BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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

APPLICATION FOR REHEARING OF DUKE ENERGY OHIO, INC.

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) seeks rehearing of the Opinion and Order (Order) issued by the Public Utilities Commission of Ohio (Commission) on April 10, 2019, on the following grounds:

1. The Commission erred in finding that it had jurisdiction over the events and relationships relevant to this complaint.

2. The Commission erred in finding that the exculpatory clause was invalid.

3. The Commission erred in finding that Duke Energy Ohio failed to provide adequate service.

4. The Commission erred in reaching a conclusion that could ultimately require Duke Energy Ohio to pay amounts to Direct Energy, even though Duke Energy Ohio was not enriched by the events, particularly in light of Direct Energy's failure to monitor its own customers' billing.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) seeks rehearing of the Opinion and Order (Order) issued by the Public Utilities Commission of Ohio (Commission) on April 10, 2019.

I. The Commission Erred in Finding that it Had Jurisdiction over the Events and Relationships Relevant to this Complaint.

The Commission has gone astray of its statutory mandate and has come to a conclusion that has the potential to wreak havoc with what is exclusively a wholesale market process and procedure. The facts giving rise to the dispute in this case related to settlements between Direct Energy Business Services, LLC, (Direct Energy) and PJM Interconnection L.L.C. (PJM). That relationship is governed by tariffs and agreements approved by the Federal Energy Regulatory Commission (FERC), including the Open Access Transmission Tariff (OATT), the Operating Agreement (OA), and the Reliability Assurance Agreement (RAA).

All entities that are members of and participate in PJM are subject to the OATT, the OA, and the RAA. However, entities within PJM have different roles:

- Transmission owners are those PJM members that own or lease transmission facilities. Duke Energy Ohio is a transmission owner in PJM.
- Transmission customers receive transmission services within PJM.
- Load serving entities, or LSEs, serve end-use customers in a PJM Control Area and have authority to sell energy to end-users in a PJM Control Area. Direct Energy is both a transmission customer and an LSE in the Duke Energy Ohio load zone within PJM.

The OATT sets forth the rates, terms, and conditions that allow transmission customers to use the transmission facilities owned by a transmission owner and operated by PJM to deliver power to end-users.[1] PJM, through its tariffs and agreements, provides certain mechanisms for

[1] Duke Energy Ohio Exhibit 8, Direct Testimony of Timothy Abbott, pg. 6.

disputed settlements that fall within identified time parameters. PJM bills its transmission customers and LSEs consistent with provisions of its OATT and OA. As summarized by PJM, "[b]illing and payment are coordinated processes under the terms of the [OA] of PJM and the PJM [OATT]."[2] The fact that such mechanisms exist at all is dispositive of the fact that errors can occur in the process.

As the facts were discussed at length in initial and reply briefs, as well as in the Commission's Order in this case, Duke Energy Ohio will not restate them for purposes of seeking rehearing. Indeed, the facts, though important in understanding the issue, are not as important as the assigned roles that evolve from the facts, and the responsibilities that flow from those roles.

The resettlement process that provides fundamental rules for billing between transmission owners, transmission customers, and LSEs in PJM was described in detail in the Company's initial brief.[3] That process comprises two parts:

- The first part is known as Settlement A and is based on an estimate of usage. The estimate is prepared by the Company on a daily basis, using weather and load from a prior period. PJM then sends weekly invoices to LSEs, based on that estimate.[4]
- Settlement B, the second part of the process, reconciles the weekly invoices on the basis of final data, comprising actual metered usage.[5]

PJM also allows for an informal resettlement process, outside of the Settlement A and Settlement B. This informal process, known as Resettlement C, is entirely voluntary. Duke Energy Ohio, therefore, is not required to initiate a Resettlement C and cannot compel participation in such a resettlement by any LSE.

[2] Duke Energy Ohio Exhibit 5, PJM Manual 29, Billing, pg. 4 (January 1, 2012).
[3] *See* Merit Brief of Duke Energy Ohio, pp. 2-4.
[4] Duke Energy Ohio Exhibit 4, PJM Operating Agreement, OA Schedule 1, Section 3.5.
[5] Duke Energy Ohio Exhibit 4, PJM Operating Agreement, OA Schedule 1, Section 3.6.

