

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 Section 4928.143, Revised) Case No. 17-1263-EL-SSO
Code, in the Form of an Electric Security)
Plan, Accounting Modifications and)
Tariffs for Generation Service.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Authority to Amend) Case No. 17-1264-EL-ATA
its Certified Supplier Tariff, P.U.C.O. No.)
20.)

In the Matter of the Application of Duke)
Energy Ohio, Inc., for Authority to Defer) Case No. 17-1265-EL-AAM
Vegetation Management Costs.)

**DUKE ENERGY OHIO'S MEMORANDUM CONTRA
MOTION TO DISMISS**

On June 1, 2017, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) filed an application (Application) with the Public Utilities Commission of Ohio (Commission), seeking an order from the Commission that, *inter alia*, would extend the Company's existing Price Stabilization Rider (Rider PSR), through which the Company would provide customers the net benefit of all revenues accruing to the Company as a result of its ownership interest and contractual entitlement in the Ohio Valley Electric Corporation (OVEC), less all costs associated with the entitlement. In addition, the Company proposed that additional contractual arrangements could be included in the PSR to

increase the benefits available to customers.¹ The purpose of Rider PSR is to mitigate anticipated volatility in the wholesale market.²

On October 13, 2017, Industrial Energy Users-Ohio (IEU) filed a motion (Motion) to dismiss the Company's request to extend Rider PSR's termination date. As Duke Energy Ohio demonstrates herein, the Motion should be denied as procedurally improper and substantively in error.

I. The Motion Is Procedurally Improper.

IEU asks the Commission to dismiss a single issue in these proceedings. IEU would have the remainder of the case go forward to hearing, while this single question is not even considered.

Although IEU gives a passing nod to procedure by referencing the Rules of Civil Procedure, it ignores the fact that such an approach is entirely outside of the usual practice of the Commission, as is reliance on the civil rules. As IEU admits but glosses over, the Commission, not being a court, is not bound by such rules.³ While they may be instructive, the Commission's past practices and its attention to justice and due process are far more important. The fact that the civil rules would allow a judge to "dismiss" one claim in a case does not make it appropriate for the Commission to do so here.

IEU also claims that insufficient support has been provided on the topic. Specifically, IEU argues that the Company's description of the proposal is incomplete because it does not fully describe Rider PSR. However, the only proposal before the

¹ See *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, *et al.*, Opinion and Order, at pg. 15 (April 2, 2015).

² See *Id.* at pg. 16.

³ See, e.g., *Greater Cleveland Welfare Rights Org., Inc. v. Pub. Util. Comm.*, 2 Ohio St.3d 62 (1982).

Commission in these proceedings, relating to Rider PSR, is that the previously imposed end date be removed. This request does not require a fresh discussion of the terms or function of Rider PSR; the rider would be unchanged other than the elimination of the end date. There can be no dispute that little discussion is required to explain the Company's simple request to extend the term of the rider, which rider remains set at zero. Duke Energy Ohio's burden of proof on this issue is more than satisfied through its application and pre-filed testimony, as no terms of the rider are sought to be changed, other than the fact that it would otherwise terminate on May 31, 2018.⁴

The Commission should deny IEU's request to prohibit the Company from presenting its case in full. The Company's request to extend the term of Rider PSR is a vital part of its overall strategy and is most definitely an issue that it intends to litigate in this proceeding, contrary to the claim of IEU.

II. Intervening Court Cases Are Irrelevant.

IEU asserts that both the Ohio Supreme Court and the United States Supreme Court have issued rulings that would result in Rider PSR being illegal. IEU is wrong on both counts.

A. Ohio Rulings on Transition Charges

With regard to Ohio cases, IEU points to the Court's rulings in two cases, both of which are entirely *in apropos*.⁵ IEU states that the Court has ruled that transition charges may not be included in an ESP;⁶ with this the Company has no dispute. However, that statement is not enough to make the cases relevant. The Court, in the two referenced

⁴ Application, at pg. 18 (June 1, 2017); Direct Testimony of William Don Wathen Jr., at pp. 29-31 (June 1, 2017).

