BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan.	)))	Case No. 08-920-EL-SSO
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Accounting Methods.	)))	Case No. 08-921-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Certificate of Public Convenience and Necessity to Establish an Unavoidable Capacity Charge(s).	)))))	Case No. 08-922-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend its Tariff.	)))	Case No. 08-923-EL-ATA

ENTRY ON REHEARING

The Commission finds:

(1) On July 31, 2008, Duke Energy Ohio, Inc., (Duke) filed an application for approval of a standard service offer (SSO), pursuant to Section 4928.141, Revised Code.

(2) On December 17, 2008, the Commission issued an opinion and order approving Duke's SSO by adopting, subject to two modifications, a stipulation and recommendation filed in these cases.

(3) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission, within 30 days of the entry of the order upon the Commission's journal.

(4) On January 16, 2009, the Ohio Environmental Council (OEC) and, jointly, the Ohio Consumers' Counsel (OCC) and the Sierra Club (Sierra) filed applications for rehearing concerning matters determined by the Commission in its opinion and order. On January

26, 2008, Duke and Industrial Energy Users – Ohio (IEU) filed memoranda contra the applications for rehearing.

(5) The OEC raises one ground for error:

> The Commission's rejection of the provision of the stipulation limiting the availability of the exemption from Rider DR-SAW to mercantile customers that have a minimum monthly demand of 3 MW at a single site or aggregated at multiple sites within [Duke's] service territory is based on erroneous interpretation of Section 4928.66(A)(2)(c), Revised Code, is inconsistent with the underlying scheme, and is contrary to sound public policy.

(6) OEC makes two arguments to support its assignment of error. We will discuss each of these arguments, together with the points raised by IEU in its memorandum contra, filed on January 26, 2009.

(7) First, OEC asserts that the Commission's rejection of the three-MW threshold was based on an erroneous interpretation of the controlling statutory provision, Section 4928.66(A)(2)(c), Revised Code.[1] OEC focuses, as it did in its post-hearing briefs, on the word "may," which, it maintains, allows the Commission latitude in granting exemptions. OEC supports this argument on three bases. It claims that the Commission based its conclusion on nondiscrimination requirements in Section 4928.02(A), Revised Code, and argues the three-MW threshold would not treat similarly situated customers differently. OEC submits that this threshold is no different than the benchmark parity requirement, approved by the Commission, that would require exempted customers to be in a position to commit demand reduction in an amount sufficient to meet the statutory benchmark.

(8) IEU responds to OEC's arguments, first pointing out that the Commission did not base its decision on a discrimination theory but, rather, on statutory language and the legislature's intent. Regarding the word "may" in the statute, IEU restates its belief that the language does not give the Commission discretion to base the availability of an exemption on a different usage level than that approved in the definition of a mercantile customer. (OEC application for rehearing at 4-6.)

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1 OEC actually cited to subsection (a). However, as the language OEC quotes is found in subsection (c), we are assuming that (c) was its intended reference.

(9) The Commission does not find OEC's argument to be convincing. We disagree with OEC's contention that there is no difference, from a potential discrimination standpoint, between the benchmark parity requirement and the rejected three-MW threshold. The threshold would have limited which customers could even attempt to position themselves to obtain an exemption, a subject that was actually addressed by the legislature. On the other hand, the parity requirement focuses on what such a customer must do in order to earn the exemption, a subject that was not addressed by the legislature. While we do not doubt that we may consider reasonable requirements relating to the latter topic, we do not believe that we have the authority to modify the legislature's decision with regard to the composition of the group of customers who might seek exemption.

(10) Second, OEC interprets the statute's permissive language to mean that the Commission must determine whether the proposed exemption "reasonably encourages mercantile customers to commit their demand response capabilities for integration into the EDU's own program. If that is the case, then the Commission must approve the 'exemption' notwithstanding that not all mercantile customers are eligible for the 'exemption' under its stated eligibility criteria." (OEC application for rehearing at 6.) OEC goes on to suggest that the Commission should not have considered "whether exempting any particular mercantile customer would encourage that customer" but, rather, should have considered whether the exemption "would encourage those mercantile customers eligible for the 'exemption' to do so." (OEC application for rehearing at 6-7.)

