

**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

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**DUKE ENERGY OHIO, INC.’S MEMORANDUM CONTRA  
APPLICATION FOR REHEARING**

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**I. INTRODUCTION**

The statutory representative of residential customers in southwestern Ohio has sought rehearing in these proceedings – a rehearing that could, if granted, leave those customers without electric distribution service. The application for rehearing must be denied.

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) provides a standard service offer of essential electric service, including a firm supply of electric generation service, under the terms of its third electric security plan (ESP3), which was approved by the Public Utilities Commission of Ohio (Commission) in the above-captioned proceedings. ESP3, as approved, was set to expire May 31, 2018. However, because Duke Energy Ohio’s next ESP (ESP4) is still under consideration by the Commission, the Commission granted the Company’s motion to continue ESP3 during the interim period.

The Office of the Ohio Consumers' Counsel (OCC) objects and, on June 29, 2018, filed an application for rehearing (AFR) of that order. Duke Energy Ohio is filing its memorandum contra that AFR, as permitted by Ohio Administrative Code (O.A.C.) 4901-1-35(B).

Rehearing should be denied.

## **II. ARGUMENT**

### **A. The Extension of the Term of ESP3 is Not Unjust, Unreasonable, or Unlawful.**

OCC first claims that the Commission's decision to extend the term of ESP3 was unjust, unreasonable, and unlawful, in that there is no statutory provision allowing an extension under the current circumstances. OCC is correct that Ohio law is silent with regard to this specific situation. It does allow for continuation of an existing ESP in other circumstances that are comparable to this one in that they allow for continuation of an ESP in order to avoid having no way for the utility to be compensated for its services to customers.

It is important to recognize that the Ohio General Assembly did not intend to allow such a vacuum to occur. Rather, the legislature included a deadline in the law, requiring an application for an ESP to be acted on within 275 days.<sup>1</sup> In light of that provision, the legislators knew that a utility would be able to avoid that vacuum by simply filing an application for the next ESP by no later than 275 days before expiration of the current one. Here, though, the Commission was not able to meet the 275 day deadline, as parties were then still engaged in settlement negotiations. It was therefore reasonable for the Commission to provide a solution to the problem by extending ESP3, much like the legislature authorized in other, similar circumstances.

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<sup>1</sup> R.C. 4928.143(C)(1).

The Commission also pointed to a similar action it took in a prior circumstance relating to Dayton Power & Light Company (DP&L). OCC makes much of the factual differences between the current situation and that faced by DP&L, but the underlying rationale is the same: The Commission extended the existing ESP to avoid having no approved standard service offer, just as the legislature contemplated with regard to other factual situations.

Finally, the Company must also respond to OCC's suggestion that the Commission's delay in responding substantively to the initial applications for rehearing in these proceedings was in part responsible for the current dilemma. It was not. The initial applications for rehearing had nothing to do with the termination date of ESP3 or the length of the negotiations concerning ESP4.

The Commission's action in extending the termination date of ESP3 was entirely reasonable and rehearing on this ground should be denied.

**B. The Extension of ESP3 Is Not Unlawful and Unreasonable due to OCC's Claim that the Extension Will Cause Irreparable Harm.**

OCC seems to assert, for its second ground for rehearing, that the extension of ESP3 will cause irreparable harm to customers and, therefore, is unlawful and unreasonable. OCC goes to great length to explain the nature of irreparable harm, as that term is applied by courts of law and equity. It argues that the application of the filed rate doctrine results in irreparable harm, because it is difficult or impossible to obtain a refund.

Although not disputing that the filed rate doctrine would be applicable if, ultimately, it were decided that ESP3 should not have been extended, the Company does not agree that the Commission's extension would have constituted an irreparable harm. Nor does the Company agree that an order by the Commission automatically becomes unlawful and unreasonable just because there is no adequate remedy at law. And, most importantly, the Commission, as a

creature of statute, does not have the equitable powers that would be used to address a harm that is irreparable at law.

At the conclusion of this argument, OCC suggests that the Commission avoid the “irreparable harm” by directing that the Company’s riders under ESP3 be collected subject to refund. OCC does not even make an effort, however, to identify any provision under which the Commission might make such a ruling.

OCC’s second ground for rehearing must be denied.

**C. The Continuation of Rider DCI Is Not Subject to Initial Approval Requirements under Ohio Law.**

As the Commission is fully aware, a distribution-related rider that is included as part of an application for approval of an ESP is subject to very specific requirements, under R.C. 4928.143(B)(2)(h). Specifically:

As part of its determination as to whether to allow in an electric distribution utility's electric security plan inclusion of any provision described in division (B)(2)(h) of this section, the commission shall examine the reliability of the electric distribution utility's distribution system and ensure that customers' and the electric distribution utility's expectations are aligned and that the electric distribution utility is placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system.<sup>2</sup>

As stated in the statute, this is a consideration that the Commission must make in the course of approving an ESP. That is assuredly not what the Commission did in its Entry allowing ESP3 to continue until ESP4 is approved and operative.

OCC argues against Rider DCI based on its view of the Company’s current service reliability. OCC’s argument in this regard must be seen as the logical fallacy that it is. In OCC’s view, apparently, the Commission can consider facts that have not yet occurred when it decides whether to approve a distribution-related rider in an ESP. Whether or not a distribution-related

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<sup>2</sup> R.C. 4928.143(B)(2)(h).

rider turns out to have been a benefit to reliability is not a fact that could ever be in existence when the Commission is considering approval.

OCC's third ground for rehearing must be denied.

### **III. CONCLUSION**

For the reasons set forth above, Duke Energy Ohio respectfully requests that the Commission deny rehearing.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum Contra was served on the following persons, this 9<sup>th</sup> day of July, 2018, by regular U.S. Mail, overnight delivery, or electronic delivery.

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