⁵ *In re Application of Columbus S. Power Co.*, 2016-Ohio-1608, 147 Ohio St.3d 439 (AEP Case); *In re Application of Dayton Power & Light Co.*, 2016-Ohio-3490, 147 Ohio St.3d 166 (DP&L Case).

⁶ Motion, at pp. 9, *et seq.*

cases, was actually considering charges that were not remotely analogous to Rider PSR. In the AEP case, the charge at issue was intended “to ensure that the company was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period.”⁷ To accomplish this result, the company’s Retail Stability Rider would “guarantee recovery of lost revenue.”⁸ Similarly, The Dayton Power and Light Company’s Service Stability Rider was also designed to recover generation revenue lost as a result of customer shopping and declining wholesale generation prices.⁹ In both of these cases, the Court concluded that the riders were equivalent to transition charges.

In contrast to the two riders reviewed by the Court, Duke Energy Ohio’s Rider PSR is a price stability rider that is designed to act as a hedge for customers.¹⁰ It is not a lost-revenue-recovery rider. And the Court has **not** ruled on whether a price stability rider is equivalent to a transition charge.¹¹

Rather, the Commission’s conclusion that a price stability rider is **not** a transition charge is the current law of the land. The Commission has explained that “the purpose of transition revenue was to allow electric distribution utilities to recover the costs of generation assets used to provide generation service to customers prior to the unbundling

⁷ AEP Case, at ¶ 23.

⁸ *Id.* See also *In the Matter of the Application of Columbus Southern Power Company and Ohio power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order, at pg. 33 (Commission goal was to establish a revenue target that would the company an opportunity to earn a return in a stated range).

⁹ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, *et al.*, Opinion and Order, at pg. 17 (Sept. 4, 2013).

¹⁰ IEU misstates the purpose of Rider PSR as being intended to “make up for generation costs that cannot be recovered in a competitive market.” But, as is evident from the Application and Testimony of William Don Wathen Jr., that statement is untrue.

¹¹ It is interesting to note that, although the question of whether recovery of OVEC-related costs are transition revenues is pending before the Ohio Supreme Court, IEU did not join in that appeal, as it had signed a settlement agreeing to AEP’s receipt of such recovery – a settlement under which IEU received \$8 million. See *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Exhibit P3/EP SA 11, Global Settlement Agreement (Dec. 14, 2015).

of rates in S.B. 3 if such costs could not be recovered through the market.”¹² This Commission perspective is supported by the Ohio Supreme Court’s definition of transition costs:

In general, these are generation costs that the utility incurred to serve its customers that would have been recovered through regulated rates before competition began, but that are no longer recoverable from customers who have switched to another generation provider.¹³

Costs related to the assets owned by OVEC that form the basis for Rider PSR did not provide generation service to Duke Energy Ohio’s customers prior to the unbundling of rates and, prior to deregulation, retail customers were never charged for any costs related to the OVEC assets through regulated rates. Thus, as the Commission has already conclusively and correctly determined, “the OVEC contract cannot be the basis for transition charges or their equivalent.”¹⁴ The Commission’s determination is unquestionably consistent with the Ohio Supreme Court’s definition of transition costs.

B. Federal Ruling on Preemption

IEU also relied on a determination by the United States Supreme Court that states are preempted from using retail rates to establish the amount that generators receive for wholesale electric sales. The Court stated, as quoted by IEU, that “States could not ‘exercise their traditional authority over retail rates, or . . . in-state generation’ as a means to disregard the wholesale rates established by FERC.”¹⁵ As is self-evident, however, Duke Energy Ohio is not a generator and the revenues that the Company might receive if

¹² *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Second Entry on Rehearing (AEP OVEC Rehearing Order), at pp. 99-100 (November 3, 2016).

