

11-3549-EL-SSO 10

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August 25, 2011

Via Hand Delivery

Ms. Betty McCauly
Public Utilities Commission of Ohio
Administration/Docketing
180 East Broad Street, 11th Floor
Columbus, OH 43215-3793

Re: Duke Energy Ohio
Case Nos. 11-3549-EL-SSO, et al.

Dear Ms. McCauly:

Attached please find for filing the Joint Reply to Duke Energy Ohio Inc.'s Memo Contra Joint Motion for Extension of Time. The Joint Movants would note that with the filing of this reply, the motion is now ripe for decision. In light of the fact that intervenor testimony is due September 7, 2011, and with the upcoming Labor Day holiday a prompt ruling would greatly benefit all intervenor parties.

If you have any questions, please call me at the number listed above.

Sincerely,

Thomas J. O'Brien

Attachment

cc: Parties of Record (via electronic service w/Attachment)

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**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)	Case No. 11-3549-EL-SSO
Security Plan, Accounting Modifications and)	
Tariffs for Generation Service.)	

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. 11-3550-EL-ATA

In the Matter of the Application of Duke Energy)	
Ohio for Authority to Amend its Corporate)	
Separation Plan.)	Case No. 11-3551-EL-UNC

**JOINT REPLY TO DUKE ENERGY OHIO INC.'S MEMO CONTRA
JOINT MOTION FOR EXTENSION OF TIME**

On August 17, 2011, Constellation NewEnergy, Inc; Constellation Energy Commodities Group, Inc.; Exelon Generation Company LLC, the COMPETE Coalition; the Retail Energy Suppliers Association and PJM Power Providers Group; the Ohio Manufacturers' Association; City of Cincinnati; the Ohio Energy Group; The Kroger Company, the Office of the Ohio Consumers' Counsel; and the Industrial Energy Users-Ohio (collectively "Joint Movants") filed a joint motion ("Joint Motion") requesting that the Public Utilities Commission of Ohio ("Commission") extend the procedural schedule in the above-captioned proceedings by two months. On August 22, 2011, Duke Energy Ohio Inc. ("Duke") filed a responsive pleading (the "Memo Contra") to the Joint Motion. Joint Movants now file this joint reply.

A. Joint Movants represent all customer classes.

Duke implies that the Joint Motion lacks unanimity among intervening parties because only a “limited number of the thirty-four intervenors in this proceeding seek to extend the procedural schedule.” Memo Contra at 2. It is disingenuous to describe the Joint Motion as having limited support. Only Duke opposed the Joint Motion. Joint Movants represent all customer classes (including residential and non-residential customers, manufacturers, industrials, and municipalities) as well as numerous competitive retail electric service providers and these parties are regular participants in Commission proceedings.

B. Ohio Revised Code Section (“R.C.”) 4928.143(a) provides a 275-day timeframe for Commission’s consideration of an ESP proposal.

Duke’s argument that Joint Movants “suggest that Ohio law imposes a firm 275-day review period” on ESP applications is false and misleading. Memo Contra at 2. Joint Movants have not suggested that R.C. 4928.143(a) requires the Commission to take 275 days to review and opine on an ESP application. Instead, Joint Movants note that the Commission retains the discretion (as set forth in statute) to take up to 275 days (until March 21, 2012) before issuing an order on Duke’s ESP application. (See Joint Motion at 2).

Duke’s reliance upon a 2011 Supreme Court of Ohio decision regarding the timing requirements in R.C. Chapter 4928 does not help its cause. The Court stated that the time requirement for the Commission to decide an initial ESP – 150 days – was “meant to hasten the filing and review of initial ESPs.” (*In re Application of Columbus Southern Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, ¶42). Duke’s

pending ESP proposal is not such an initial ESP, and the circumstances in the case reviewed by the Court involved a Commission decision that *exceeded* (not cut short) the deadline provided by the General Assembly. The statutory deadlines for Commission decisions in ESP cases reflect the General Assembly's intention to "effectuate[] 'the proper, orderly, and prompt' resolution" of ESP cases (*Id.* at ¶42, quoting *State ex rel. Jones v. Farrar* (1946), 146 Ohio St. 467, 472); and, the time period provided by the General Assembly for Commission decision in the instant case is 275 days.