There is no question that the Commission's jurisdiction goes no farther than is specifically granted to it by Ohio law.[6] And, as the Company stated on brief, it is also undeniable that Direct Energy's complaint is based solely on the PJM settlement process and its efforts to recover overbillings thereunder.[7] Unfortunately for Direct Energy, nothing in Ohio law gives the Commission the power to order resettlement under PJM's controlling documents. Furthermore, federal law clearly states that the Federal Energy Regulatory Commission has exclusive jurisdiction over matters related to the transmission of electricity in interstate commerce.[8]

The Commission should not have taken jurisdiction over Direct Energy's complaint in this case. The subject matter thereof is clearly outside of the Commission's well-defined authority. The Order should therefore be reconsidered and the complaint should be dismissed.

II. The Commission Erred in Finding that the Exculpatory Clause in the Supplier Tariff Was Contrary to Public Policy and Invalid.

As the Commission correctly noted, the Company's Supplier Tariff includes a provision requiring Direct Energy to hold the Company harmless for actions taken while it serves as a Meter Data Management Agent.[9] The Commission invalidated that provision on the basis of a rule prohibiting the use of exculpatory clauses, where those clauses would limit a utility's liability resulting from **negligence** in the course of providing a **regulated** service.[10]

The Commission's invalidation of the tariff provision is in error for two reasons. First, nothing in the exculpatory clause addresses negligent actions. The tariff provision merely requires the Company to be held harmless in its provision of meter data management services to a competitive provider, regardless of what those actions might be. It is important to recognize that

[6] *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 99 (1973).
[7] Complaint, Request for Relief ¶A (asking for an order directing the Company to again initiate Resettlement C and directing all impacted CRES providers to consent to that resettlement).
[8] 16 U.S.C. 824.
[9] Duke Energy Ohio Supplier Tariff, P.U.C.O. Electric No. 20, Section 14.1.
[10] O.A.C. 4901:1-10-02(G).

the tariff also specifically states that the use of estimates might be necessary and that it is the supplier's responsibility to understand the process.

Nor did the Commission attempt to determine, in its Order, whether Duke Energy Ohio was "negligent" in the performance of its meter data management services. What the Commission did conclude was that the Company provided "inadequate" service. This is not equivalent to negligence. And, even though the Commission used the term "negligence" in its rule, there is absolutely nothing in Title 49 of the Revised Code that would give the Commission the jurisdiction or authority to determine the presence of negligence in any set of facts. Therefore, the tariff provision cannot be invalidated as eliminating liability for negligence.

The second vital criterion in the rule is that the invalidation must relate to elimination of liability relating to the provision of a regulated service. Performing meter data management services for purposes of PJM billings is not a service that is regulated by the state of Ohio. This is not even a service that is recognized or addressed by Title 49. Indeed, the Company's Supplier Tariff defines a "Meter Data Management Agent" as "the party designated by the [Transmission Scheduling Agent] to provide hourly metered load data to [PJM]."[11] The services provided by the Company to Direct Energy for the management of meter data to be sent to PJM is not a service that is cognizable under Ohio law or regulated under the jurisdiction of the Commission. Therefore, the tariff provision cannot be invalidated as eliminating liability related to the performance of regulated services.

The Commission's conclusion that the exculpatory clause must be or can be invalidated should be reversed.

III. <u>The Commission Erred in Finding that Duke Energy Ohio Failed To Provide Adequate Service</u>.

[11] Duke Energy Ohio Supplier Tariff, P.U.C.O. Electric No. 20, Sheet No. 20.3.

Although the Commission did not specifically address the basic jurisdictional issue discussed above, it did purport to take jurisdiction. And, although the Commission was incorrect in its application of its rule to invalidate the exculpatory clause, it nevertheless did do so. As such, the Company will address the Commission's ultimate conclusion that Duke Energy Ohio failed to provide adequate service, even though the Commission should never have reached this issue.

The Commission itself has created rules that govern relationships between the Company and its distribution customers with respect to electric distribution service billing disputes.[12] When the Company engages with customers to adjust their bills, this is not regarded as inadequate service. Although Ohio law requires that all public utilities provide "adequate service," that term is never defined, either by statute or by administrative rule. "'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."[13] 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.