¹³ AEP Case, at ¶ 15.

¹⁴ AEP OVEC Rehearing Order, at pg. 100.

¹⁵ Motion, at pg. 15, *citing Hughes v. Talen Energy Marketing LLC*, 578 U.S. ___, 136 S.Ct. 1288, 1299 (2016) (*Talen*).

Rider PSR is set at anything other than zero would have no impact whatsoever on the wholesale rates approved by the Federal Energy Regulatory Commission (FERC) that are charged by the generator, OVEC, for its generation. No action by the retail regulator can modify the FERC-approved contract that sets the prices paid to OVEC by its wholesale customers.

The Commission reached that same conclusion in a prior, analogous situation:

The Commission also notes that our approval of the . . . rider, as a retail hedge, is based upon retail ratemaking authority under state law, which does not conflict with or erode federal laws or the responsibility of FERC to regulate electricity at wholesale. Charges at wholesale are exclusively within the jurisdiction of FERC.¹⁶

IEU fails to recognize either the factual differences between the situation that was under consideration before the Court and the facts at hand in these proceedings or certain important points made by the Court. In *Talen*, the Court rejected a state program that disregarded the interstate wholesale rate required by FERC, as the program guaranteed a rate other than the clearing price for the utility’s interstate capacity sales to PJM Interconnection L.L.C. These facts are entirely unlike Duke Energy Ohio’s Rider PSR. Rider PSR does not, and cannot, set or modify a wholesale rate and, thus, does not contravene the “division of authority between state and federal regulators.”¹⁷ Furthermore, the Court specifically limited the holding in *Talen* to the specific facts in front of them:

We reject Maryland’s program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ . . .¹⁸

¹⁶ AEP OVEC Order, at pg. 82.

¹⁷ *Talen*, at pg. 1297.

¹⁸ *Talen*, at pg. 1299.

Rider PSR is just such a measure: a measure employed by a state that does not impact any interstate wholesale rates established by FERC.

III. Other Statutory Provisions Do Not Bar Rider PSR.

IEU argues that Rider PSR would constitute an anticompetitive subsidy and would allow the collection of generation costs through distribution rates. Rider PSR does not reflect an improper anticompetitive subsidy. Indeed, as the Commission has already found, Rider PSR “would not permit the recovery of generation-related cost through distribution or transmission rates... . [The] PSR, whether a charge or a credit, would be considered a generation rate.”¹⁹ As the Commission further found in approving Rider PSR, it is consistent with state policy.²⁰

WHEREFORE, Duke Energy Ohio respectfully requests that the Commission deny the Movants’ motion to dismiss.

¹⁹ ESP III Order, at pp. 47-48.

²⁰ *Id.*, at pg. 48.

Respectfully submitted,
DUKE ENERGY OHIO, INC.

/s/ Jeanne W. Kingery
Amy B. Spiller (0047277) (Counsel of Record)
Deputy General Counsel
Jeanne W. Kingery (0012172)
Associate General Counsel
Elizabeth H. Watts (0031092)
Associate General Counsel
Rocco D'Ascenzo (0077651)
Associate General Counsel
139 E. Fourth Street
1303-Main
Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)
Amy.Spiller@duke-energy.com (e-mail)
Attorneys for Applicant

CERTIFICATE OF SERVICE

The undersigned certifies that notification of the filing of the foregoing document Duke Energy Ohio's Memorandum Contra Motion to Dismiss is being made upon the persons listed below via electronic mail, this 18th day of October, 2017.

