ESP beyond its termination date, pointing to a 2015 decision.[3] That decision, however, did not include an "express rejection" of the Commission's authority to extend an ESP; the situation was much more nuanced. In *Ohio Power*, the Commission had, in the context of an ESP, authorized the utility to recover carrying charges on a deferral, at a given rate. After the ESP had terminated, the Commission modified that rate to drastically reduce the recoverable carrying charges. Noting that Ohio law allows a utility to withdraw an ESP if the Commission modifies it in an unacceptable manner, the Court concluded that this post-termination modification deprived the utility of its statutory right of withdrawal. "Ohio Power asserts that the commission deprived the company of the statutory right to withdraw the modified ESP, because the plan was modified well after it had expired. We agree."[4]

[3] *In re Ohio Power Co.*, 2015-Ohio-2056, 144 Ohio St.3d 1 (*Ohio Power*).
[4] *Id.*, ¶24.

Movants' quotation from this decision, and their use of the quoted words, is misleading. Movants allege that the Court found extension of an ESP by the Commission to "hardly be a just and reasonable result."[5] In truth, however, the Court used those words only in reference to the utility's loss of its ability to withdraw its ESP in the face of an unacceptable Commission modification.[6]

The present situation is not remotely analogous. Here, the Commission would be acting at the request of the utility, not contrary to its wishes. And here, the Commission would not be changing a substantive provision of the ESP; it would be extending the time period during which the ESP would be operative.

The Company Has Shown that Extension of Riders is Reasonable and Appropriate

Movants propose that the extension of an ESP only applies to those aspects of the ESP that are "'necessary to maintain essential electric service' to customers," pointing (without citation) to language in R.C. 4928.141. Movants apparently rely on a misreading of the language in R.C. 4928.141, which states that the utility "shall provide consumers . . . a standard service offer of all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service."[7] They seem to view that language as a definition and then, apparently, conclude that only part of an ESP qualified as a "standard service offer." What Movants miss is the second sentence of R.C. 4928.141(A), which requires the utility to apply to the Commission "to establish the standard service offer in accordance with section 4928.142 or 4928.143 . . .." This language makes it clear that the standard service offer is whatever the Commission approves following an application under either of the two statutory provisions referenced in R.C. 4928.141. These two provisions have

[5] Movants' Memorandum Contra, pg. 7.
[6] *Ohio Power*, ¶30.
[7] R.C. 4928.141(A).

been identified by the legislature as the only two recognized forms of a standard service offer; namely, a market rate offer or an ESP, respectively. If the legislature had meant to define a standard service offer as something other than what the Commission approves under 4928.142 or 4928.143, or otherwise limit the "standard service offer" in some way to only the mandatory portion of an ESP, it would have done so. For example, the legislature could have easily qualified its R.C. 4928.141 to state "in accordance with section 4928.142 or paragraph (B)(1) of section 4928.143 . . .." The legislature did no such thing. Movants have no justification to read such a limitation into the law.

Rider DCI Should Be Extended

Finally, Movants propose that Rider DCI should not be extended, based on their theory that it will expire on May 31, 2018. Although Movants allege that "Rider DCI terminates on either the date the $35 million cap is reached or May 31, 2018, whichever occurs earlier,"[8] they can point to no such provision in the Commission's Opinion and Order in these proceedings. Thus, as the Company previously indicated, Rider DCI does not have a definite termination date and should be extended with the rest of the riders under consideration.

Conclusion

For the reasons stated herein, Duke Energy Ohio respectfully requests that the Commission issue an order confirming that riders currently in effect under its existing ESP, including Rider DCI, shall continue during the pendency of the Company's pending ESP application and until the earlier of August 1, 2018, or the effective date of its fourth ESP.

[8] Movants' Memorandum Contra, pg. 9.

Respectfully submitted,

/s/ *Jeanne W. Kingery*
Rocco O. D'Ascenzo (0077651)
Deputy General Counsel
Jeanne W. Kingery (0012172)
Associate General Counsel
Elizabeth H. Watts (0031092)
Associate General Counsel
DUKE ENERGY OHIO, INC.
Room 1303 Main
139 E. Fourth Street
Cincinnati, Ohio 45202
Rocco.d'ascenzo@duke-energy.com
Jeanne.kingery@duke-energy.com
Elizabeth.watts@duke-energy.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following parties via ordinary mail delivery, postage prepaid, and/or electronic mail delivery on this 29th day of March, 2018.

/s/ *Jeanne W. Kingery*
Jeanne W. Kingery

Steven Beeler
Thomas Lindgren
Assistant Attorneys General
Public Utilities Section
180 East Broad St., 6th Floor
Columbus, Ohio 43215
Steven.beeler@ohioattorneygeneral.gov
Thomas.lindgren@ohioattorneygeneral.gov
Counsel for Staff of the Commission

David F. Boehm
Michael L. Kurtz
Jody M. Kyler Cohn
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
dboehm@BKLlawfirm.com
mkurtz@BKLlawfirm.com
jkylercohn@BKLlawfirm.com

Counsel for the Ohio Energy Group

Kevin R. Schmidt
88 East Broad Street, Suite 1770
Columbus, Ohio 43215
schmidt@sppgrp.com

Counsel for the Energy Professionals of Ohio

Mark A. Hayden
Jacob A. McDermott
Scott J. Casto
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308
haydenm@firstenergycorp.com
jmcdermott@firstenergycorp.com
scasto@firstenergycorp.com

Counsel for FirstEnergy Solutions Corp.

