BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Revised Code Section 4909.18.	)))	Case No. 12-2400-EL-UNC
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)))	Case No. 12-2401-EL-AAM
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Tariff for a New Service.	)))	Case No. 12-2402-EL-ATA

OHIO PARTNERS FOR AFFORDABLE ENERGY'S REPLY BRIEF

I. Introduction

Ohio Partners for Affordable Energy ("OPAE") hereby submits to the Public Utilities Commission of Ohio ("Commission") this reply brief in the above-referenced applications of Duke Energy Ohio, Inc. ("Duke"). OPAE agrees with the positions of nearly all the intervenors that these applications explicitly violate the provisions of the Stipulation and Recommendation signed by Duke, OPAE and numerous other parties in the proceedings to consider Duke's current electric security plan ("ESP"), Case No. 11-3549-EL-SSO, et al., which the Commission approved over a year ago. *Duke Energy Ohio*, Case Nos. 11-3549-EL-SSO, et al., Opinion and Order (November 22, 2011). These applications also violate stipulations signed by Duke in Case Nos. 11-2641-EL-RDR, et al., and Case Nos. 09-1685-EL-ETP, et al. The applications violate Ohio law on the recovery of above-market generation costs. Revised Code ("R.C.") Sections 4928.38 and 4928.39. Therefore, the Commission must dismiss these applications.

II. In addition to all the other reasons why the applications should be dismissed, Duke's expressed attitude on deferrals is another reason for dismissal.

OPAE will not repeat all the arguments for dismissal of these applications already made in OPAE's initial brief and the initial briefs of nearly every other intervenor, including the Ohio Energy Group, the Office of the Ohio Consumers' Counsel, the Industrial Energy Users-Ohio, the Ohio Manufactures Association, the City of Cincinnati, the University of Cincinnati and Miami University, the Greater Cincinnati Health Council and Cincinnati Bell Inc., Kroger, FirstEnergy Solutions, the Retail Energy Supply Association and IGS, and the Staff of the Commission. Their positions are all in basic agreement that these Duke applications violate stipulations, Ohio law, Commission precedent, and legal authority. There is not much to add that has not already been said, and nothing in Duke's initial brief leads to any other conclusion but that these applications must be dismissed.

One point that must also be stressed is Duke's failure to accept Commission precedent with respect to deferrals. In these applications, Duke is asking for a new charge, accounting authority for deferrals, and a new tariff for a "new service." In its initial brief, Duke states that it "is entitled to recovery of its actual costs, together with a fair return, for capacity service that it is obligated to provide." Duke Initial Brief at 17. Duke refers to "its right to just and reasonable compensation for capacity service." Id. at 38. Referring to its deferral request, Duke states that its "recovery of costs through the term of its FRR obligations is appropriate." Duke states that its "recovery of the actual cost to acquire additional capacity" should be approved. Id. at 63-64.

It is apparent then that if these applications are granted, Duke believes that the Commission has also approved Duke's recovery of the new charge, which would recover from ratepayers any amounts that are deferred.

It is not Commission precedent that deferral authority is the same as recovery of deferrals. In Case No. 09-712-GA-AAM, Duke asked for authority to defer environmental investigation and mediation costs. In the Finding and Order granting Duke's request to defer costs, the Commission stated that "the recovery of the deferred amounts will be addressed in a base rate case proceeding should Duke ever seek to recover the deferrals." Finding and Order, Case No. 09-712-GA-AAM (November 12, 2009), at 3-4. This is standard language for the Commission to use when granting a deferral. OPAE filed an application for rehearing contesting the deferral authority. In its Entry on Rehearing, the Commission stated: "the Commission has not yet made a determination on what costs, if any, may be appropriate for recovery." Entry on Rehearing, Case No. 09-712-GA-AAM (January 7, 2010), at 6. Clearly, the Commission did not consider that deferral authority was the same thing as authority to recover the deferrals from ratepayers.

When the issue of the actual recovery from ratepayers was raised in Duke's base rate proceeding, Case No. 12-1685-GA-AIR, now pending before the Commission, Duke filed the third supplemental testimony of William Don Wathen, Jr., also a witness in these cases. In his third supplemental testimony filed in the rate case, Mr. Wathen stated, at 9, that "it would be nonsensical for the Commission to allow deferral of costs that it would knowingly disallow in the future. A deferral is granted when there is assurance of recovery in the future and, typically, disallowances of any deferrals occur when the Commission determines that some or all of the costs were incurred imprudently. It would be contrary to standard regulatory policy for this Commission or any regulator to allow for a deferral of costs knowing that the circumstances for recovery of prudently incurred costs are not met." In other words, according to Mr. Wathen,

allowance of the deferrals means that the costs were prudently incurred and the costs will be recovered.

Mr. Wathen also stated at 11 of his third supplemental testimony: “utilities in Ohio rely on the findings in Commission orders. The accountants and auditors of Duke Energy Ohio look to the Commission’s orders for an indication about the probability for future recovery of costs when establishing deferrals. It would be contrary to precedent in the previous years for the Commission to issue orders regarding deferral of costs knowing that it would never allow recovery of such costs.” He also stated: “No utility in the state could reasonably rely on Commission decisions for establishing regulatory assets insofar as there would be no trust in the validity of the Commission’s decision to authorize such deferrals.” He also stated, at 12 of his third supplemental testimony, that the Staff’s recommendation that all the deferrals not be recovered, “would undermine the credibility of the Commission decisions authorizing such deferrals and impact the accounting treatment accorded such deferrals generally.”

In short, Duke believes that once the deferral is authorized, it will be recovered from ratepayers. This is not Commission precedent, as the Commission has stated time and again. But it is obvious from Duke’s initial brief and the testimony of Duke’s witness Wathen in the pending base rate case that Duke believes that deferral authority means cost recovery. Therefore, if Duke is allowed to defer some difference between market-based capacity rates and whatever the Commission allows as Duke’s cost of capacity, Duke expects to recover from ratepayers the deferred amount.

Given the lack of confidence in Duke’s calculation of its costs and Duke’s failure to accept Commission precedent with respect to deferrals, it cannot be reasonable for the Commission to grant these applications. This is another reason why these applications should be dismissed.

III. Conclusion

The Commission has no alternative but to dismiss these applications for the reasons set forth in the Joint Motion to Dismiss filed October 4, 2012. The Commission should enforce the ESP, RDR and ETP Stipulations that the Commission approved. Approval of these applications would not only violate the ESP, RDR and ETP Stipulations, it would also effectively undo the stipulations and result in another round of litigation.

The Commission must also follow the requirements of Ohio law. Duke's request for recovery of generation stranded costs is unlawful under R.C. 4928.38 and R.C. 4928.39. Under Ohio law, generation stranded cost recovery ended as of December 31, 2005.

Finally, the Commission should not consider deferral authority for Duke because Duke does not understand Commission precedent with respect to deferrals. Deferral authority does not mean cost recovery. There is no reason for the Commission to allow Duke another opportunity, as it had with these applications, to flaunt Ohio law and Commission precedent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was served electronically upon the following persons identified below on this 30th day of July 2013.

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