/s/ Jeanne W. Kingery
Jeanne W. Kingery

Steven Beeler
Attorney General's Office
Public Utilities Section
30 East Broad St., 16th Floor
Columbus, Ohio 43215
Steven.beeler@ohioattorneygeneral.gov

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

Counsel for Staff of the Commission

Counsel for Ohio Energy Group

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

**Counsel for Industrial Energy Users-
Ohio**

William J. Michael (Counsel of Record)
Kevin Moore
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
William.michael@occ.ohio.gov
Kevin.moore@occ.ohio.gov

**Counsel for the Ohio Consumers'
Counsel**

Kimberly W. Bojko (Counsel of Record)
James D. Perko, Jr.
Carpenter Lipps & Leland LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Bojko@carpenterlipps.com
Perko@carpenterlipps.com

Counsel for the OMAEG

Colleen Mooney
Ohio Partners for Affordable Energy
1431 Mulford Road
Columbus, Ohio 43212
cmooney@ohiopartners.org

**Counsel for Ohio Partners for
Affordable Energy**

Madeline Fleisher
Environmental Law & Policy Center
21 W. Broad St., 8th Floor
Columbus, Ohio 43215
mfleisher@elpc.org

**Counsel for the Environmental Law &
Policy Center**

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

Counsel for The Kroger Co.

Carrie M. Harris
Spilman Thomas & Battle, PLLC
110 Oakwood Drive, Suite 500
Winston-Salem, North Carolina 27103
charris@spilmanlaw.com

Derrick Price Williamson
Spilman Thomas & Battle, PLLC
1100 Bent Creek Blvd., Suite 101
Mechanicsburg, PA 17050
dwilliamson@spilmanlaw.com

Lara R. Brandfass
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East
P.O. Box 273
Charleston, WV 25321-0273
lbrandfass@spilmanlaw.com
**Counsel for Wal-Mart Stores East, LP
and Sam's East, Inc.**

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 3rd Floor
Columbus, OH 43215-3620
rick.sites@ohiohospitals.org

Dylan F. Borchers
Devin D. Parram
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
dborchers@bricker.com
dparram@bricker.com

**Counsel for the Ohio Hospital
Association**

Elyse Akhbari
Counsel of Record
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215
eakhbari@bricker.com

**Counsel for People Working
Cooperatively, Inc.**

Trent Dougherty
Counsel of Record
Miranda Leppla
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212-3449
tdougherty@theOEC.org
mleppa@theOEC.org

**Counsel for the Ohio Environmental
Council and Environmental Defense
Fund**

Joseph Olikier
Counsel of Record
Michael Nugent
IGS Energy
6100 Emerald Parkway
Dublin, Ohio 43016
joliker@igsenergy.com
mnugent@igsenergy.com

Counsel for IGS Energy

Mark A. Whitt
Andrew J. Campbell
Rebekah J. Glover
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

**Counsel for Retail Energy Supply
Association (RESA)**

Steven D. Lesser
James F. Lang
N. Trevor Alexander
Mark T. Keaney
CALFEE, HALTER & GRISWOLD
LLP
41 S. High St.
1200 Huntington Center
Columbus, Ohio 43215
Telephone: (614) 621-1500
slesser@calfee.com
jlang@calfee.com
talexander@calfee.com
mkeaney@calfee.com

Counsel for the City of Cincinnati

Michael D. Dortch (Counsel of Record)
Richard R. Parsons
Justin M. Dortch
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, Ohio 43215
mdortch@kravitzllc.com

**Counsel for Calpine Energy Solutions,
LLC**

Mark A. Whitt
Andrew J. Campbell
Rebekah J. Glover
WHITT STURTEVANT LLP
The KeyBank Building, Suite 1590
88 East Broad Street
Columbus, Ohio 43215
whitt@whitt-sturtevant.com
campbell@whitt-sturtevant.com
glover@whitt-sturtevant.com

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

Michael J. Settineri
Special Assistant Attorney General
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
mjsettineri@vorys.com

**Counsel for the University of
Cincinnati and Miami University**

Michael J. Settineri, Counsel of Record
Gretchen L. Petrucci
Vorys, Sater, Seymour and Pease LLP
52 E. 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**