Maureen R. Willis
Office of the Ohio Consumers' Counsel
65 East State Street, 7th floor
Columbus, Ohio 43215-4203
Maureen.willis@occ.ohio.gov

Counsel for the Ohio Consumers' Counsel

Dane Stinson
Bricker & Eckler LLP
100 S. Third Street
Columbus, Ohio 43215
dstinson@bricker.com

Counsel for the Ohio Developmental Services Agency

Kimberly W. Bojko
James Perko
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Bojko@carpenterlipps.com
perko@carpenterlipps.com

Counsel for the Ohio Manufacturers' Association

Joseph Oliker
6100 Emerald Parkway
Dublin, Ohio 43016
joliker@igsenergy.com

Counsel for Interstate Gas Supply, Inc.

Judi L. Sobecki
The Dayton Power and Light Company
1065 Woodman Drive
Dayton, Ohio 45432
Judi.sobecki@aes.com

Counsel for The Dayton Power and Light Company

Mark J. Whitt
Andrew J. Campbell
Rebekah J. Glover
Whitt Sturtevant LLP
88 East Broad Street, Suite 1950
Chicago, Illinois 60601
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

Counsel for Direct Energy Services, LLC and Direct Energy Business, LLC

Samuel C. Randazzo
Frank P. Darr
Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
fdarr@mwncmh.com
mpritchard@mwncmh.com

Counsel for Industrial Energy Users-Ohio

Colleen L. Mooney
Ohio Partners for Affordable Energy
P.O. Box
Columbus, Ohio 43264
cmooney@ohiopartners.org

Counsel for Ohio Partners for Affordable Energy

Trent Dougherty
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
tdougherty@theOEC.org

Steven T. Nourse
American Electric Power Service Corporation
1 Riverside Plaza 29th Floor
Columbus, Ohio 43215
stnourse@aep.com

Counsel for Ohio Power Company

Counsel for the Ohio Environmental Council

Andrew J. Sonderman
Margeaux Kimbrough
Kegler Brown Hill & Ritter LPA
Capitol Square, Suite 1800
65 East State Street
Columbus, Ohio 43215-4294
asonderman@keglerbrown.com
mkimbrough@keglerbrown.com

Richard Sahli
Richard Sahli Law Office, LLC
981 Pinewood Lane
Columbus, Ohio 43230
rsahli@columbus.rr.com

Counsel for People Working Cooperatively, Inc.

Counsel for the Sierra Club

Angela Paul Whitfield
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
paul@carpenterlipps.com

Counsel for The Kroger Company

Douglas E. Hart
441 Vine Street
Suite 4192
Cincinnati, Ohio 45202
dhart@douglasehart.com

Counsel for The Greater Cincinnati Health Council

Michael J. Settineri
Gretchen L. Petrucci
Vorys, Sater, Seymour, and Pease, LLP
52 East Gay Street
P.O.Box 1008
Columbus, Ohio 43216-1008
mjsettineri@vorys.com
glpetrucci@vorys.com

Counsel for Constellation NewEnergy, Inc. and Exelon Generation Company, LLC

Cynthia Fonner Brady
Exelon Business Services Company
4300 Winfield Road
Warrenville, Illinois 60555
Cynthia.brady@constellation.com

For Exelon Generation Company, LLC

David I. Fein
Vice President, State Government Affairs - East
Exelon Corporation
10 South Dearborn Street, 47th Floor
Chicago, Illinois 60603
David.fein@exeloncorp.com

For Exelon Corporation

Lael Campbell
Exelon
101 Constitution Avenue, NW
Washington, DC 2001
Lael.Campbell@constellation.com

For Constellation NewEnergy, Inc.

Michael J Settineri
Vorys, Sater, Seymour, and Pease, LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

mjsettineri@vorys.com

Michael J. Settineri
Gretchen L. Petrucci
Vorys, Sater, Seymour, and Pease, LLP
52 East Gay Street
P.O.Box 1008
Columbus, Ohio 43216-1008
mjsettineri@vorys.com
glpetrucci@vorys.com

Counsel for Miami University and the University of Cincinnati

Justin Vickers
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, Illinois 60601
jvickers@elpc.org

Counsel for the Retail Energy Supply Association

Joel E. Sechler
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
sechler@carpenterlipps.com

Counsel for the Environmental Law & Policy Center

Samantha Williams
Natural Resources Defense Council
20 N. Wacker Drive, Suite 1600
Chicago, Illinois 60606

swilliams@nrdc.org

Counsel for the Natural Resources Defense Council

Counsel for EnerNOC, Inc.

Tony Mendoza
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612

Tony.mendoza@sierraclub.org

Counsel for the Sierra Club

Rick D. Chamberlain
Behrens, Wheeler, & Chamberlain
6 N.E. 63rd Street, Suite 400
Oklahoma City, OK 73105
rchamberlain@okenergylaw.com

Counsel for Wal-Mart Stores East, LP and Sam's East, Inc.

Donald L. Mason
Michael R. Traven
Roetzel & Andress, LPA
155 E. Broad Street, 12th Floor
Columbus, Ohio 43215
dmason@ralaw.com
mtraven@ralaw.com

Counsel for Wal-Mart Stores East, LP and Sam's East, Inc.