(11) With regard to OEC's second point, we would initially note that our opinion and order was not based, as OEC contends, on an evaluation of the effect of the proposed exemption on individual customers. Based on the clear language of the statute, we considered the proposal's effect on "mercantile customers." By asking us to approve an exemption that is available to only certain mercantile customers, OEC is asking that we, de facto, modify the statute by inserting the word "some" into the statute. For its argument to have validity, the statute would have to read, "Any mechanism . . . may exempt *some* mercantile customers . . .." Section 4928.66(A)(2)(c), Revised Code (word added).

(12) Third, OEC points out that the onus is on Duke to achieve benchmark compliance and opines that the ability to exempt

customers is intended to assist the electric utility's ability to comply, not to provide rate relief. OEC suggests that the availability of the exemption is based on Duke's need for a particular customer's demand response capabilities. (OEC application for rehearing at 7-8.)

(13) A review of the parties' stipulation and the governing statute reveals no requirement that, in order to effectuate an exemption, there must be any showing of need on the part of Duke. Therefore, we disagree with OEC's conclusion.

(14) In OEC's second argument supporting its assignment of error, it submits that the Commission's rejection of the three-MW threshold is inconsistent with the underlying legislative scheme and is contrary to sound public policy. OEC points out that mercantile customers make decisions regarding reductions in demand for economic reasons and explains that additional incentives are only necessary if the internal economics of a project would not otherwise prompt the customer to proceed with the project. Noting that it is Duke that will be subject to penalties for failure to meet the benchmarks, OEC concludes that Duke's support of the three-MW threshold demonstrates its reasonableness. Finally, OEC is also concerned that the administrative burden resulting from rejection of the three-MW threshold requires reconsideration of the decision.

(15) IEU notes that OEC's arguments regarding compliance burdens resting with Duke, the exemption process, and administrative feasibility were already made on brief and should be rejected by the Commission once again.

(16) OEC's argument fails to convince us to alter our conclusions on this issue. Duke's support, or lack thereof, does not demonstrate to us that the stipulation's threshold must be reasonable or legal. Nowhere has the legislature placed that determination in the hands of the electric utility. With regard to the consequent administrative burden, we are aware of that burden and believe that, to the extent there is a burden, it will also fall on all applicants and will thereby play a part in naturally limiting the number of exemption applications that might otherwise be filed. In addition, we would note that the administrative burden was no doubt a factor considered by the legislature in its adoption of this statute but should not play a part in our determination of the legality of the stipulation.

(17) The Sierra Club Ohio Chapter (Sierra) and the Ohio Consumers' Counsel (OCC) jointly raise two grounds for error, each of which is divided into multiple arguments:

A. The Commission's opinion and order unreasonably and unlawfully denied residential aggregation customers the opportunity to fully bypass standby service when they purchase generation from an entity other than Duke.

1. The Commission erred in applying its standard for partial stipulations to the issue of the bypassability of [the capacity dedication rider (SRA-CD)] and [the system reliability charge rider (SRA-SRT)] by residential governmental aggregation customers when all parties to the Stipulation agreed to carve the issue out of the Stipulation for litigation.

2. The Commission's failure to allow residential aggregation customers to avoid rider SRA-CD is inconsistent with its treatment of residential aggregation customers and shopping customers in the [FirstEnergy Corp. (FirstEnergy)] service territory.

3. The Commission's Opinion and Order unreasonably discriminates against residential governmental aggregation customers in not permitting them to avoid the SRA-CD rider when they shop and requiring them to return to the same standard service offer price as nonresidential governmental aggregation customers who are permitted to avoid the SRA-CD rider when they shop.

4. The Commission's Opinion and Order unreasonably narrowly interprets SB 221's definition of "standby service" as it relates to shopping customers when the language of the statute specifically indentifies the definition.

B. The Commission erred when it failed to provide for standards, due process opportunities, and approval

criteria for exemptions from Rider SAW by mercantile customers.

1. The Commission failed to apply the three-pronged test to the stipulation, which called for limiting mercantile opt-out to 3 MW.

2. Neither the Commission's opinion and order nor the Commission's rules provide for due process for parties to contest the legitimacy of granting the exemptions for contributions to the energy efficiency rider.

3. Neither the Commission's opinion and order nor the commission's rules provide for standards that mercantile customers must meet to obtain an exemption from Rider SAW.

4. Neither the Commission's opinion and order nor the Commission rules clarify the consequences of an exempted mercantile customer's failure to meet the energy savings projected during its application for an exemption.

(18) In response to this application for rehearing, IEU and Duke both filed memoranda contra on January 26, 2009.

(19) The Commission would note, initially, that Sierra signed the stipulation, with no reservation of issues for subsequent litigation. Its request for rehearing on issues addressing the Commission's adoption of that stipulation is, therefore, denied.

