

FILE

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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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PUCO

In the Matter of the Application of Duke)
Energy Ohio for Submission of Rider) Case No. 08-184-EL-ATA
BPS, Market Price Backup Power)
Service Rider, PUCO No. 19.)

**MOTION TO INTERVENE
AND
MOTION TO AMEND APPLICATION
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

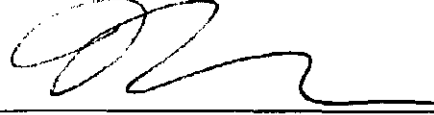
The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of all 607,000 residential electric utility consumers of Duke Energy Ohio ("Duke"), moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to intervene in Duke's above-captioned application, represent residential consumers and further the public interest in the implementation of market-based standby service.¹ Duke's proposed standby rate ("Tariff" or "Tariffs") should be reasonable to allow for net metering and connecting cogeneration and distributed generation to the power grid, as these generation alternatives can provide system benefits for all customers. Duke's Application should also be amended to comply with the energy policy determinations of this Commission. OCC's Motions should be granted as explained in the attached Memorandum in Support.

¹ Revised Code 4903.221 and Ohio Adm. Code 4901-1-11.

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Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On February 27, 2008, Duke filed this application requesting the PUCO approve a new market-based standby service Tariff and proposed that the effective date of the Tariff be the next morning (less than 7 hours after the filing).² This filing follows an extensive investigation by the PUCO as required by the Energy Policy Act of 2005 ("EPAct 2005"), in Case No. 05-1500 EL-COI³ that resulted in the determination of energy policy for Ohio consistent with national energy policy.⁴ In implementing Ohio energy policy, the PUCO required all utilities to file market-based standby rates.

Cogenerators need standby service for planned or unplanned outages. Standby rates have a direct effect upon whether cogeneration is economic and thereby can discourage or encourage distributed generation. Distributed generation benefits all Ohioans, including residential customers, through enhancing the efficiency and reliability

² Tariff P.U.C.O. Electric No. 19, Table of Contents and Page 1 - 3.

³ *In the Matter of the Commission's Response To Provisions of the Federal Energy Policy Act of 2005 Regarding Net Metering, Smart Metering and Demand Response, Cogeneration and Power Production Purchase and Sale Requirements, and Interconnection*, Case No. 05-1500-EL-COI ("05-1500 Case").

⁴ Energy Policy Act of 2005.

of the electric system. OCC is experienced in matters concerning market-based standby rates.

II. INTERVENTION

OCC moves to intervene under its legislative authority to represent residential utility consumers in Ohio.⁵ In addition, R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding may seek intervention in that proceeding. The interests of Ohio’s residential consumers may be “adversely affected” by this case, especially if the consumers are unrepresented in a proceeding where the PUCO approves the implementation of the energy policies in EPAct 2005 via approving the new market-based standby rates Duke offers customers. Thus, the element of the intervention standard in R.C. 4903.221, regarding whether a person is “adversely affected,” is satisfied.

R.C. 4903.221(B) requires the Commission to consider the following criteria in ruling on motions to intervene:

- (1) The nature and extent of the prospective intervenor’s interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of OCC’s interest lie in ensuring that the policies in EPAct 2005 are properly implemented by Duke and that residential customers do not pay

⁵ R.C. Chapter 4911.

unjust and unreasonable charges. Nor should residential customers pay more than a reasonable and just share of any standby rate costs. Customers should have reasonable and lawful standards and conditions for standby service. This interest is different than that of any other party and especially different than that of the utility that advocates for the financial interest of its shareholders.

Second, OCC will advocate a legal position that the Tariffs should be limited to assessing costs that are no more than what is reasonable and permissible under Ohio law and that the standards for standby service are reasonable, lawful and adequate. OCC's position is therefore directly related to the merits of this case pending before the PUCO.

Third, OCC's intervention will not unduly prolong or delay the proceeding. OCC has longstanding expertise and experience in PUCO proceedings and standby rate matters, and will contribute to the process of the case. As previously stated OCC was a party to and actively participated in the predecessor case, 05-1500, as well as the PUCO workshops regarding standby, net metering, and interconnection service tariff modifications.

Fourth, OCC's intervention will significantly contribute to the full development and equitable resolution of the factual issues. OCC will obtain and develop information that the PUCO should consider for equitably and lawfully deciding the case in the public interest.

OCC also satisfies the intervention criteria in the Ohio Adm. Code (which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code). To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the residential utility consumer advocate, OCC has a very real and

substantial interest in this case where Duke proposes to implement the policies of EPAct 2005 and have the PUCO approve new market-based standby rates that relate to expenses borne by customers, including residential customers.

In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC already has addressed and that OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the “extent to which the person’s interest is represented by existing parties.” While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion because it has been uniquely designated as the state representative of the interests of Ohio’s residential utility consumers. That interest is different from, and not represented by, any other entity in Ohio.

Moreover, the Supreme Court of Ohio recently confirmed OCC’s right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying OCC’s intervention and that OCC should have been granted intervention.⁶

OCC meets the criteria set forth in R.C. 4903.221 and Ohio Adm. Code 4901-1-11. Additionally, granting OCC intervention is consistent with the intervention standards explained by the Supreme Court of Ohio. On behalf of all the Duke’s residential consumers, the Commission should grant OCC’s Motion to Intervene.

⁶ *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶18-20.