Indeed, Duke seeks to impose its own arbitrary deadline of January 1, 2012 for a Commission decision and implementation of that decision. In essence, Duke seeks to impose an approximately 150 day deadline (the time period from the ESP's June 20, 2011 filing date through Duke's requested November 2011 decision date) in contravention of the General Assembly's direction as stated in the statute. The Commission, like the intervening parties, should have an adequate period of time in which to review the ESP application without having to deal with Duke's unjustified and self-imposed deadline.

C. Joint Movants Present Just Cause for Extending the Procedural Schedule by Two Months.

First, and foremost, Duke's Memo Contra completely ignores the fact that Duke controlled the timing of its ESP filing. Putting aside the fact that Duke ignored all indications that its previously filed (and rejected) MRO proposal contained provisions not conforming to Ohio law, Duke delayed more than six weeks from the date the Commission issued its final Entry on Rehearing (even longer from the date

of the Commission's Order) in the MRO proceeding to submit an alternative proposal. Duke should not now be able to take advantage of its own delays by forcing the intervening parties to participate in an unnecessarily expedited proceeding.

Second, and making matters worse, Duke's unilateral delay resulted in a procedural schedule that coincides with more than a half dozen AEP proceedings—most of which were filed long before Duke's ESP application. Although many of the parties regularly practice before the Commission, Duke's proposal places an undue burden on the intervening parties' time and resources.

Third, the failure to receive a Commission decision by January 1, 2012 would not prejudice Duke. R.C. 4928.141(A) provides that Duke's current ESP plan will continue in effect if Duke does not obtain approval for an alternative plan by January 1, 2012. Even Jim Rogers, Duke's CEO, recognized in an August 2, 2011 earnings conference call that it does not matter if a new plan goes into effect prior to the end of 2011 because the current ESP will stay in place.¹ The continuation of the current plan is a superior option to a rushed, ill-considered replacement.

Finally, the ESP application filed by Duke is novel. Not only could the proposed ESP remain in place for up to 10 years, but it calls for a return to monopoly-based capacity pricing. Contrary to the arguments raised in Duke's Memo Contra, the capacity pricing model and corresponding profit-sharing mechanism are not only unique to Duke, but are being presented to the Commission (and intervening parties)

¹ "My belief is that we probably need approval in the October/November time frame to be able to do that. But in the event that we don't get it till later, as you know, we keep our existing plan in place until we are able to implement a new proposal." Second Quarter 2011 Duke Energy Corp Earnings Conference Call at 11 (August 2, 2011) (found at <http://www.duke-energy.com/pdfs/Transcript-2Q2011.pdf>) (last viewed on August 23, 2011).

for the first time in Ohio history. Expanding the procedural schedule by two months allows all parties the time necessary for a thorough and thoughtful review of Duke's three volume, thousand page ESP application, and the potential impact of such a long-term shift in capacity pricing on customers.

WHEREFORE, the Joint Movants respectfully request that its motion for an extension of time be granted and the following procedural schedule be established for the above-captioned proceedings:

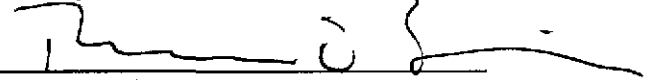
- Intervenor Testimony due November 7, 2011
- Discovery Cutoff – November 9, 2011
- Evidentiary hearing begins – November 21, 2011

Respectfully submitted on behalf of

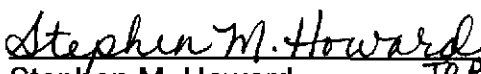
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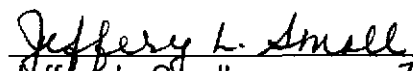
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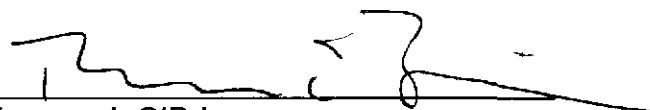
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the parties of record listed below this 25th day of August 2011 *via* electronic mail.



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