(20) OCC and Sierra argue, first, that the Commission was in error in its application of the three-pronged test to OCC's issue regarding the ability of residential governmental aggregation customers to avoid payment of riders SRA-CD and SRA-SRT (aggregation issue). The focus of their concern is a single paragraph in the opinion and order in which we explained that, for two reasons, we would apply the test for stipulations, rather than requiring Duke to bear the burden of proof on the issue of whether the electric security plan (ESP) or a market rate would be more favorable. First, we noted that OCC was the only party not agreeing to the aggregation issue. Second, we pointed out that OCC had stipulated to the fact that the ESP, with the

aggregation issue undecided, was more favorable in the aggregate than a market rate offer.

OCC and Sierra claim that the stipulating parties all agreed to carve the aggregation issue out for litigation, "asking the Commission to decide the issue by employing the evidentiary standard set forth in the guiding statute." (OCC and Sierra application for rehearing at 3.) Further, OCC and Sierra suggest that "no party to the Stipulation explicitly took a position on residential governmental aggregation" and that "there is very little in the Stipulation on the subject." (OCC and Sierra application for rehearing at 3.) Therefore, they conclude that there is no partial stipulation on this issue. They also maintain that OCC was merely "the only party that took advantage of the opportunity to contest the residential governmental aggregation bypassability issue . . .." (OCC and Sierra application for rehearing at 4.) Finally, as further proof that there was no partial stipulation on this issue, they quote certain testimony of Duke's witness, Paul Smith, attempting to prove that several parties expressed no position on this point and that some believed that all generation-related charges should be avoidable. (OCC and Sierra application for rehearing at 2-4.)

OCC and Sierra also take issue with the Commission basing its application of the three-pronged test on the fact that OCC and Sierra both stipulated that the ESP is more favorable in the aggregate than a market rate. They submit that, because the Commission did not base its decision on proof by Duke that the ESP's resolution of the aggregation issue is more favorable than a market rate offer's resolution of that issue would be, after the Commission made its decision OCC could argue that the ESP, as a whole, is no longer more favorable in the aggregate than a market rate offer.

(21) Duke disagrees, arguing that the Commission correctly applied the three-pronged test to the aggregation issue. Duke points out that only OCC reserved the right to challenge the aggregation issue and that the stipulation included other relevant provisions, to which all of the parties agreed. With regard to the testimony of Mr. Smith, Duke asserts that OCC and Sierra mischaracterize his opinion by omitting a portion of his statement. Thus, Duke contends that a partial stipulation was before the Commission on the aggregation issue. (Duke memorandum contra at 5-7.)

Duke points out that the stipulation includes a specific provision reflecting an agreement that the ESP is more favorable in the aggregate than a market rate and notes that OCC could have chosen not to sign the stipulation, or to carve out that provision as well, if it had believed that the ESP was only more favorable if the Commission ruled in its favor on the aggregation issue. (Duke memorandum contra at 7.)

(22) We disagree with the arguments of OCC and Sierra on the aggregation issue. The entire argument on rehearing concerning the aggregation issue, while broken up into smaller points, appears to revolve around the ultimate question of whether the parties' agreement that the ESP is more favorable in the aggregate than a market rate offer related to the entire stipulation or only that part with which OCC agreed. OCC and Sierra, in the application for rehearing, profess to believe the latter.

We will begin by evaluating their starting point for this argument, that there was no stipulation at all as to the aggregation issue. OCC and Sierra assert that "no party to the stipulation explicitly took a position" on the aggregation issue. (OCC and Sierra application for rehearing at 3.) Duke controverts this assertion by noting that the provision in the stipulation (relating to nonresidential governmental aggregation customers) that was "carved out" by OCC was agreed to by all other stipulating parties and that the stipulation addressed residential governmental aggregation customers in paragraph 21. Further, Duke points out that Mr. Smith's testimony, although truncated by OCC and Sierra, actually supports the view that the stipulation encompassed residential governmental aggregations: "It was my intent simply to reference that for purposes of settlement, all parties are in agreement regarding the treatment of residential governmental aggregation customers as prescribed in the Stipulation except for OCC." (Duke memorandum contra at 6.) We agree with Duke on this point. The stipulation does address residential governmental aggregation customers, although not as OCC would prefer, and the other stipulating parties apparently did intend to have resolved those issues. Contrary to the point made by OCC and Sierra that the stipulation includes "very little" with regard to residential governmental aggregation customers, we also do not believe that the quantity of material on any particular issue is dispositive of whether the stipulation resolves it appropriately.