III. THE FILING MUST BE AMENDED

As stated, Ohio Adm. Code 4901-01-06 provides that any party for good cause can move to amend any application that violates the PUCO's orders, etc. By this filing, OCC moves that the PUCO require Duke to amend its Tariffs by conforming and clarifying them consistent with the PUCO's energy policies announced in the Order⁷ of the 05-1500 Case.

OCC has identified several initial problems with Tariffs that require amendment before becoming effective. OCC expects that the issues it raises, below, and other issues will be addressed at the workshops announced by Commission Staff. And the Commission has not required intervenors, like OCC, to fully develop their cases prior to intervention; the statutory standards for intervention do not require it:

...we do not require such specification at this early stage in the proceeding. Our rules clarify that the "legal position" of a movant is its showing of a real and substantial interest in the subject at hand, where the proceeding may impair or impede his ability to protect that interest, unless the interest is already represented by other parties.⁸

Nevertheless, the issues OCC has identified regarding Duke's Tariffs--and that should be addressed by an amendment of the Application--include the following:

- It is unreasonable that Tariffs require a monthly \$75 administrative fee;⁹

⁷ *In the Matter of the Commission's Response To Provisions of the Federal Energy Policy Act of 2005 Regarding Net Metering, Smart Metering and Demand Response, Cogeneration and Power Production Purchase and Sale Requirements, and Interconnection*, Case No. 05-1500-EL-COI, Order (March 28, 2007).

⁸ *In re east Ohio Gas Company*, Case No. 06-1452-GA-WVR, Entry dated May 24, 2007.

⁹ Tariff P.U.C.O. Electric No. 19 Page 1 of 3.

- It is unreasonable that the market-based rate appears to include an adjustment for distribution losses;¹⁰
- It is unreasonable that the “Transmission Cost Recovery Reservation Charge” is not explained;¹¹
- It is unreasonable that the reference to Interconnection standards should be to Duke’s Interconnection Tariff and not to an “Interconnection Guideline;”¹² and
- It is unreasonable that the customer should be able to change contract demand when its circumstances change in addition to once a year.¹³

Finally, it is extremely unreasonable that Duke has included language in the Tariff that would authorize it to deviate from the Tariff without explanation of the circumstances that would warrant such deviation when this would completely abrogate the terms of the tariff:

The Company may enter into special agreements with customers which may deviate from the provisions of this rider. Such agreements shall address those significant characteristics of service and cost which would influence the need for such an agreement.¹⁴

This provision of the Duke Tariff has no basis in the energy policy determinations of the Commission in the 05-1500 case.

In the 05-1500 Case Order, where the Commission was considering standby rates, it stated: “We believe that any procedures regarding the market based option should be clearly and specifically defined in the utilities’ stand-by tariffs. Finally, any “terms”

¹⁰ Id at Page 2 of 3.

¹¹ Id.

¹² Id at Page 3 of 3.

¹³ Id.

¹⁴ Id.

pursuant to this recommendation should be expressly defined in the tariffs to avoid confusion.”¹⁵ (Emphasis added). Duke’s Tariffs do not satisfy these requirements and provide no information whatsoever to customers of how to qualify for a “special agreement.” Special agreements that result in subsidies - especially subsidies paid by residential consumers - may adversely affect residential consumers. Duke’s Tariff is so vague in this regard that most any customer could be awarded a “special agreement” for about any reason, at Duke’s discretion. The reconciliation of this Tariff language with the Commission’s stated requirements in the 05-1500 Order requiring the Tariff be specific must be rectified. Duke certainly has not met its burden of proof, under R.C. 4909.18, regarding this provision, even if we were to assume the application of such a policy was consistent with the 05-1500 Case – which it is not. At a time when the transparency of the PUCO’s regulatory process is being recognized as critically important, Duke seeks an inappropriate closed-door process that would exclude other parties’ participation in that process and allow for off-tariff special agreements.

Duke must be required to amend its filing. In the alternative and if Duke fails to comply with the PUCO’s requirements for market-based standby rates, the PUCO should convene hearings to take evidence from Duke and from others, on whether the Tariffs are reasonable and lawful.

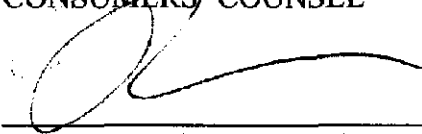
¹⁵ *In the Matter of the Commission’s Response To Provisions of the Federal Energy Policy Act of 2005 Regarding Net Metering, Smart Metering and Demand Response, Cogeneration and Power Production Purchase and Sale Requirements, and Interconnection*, Case No. 05-1500-EL-COI, March 28, 2007 Order at 11.

IV. CONCLUSION

For the reasons stated above, the Commission should grant OCC's Motion to Intervene, on behalf of all residential consumers in Duke's service area. The PUCO should also grant OCC's Motion to Amend the Application so that the proposed Tariffs are compliant with the PUCO's requirements for standby service and serve the purposes of a transparent regulatory process that is fairly applied to all affected by the Tariffs. If Duke does not become compliant with PUCO standards for Tariffs, then the PUCO should convene hearings to resolve the matter in the public interest.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

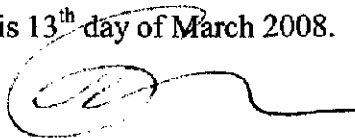


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Office of the Ohio Consumers' Counsel's *Motion to Intervene and Motion to Amend Application* was provided to the persons listed below via first class U.S. Mail, postage prepaid, this 13th day of March 2008.



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