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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. For Approval of a) Case No. 08-920-EL-SSO
Residential Solar Renewable Energy) Case No. 09-834-EL-REN
Credit Purchase Program Agreement and)
Tariff.)

**RESPONSE TO REPLY COMMENTS OF DUKE ENERGY OHIO, INC.
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE NATURAL
RESOURCES DEFENSE COUNCIL**

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") and the Natural Resources Defense Council ("NRDC") file the following response to Duke Energy Ohio, Inc.'s ("Duke" or "Company") proposed residential solar renewable energy credit purchase program. The program proposed by Duke for approval of a residential renewable energy credit ("REC") program is insufficient in that it fails to conform with the settlement terms negotiated by Duke and members of OCEA in the electric security plan ("ESP") case.¹ The expectation that parties negotiated in good faith to obtain was that a workable program, unfettered with utility-imposed barriers, would be available to all residential customers and would be filed no later than June 30, 2009 and in place shortly thereafter. This proposal fails to comply with these simple requirements.

On September 21, 2009, Duke filed its Application for the approval of a residential REC program as provided for under the ESP Stipulation. On October 2, 2009,

¹ *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, Stipulation (October 27, 2008). OCC has discussed this issue at length in previous filings in this case.

the OCC moved to intervene and on October 8, 2009, Duke filed an amended application and OCEA filed Comments on Duke's amended application. On January 15, 2010, the OCC and the NRDC filed a Motion for Ruling and Revision of the application and on January 29, Duke filed a Memorandum Contra the motion. On February 8, 2010, OCC and NRDC filed a Reply to Duke's Memorandum Contra. On February 19, 2010, Duke filed a Second Amended Application. On March 15, 2010, OCC filed a Motion for Ruling and Revisions of Duke's second amended application.

On March 22, 2010, the Commission issued an Entry establishing a procedural schedule and revising the docket number. On April 5, 2010, the Staff ("Staff") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") filed Comments. The OCC, NRDC and OEC filed Reply Comments in response to the Staff's Comments and Duke filed another REC program proposal in response to the Staff's Comments. The OCC and NRDC file this Response to Duke most recent REC proposal.

II. COMMENTS

A. The Commission Should Quickly Order Duke To Offer A REC Purchase Program That Satisfies Duke's Commitment In The Electric Security Plan.

Under the electric security plan ("ESP") Stipulation and Recommendation filed on October 27, 2008 Duke agreed to include a residential renewable energy credit ("REC") program in its REC tariff by June 2009.² But Duke did not file its application for approval until September 21, 2009 and filed an amended application on October 8, 2009. Neither of those applications included residential REC programs that would be

² *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO et. al., Stipulation and Recommendation at 37.

effective because Duke was unwilling to guarantee sufficient REC payments to customers who were interested in participating so that the customers could obtain financial support to participate.

Since that time, the OCC, sometimes with additional parties, has filed Comments on October 8, 2009, Motion and memorandum in support for ruling on and revision of Duke's application on January 15, 2010, Reply to Duke's memorandum in opposition of the motion for a ruling on and revision of Duke's first amended application on January February 8, 2010, a motion for a ruling on and revision of Duke's second amended application on March 15, 2010 and Reply Comments to the Staff's Comments filed on April 14, 2010. In the Staff Comments, the Staff agreed with OCC that Duke should be required to purchase RECs from both shopping and nonshopping residential customers.³

Duke also filed Reply Comments to the Staff's Comments on April 14, 2010. In its Reply Comments, Duke agreed to revise its program to meet Staff recommendations only if it is not required to purchase residential RECs at all if it can meet its in-state solar renewable energy credits otherwise,⁴ completely eviscerating the value of the program for residential customers. No such limitation exists in the terms of the Stipulation and Duke should not be permitted to intentionally violate both the Stipulation and the Commission's order approving the Stipulation. Duke's most recent proposal clarifies that Duke does not intend to meet its commitment under the ESP Stipulation to offer a residential REC purchase program unless the Commission orders it to provide a workable effective program. Negotiations are a give and take process where in order to get a benefit, a party concedes or gives a benefit to the other party. It is simply not right of

³ Staff Comments at 3-4.

⁴Duke Comments at 4,¶1.

Duke to take all its benefits without providing the benefits it committed to. This goes to the very heart of whether Duke can be relied on to live up to its part of the bargain and casts doubt on the ability of OCC and other parties to rely on agreements reached with Duke in future negotiations.

Accordingly, the Commission should waste no more time and order Duke to offer a residential REC purchase program that provides either up-front payment for the RECs for the life of the solar facility or a guarantee to purchase the RECs over a 15 year term which would assist all residential distribution customers in obtaining financing so that they can participate.

B. The Commission Should Require Duke to Offer the Residential REC Purchase Program Whether Duke Meets Its Statutory REC Benchmarks or Not.