The next step in OCC and Sierra's argument is their assertion that the parties "ask[ed] the Commission to decide the issue by employing the evidentiary standard set forth in the guiding statute." While OCC did include this concept in its post-hearing brief (OCC brief at 3), the "parties" did not do so in the stipulation.

Finally, OCC and Sierra address their agreement, in the stipulation, that the ESP is more favorable in the aggregate than a market rate offer. They contend that, because the Commission did not apply that statutory test to the residential governmental aggregation issue, they have the right to change their minds as to the stipulated provision. The difficulty with this contention, as noted by Duke, is that these parties could have declined to sign the stipulation on the grounds that it addressed the statutory standard or could have demanded that the stipulation include a clarification or reservation to the effect that these one or two parties were not addressing the favorability of the treatment, in the ESP, of residential governmental aggregation customers. They did not take these actions. Rather, they signed, with no comment or reservation, a stipulation that specifically asked the Commission to find that the statutory test had been met.

We would also note that the language of the very test requested by OCC and Sierra runs counter to their argument. The test, in Section 4928.143(C), Revised Code, requires the Commission to approve, or to modify and approve, an ESP if it finds that the plan is more favorable *in the aggregate* than the expected results under a market rate offer. If the words "in the aggregate" were not included in the statute, then OCC and Sierra might be able to argue that each and every provision of an ESP must be more favorable than a similar provision that might be expected in a market rate offer. Such a position might allow or require us to consider individual provisions in ESPs. However, the statute does include these words and they must be given effect. *Akron Management Corporation v. Zaino*, 94 Ohio St.3d 101, 103, 760 N.E.2d 405, 407 (2002). We find that we are required, by the statute in question, to consider the ESP as a whole and that the stipulating parties intended their agreement to address the favorability of the ESP as a whole. As such, we do not believe that it is appropriate or necessary to require Duke to prove that the residential governmental aggregation provisions, which were "carved out" by OCC, are more favorable, considered separately, than the expected results under a market rate offer. Rehearing on this ground is denied.

(23) Following their discussion of the rationale for applying the statutory test to the reserved aggregation issue, OCC and Sierra discuss the outcome that they believe should result from such an application. As we have determined that application of the statutory test is inappropriate, their arguments under the test are moot. Further, they state that the Commission erred by "ignoring" Section 4928.20(J), Revised Code. Of course, we did not ignore that section, but discussed it at length. Rehearing on this ground is denied.

(24) The second argument under the first assignment of error is that the Commission's opinion and order was inconsistent with the treatment of residential governmental aggregation customers in the other electric utilities' territories. OCC and Sierra describe several riders that were considered in the ESP for Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, FirstEnergy) and conclude that the Commission should, from a consistency standpoint, allow residential governmental aggregation customers in Duke's service territory to avoid rider SRA-CD.

(25) As noted by Duke in response, FirstEnergy and Duke are not in comparable positions and their ESPs, one having been litigated and one having been stipulated, are not comparable. In addition, Duke is correct that the Commission found that FirstEnergy's comparable rider was not sufficiently supported by the record. Rehearing on this ground is denied.

(26) The third argument by OCC and Sierra relates to the definition of "standby service" and the application of that definition to riders SRA-SRT and SRA-CD. They contend, as OCC did in its post-hearing brief, that Section 4928.143(B)(2)(d), Revised Code, is a definition, arguing that, "[b]ecause R.C. 4928.20(J) promises a meaning in division (B)(2)(d), the meaning can only be taken in the context of the entire category of (B)(2)(d)." OCC and Sierra go on to describe the list in (B)(2)(d) as a list of synonyms. Having a "definition" established by looking at synonyms, OCC and Sierra assert that riders SRA-SRT and SRA-CD both recover the cost of standby service and are identical except that rider SRA-SRT relates to purchase capacity and rider SRA-CD relates to utility-owned capacity.

(27) Duke disagrees with this line of argument. Duke insists that Section 4928.143(B)(2)(d), Revised Code, contains no definitions at all and concludes that the Commission was correct to attempt to discern the

legislature's intended definition of "standby service." Duke also counters the suggestion that there is little difference between riders SRA-SRT and SRA-CD.

(28) Section 4928.143(B)(2)(d), Revised Code, provides that an ESP may provide for or include:

> Terms, conditions, or charges relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.