Furthermore, it is critical to focus on the who the parties actually are in this proceeding. Duke Energy Ohio is a regulated public utility because it falls within the definition of an "electric light company." That is, it is a public utility when it is "engaged in the business of supplying electricity . . . to consumers within this state."[14] When Duke Energy Ohio is providing meter data management services, it is not supplying electricity. Rather, the Company is acting as the billing agent of Direct Energy to provide information to PJM. And Direct Energy can in no way be

[12] *See* 4901:1-10-22, O.A.C.
[13] *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 14 Ohio St.3d 49, 50, 471 N.E.2d 475, 477 (1984).
[14] R.C. 4905.03(A)(4).

deemed a consumer of electricity in this transaction. Therefore, R.C. 4905.22 and .26 neither mandate the provision of reasonable and adequate service to Direct Energy in this regard, nor do they allow Direct Energy to complain, as if it were a customer.[15]

IV. The Commission erred in reaching a conclusion that could ultimately require Duke Energy Ohio to pay monetary damages to Direct Energy, even though Duke Energy Ohio was not enriched by the events, particularly in light of Direct Energy's failure to monitor its own customers' billing.

After erroneously concluding that Duke Energy Ohio failed to comply with R.C.4905.22 and 4905.26, the Commission denied Direct Energy's request for monetary damages stating that it did not have authority to award monetary relief. 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. Duke Energy Ohio merely provided data to PJM. Data, which Direct Energy had the ability and opportunity to review and verify and neglected to do so. PJM issued the bills to the LSEs, not Duke Energy Ohio. To the extent Direct Energy was over billed by PJM during the period at issue, that means that the other LSEs are underbilled. Duke Energy Ohio as the transmission owner does not bill or process payments between the LSEs and PJM and did not benefit. All other LSEs, however, did. But the Commission's decision seems to overlook this fact, as well as the inequitable result of a finding of inadequate service as it relates to R.C. 4905.61. To the extent that Direct Energy pursues enforcement of this section in civil court, the outcome would result in significant injustice to the Company. As the Company pointed out in its initial brief, when Direct Energy established its subaccount with PJM, it voluntarily elected a "buyer unilateral" confirmation, meaning that it waived the right to review data before it was submitted to PJM and

[15] *Accord, In the Matter of the Complaint of S.G. Foods, Inc., et al. v. FirstEnergy Corp., et al.*, Case No. 04-28-EL-CSS, *et al.*, Entry, Finding 48, *et seq.* (March 7, 2006).

assumed the risk associated with its election.[16] There was nothing that prevented Direct Energy from comparing load dated posted by PJM on its electronic tools to the historical customer usage data in Direct Energy's possession.[17] Thus Direct Energy comes to this case with "unclean hands." The equitable doctrine of unclean hands prescribes that when a party takes the initiative to set in motion the judicial machinery to obtain some remedy, but has violated good faith by some prior related conduct, the court will deny the remedy.[18] The maxim that one seeking equity must come to the court with clean hands denies all relieve to one, no matter how well-founded the claim may otherwise be, if, in granting the relief that the plaintiff seeks, the court would be required, by implication even, to affirm the validity of an unlawful agreement or give approval to inequitable conduct.[19] Here, Direct Energy knowingly waived its rights to oversee its own customers' billing, and now seeks to hold Duke Energy Ohio responsible. In addition to all the other reasons why the Commission should not have found Duke Energy Ohio to have violated its tariff, the outcome in this instance works an extreme inequity.

Moreover, allowing Direct Energy to have the potential to collect treble damages from Duke Energy Ohio, when the Company was merely acting as the meter data management agent for Direct Energy and following the processes prescribed by PJM, is particularly unfair. The monetary damages that Direct Energy seeks are in the hands of other energy suppliers that were participating in the PJM settlement process during the same settlement period. None of those dollars are in Duke Energy Ohio's pockets. The result of the Commission's decision is to levy an

[16] Merit Brief, pg. 5.
[17] *Id*.
[18] *See, e.g., Wooster v. Entertainment One, Inc.*, 158 Ohio App.3d 161, 182-183, 814 N.E.2d 521 (9th Dist., Wayne County, 2004); *Trott v. Trott*, 2002-Ohio-1077 (10th Dist., Franklin County); *Oliver v. Natl. Collegiate Athletic Assn.*, 155 Ohio Misc.2d 8, 2008-Ohio-7143, 920 N.E.2d 196 (Erie County C.P., 2008).
[19] *Bradford v. Reid*, 126 Ohio App.3d 448, 710 N.E.2d 761 (1st Dist., Hamilton County, 1998).

extreme penalty on the Company for a claimed infraction that relates to a process that doesn't even fall within the Commission's jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing of Duke Energy Ohio, Inc., was served on the following parties this 10th day of May, 2019, by hand-delivery or electronic delivery.

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