Specifically, Duke suggested in its Reply comments that if it can meet its REC benchmarks without a residential REC program, it should not be required to purchase any RECs from residential customers.⁵ This approach is entirely contradictory to legislative intent. R.C. 4928.02(C), (F), (I), (J) and (K) articulate state policies that the residential REC program would promote. In particular R.C. 4928.02(K) states:

It is the policy of this state to do the following throughout this state:

(K) Encourage implementation of distributed generation **across customer classes** through regular review and updating of administrative rules governing critical issues such as, but not limited to, interconnection standards, standby charges, and net metering. (Emphasis added.)

In addition to directing the Commission to establish rules for a system of registering renewable energy credits, under R.C. 4928.65, the General Assembly directed

⁵ Id.

the Commission to establish a system that “shall allow customer-sited projects or actions the broadest opportunities to be eligible for obtaining renewable energy credits.” The Company’s suggestion that it not be required to purchase any residential RECs if it meets its renewable energy benchmarks otherwise, is contrary to its Duke’s commitment in the ESP stipulation to:

Include a R.C. 4928.64 residential REC purchase program by June 30, 2009. Upon inquiry by a consumer considering the installation of renewable energy generation at the consumer’s site, DE-Ohio shall make information available to the consumer on net metering, interconnection and the REC purchase program.

The language contains no limitations. It is “come one, come all” language.

C. The Commission Should Require Duke To Offer The REC Purchase Program For At Least A Period Of Four Years Due To Duke’s Recalcitrance In Providing The Fair And Reasonable REC Purchase Program It Negotiated To Provide And For Which Consumer Concessions Were Made.

The beginning of the residential REC program is currently overdue by almost one year and was intended to be an important part of Duke’s ESP plan for the years 2009-2011. As mentioned above, Duke’s most recent proposal is to be able to avoid purchasing RECs from residential customers altogether, which indicates that Duke is not negotiating for a residential REC program in good faith. Because the negotiation process has taken over a year and one half and a reasonable residential REC program is not yet established, the Commission should order Duke to implement an effective and nondiscriminatory program that will last at least four years. Because the parties have taken so much time to negotiate for a residential REC program and still do not have one, the Commission should keep the final program for an extended period of time.

D. The Commission Should Require Duke To Pay Residential Customers 80% Of The Penalty Of R.C. 4928.64(C)(1)(A) Throughout 15 Years To Ensure The Residential Customers Will Be Able To Obtain Adequate Financing For Renewable Projects.

The Commission approved the Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively “FirstEnergy”) residential REC purchase program through a Finding and Order issued on September 23, 2009.⁶ As part of that program, FirstEnergy will purchase RECs from residential customers at the price of 80% of the penalty amount under R.C. 4928.64(C)(1)(a).⁷ This is the appropriate amount to encourage participation in a residential REC program and the Commission should order Duke to pay this amount.

III. CONCLUSION

The Commission should order the Company to implement a residential REC program that provides for an upfront payment for the RECs or guaranteed payments over 15 years that is available to all distribution customers. Otherwise Duke will not meet the commitment it made in the ESP Stipulation. The Commission should not allow Duke to avoid its obligation to buy RECs from residential customers if it meets its renewable benchmarks otherwise the program will be meaningless. Duke’s proposal reveals that it has not been negotiating in good faith. Due to the length of time it has taken Duke to live up to its end of the bargain – which it still has not done, the Commission should order Duke to maintain this residential REC program over a period of four years to send a

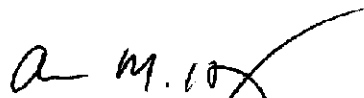
⁶ *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating company and The Toledo Edison Company for Approval of Residential Renewable Energy Credit Purchase Program Agreement*, Case No. 09-551-EL-REN, Finding and Order (September 23, 2009).

⁷ *Id.*, Second Amended Residential Renewable Energy Credit Purchase Program Agreement, ¶ 5 Purchase Price, Attachment B, eg. ACP is \$450 in 2009, $450 \times .80 = \$360$.

message that Stipulations are to be honored in good faith and Commission orders are to be obeyed. Finally, the Commission should order Duke to purchase RECs from residential customers at 80% of the penalty under R.C. 4928. 64(C)(1)(a), as it approved in the FirstEnergy REC program, to ensure that residential customers will have sufficient financial incentive to participate.

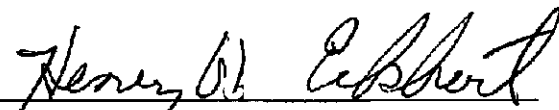
Respectfully submitted,

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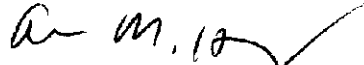
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this *Response to Reply Comments of Duke Energy Ohio, Inc. by the Office of the Ohio Consumers' Counsel and the Natural Resources Defense Council* was served on the persons stated below, via First Class U.S. Mail, postage prepaid, this 12th day of May, 2010.



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