Based on a reading of the list of items set forth in that section, we can not conclude that these are synonymous items and, therefore, should be treated as a definition, as proposed by OCC and Sierra. That section lists, among other items, carrying costs, amortization periods, and deferrals. Clearly, these items are not synonymous with standby service. Further, as we discussed in the opinion and order, we conclude that rider SRA-CD is not a mechanism for recovery of the cost of providing standby service. Rider SRA-CD is described as compensating Duke for providing customers with a first call on its capacity, foregoing the opportunity to sell capacity that is currently dedicated to its standard service offer, permitting customers to switch to competitive suppliers, and assuming the risk associated with maintaining a reasonably stable price during the ESP period. None of these items suggests standby service. Rehearing on the basis of this argument is denied.[2]

(29) The final argument relating to the first assignment of error suggests that the Commission's opinion and order unreasonably discriminates against residential governmental aggregation customers by not permitting them to avoid rider SRA-CD and requiring them to return to the same standard service price as a customer who has avoided that rider. OCC and Sierra claim that the Commission found that nonresidential and residential governmental aggregation customers are not differently situated and that, therefore, they should both be

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2 OCC and Sierra also respond, in their application for rehearing, to an argument made by staff in its reply brief. As this is not a matter found in the opinion and order, the Commission will not address this discussion.

permitted to bypass the same riders. They also contend that, because the two groups of customers would, when shopping, avoid different riders, they are not similarly situated and should not pay the same price upon return.[3]

(30) Duke notes, in response, that the Commission's determination that residential and nonresidential customers are similarly situated was immaterial to the issue reserved for litigation and pertained only to an issue that was not before the Commission. In addition, Duke points out that OCC's witness admitted that there may be reasons, such as cost of service, to treat different customer classes differently.

(31) We determined, in the opinion and order, that the return price to be charged to residential governmental aggregation customers was not reserved for litigation. We therefore did not address it directly but included a statement, quoted by OCC and Sierra, that commented on what our conclusion would be if the return price issue were to be addressed. OCC and Sierra pull out that comment and attempt to use it to prove that residential and nonresidential customers are similarly positioned and, therefore, must avoid the same riders. In addition to misusing our statement and ignoring a portion thereof, it also ignores the rationale for our conclusion as to the avoidability of rider SRA-CD. We also note that OCC has failed to prove that residential and nonresidential customers are similarly situated and therefore must be treated similarly with regard to rider avoidability. Rehearing on this ground is denied.

(32) The second assignment of error by OCC and Sierra relates to the issue litigated by IEU. They propose that the Commission erred by failing to provide standards, due process opportunities and approval criteria for exemptions from rider DR-SAW. In so arguing, the first point they raise is that the Commission failed to apply the standard three-pronged test to the stipulation. They claim that the three-pronged test is met and, therefore, that the Commission should not have modified the stipulation to require all mercantile customers to have an opportunity to obtain the exemption.

(33) In response to this argument, IEU reasons that the Commission need not apply the three-pronged test if it finds that a provision violates the law.

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3 We note that OCC and Sierra did not include in their application for rehearing any suggestion that we erred in concluding that the return price was not reserved for litigation.

(34) OCC, Sierra, and IEU are all incorrect in saying that we did not apply the three-pronged test to this issue. It is clearly a violation of an important regulatory principle or practice for a stipulation to violate the face of a statute. In finding that the stipulation's limitation of the exemption from rider DR-SAW was a violation of the law, we were applying the three-pronged test. Rehearing on this ground is denied.

(35) OCC and Sierra continue their arguments on this ground for rehearing with claims that the Commission should have addressed, either in administrative rules or in the opinion and order in these proceedings, due process, standards, and consequences for failure to attain projected energy savings. The detailed provisions relating to exemptions from rider DR-SAW are discussed in the stipulation. If OCC and Sierra believed that the stipulation needed additional detail, they should have attempted to negotiate such detail or refrain from signing it. We find that the stipulation, as drafted, is not unreasonable in its coverage of these matters so as to require modification. Additionally, we note that concerns that OCC and Sierra have regarding the matters included in administrative rules are not appropriate for these proceedings. Rehearing on this ground is denied.

(36) The Commission has reviewed all the arguments on rehearing. Arguments on rehearing not discussed herein have been adequately considered by the Commission and are being denied.

It is, therefore,

ORDERED, That the applications for rehearing by OEC and by OCC and Sierra be denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record in these proceedings.

THE PUBLIC UTILITIES COMMISSION OF OHIO

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Secretary