

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF )  
DUKE ENERGY OHIO, INC. FOR AUTHORITY )  
TO ESTABLISH A STANDARD SERVICE OFFER )  
PURSUANT TO R.C. 4928.143, IN THE FORM ) CASE NO. 14-841-EL-SSO  
OF AN ELECTRIC SECURITY PLAN, )  
ACCOUNTING MODIFICATIONS AND TARIFFS )  
FOR GENERATION SERVICE. )

IN THE MATTER OF THE APPLICATION OF )  
DUKE ENERGY OHIO, INC. FOR AUTHORITY )  
TO AMEND ITS CERTIFIED SUPPLIER TARIFF, ) CASE NO. 14-842-EL-ATA  
P.U.C.O. NO. 20. )

**INITIAL POST-HEARING BRIEF OF  
WAL-MART STORES EAST, LP, AND SAM'S EAST, INC.**

Wal-Mart Stores East, LP, and Sam's East, Inc., (collectively "Walmart")  
respectfully submit this initial post-hearing brief pursuant to the direction of the Attorney  
Examiners.

**INTRODUCTION**

Duke Energy Ohio ("DEO" or "the Company") currently provides its Standard  
Service Offer ("SSO") in the form of an Electric Security Plan ("ESP") approved in the  
Commission's Case No. 11-3549-EL-SSO. By the application and evidence submitted in  
this docket, DEO seeks approval of a revised ESP that would be in effect from June 1,  
2015, to May 31, 2018.

Walmart is an international retailer operating over 11,000 retail units in 27  
countries.<sup>1</sup> Approximately 22 Walmart stores and related facilities are located within  
DEO's Ohio service territory. Collectively, these facilities consume over 70 million kWh  
of electricity on an annual basis.

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<sup>1</sup> See <http://corporate.walmart.com/our-story/our-business/>.

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Walmart's approach to the application in this docket has been very focused. That is, rather than trying to address all of the issues in this docket, Walmart focused its efforts on a few select issues, relying on other parties to develop other issues.

Walmart submitted the expert testimony of Mr. Steve Chriss in support of its position. See Direct Testimony And Exhibits Of Steve W. Chriss On Behalf Of Wal-Mart Stores East, LP, And Sam's East, Inc. (Sept. 26, 2014) (hereinafter "Chriss Direct"). Mr. Chriss' testimony was admitted without objection as Wal-Mart Exhibit No. 1. (10/30/14 tr., p. 2103, ln. 15-16). In further support of its position in this docket Walmart submits the following arguments and authorities.

**ARGUMENTS AND AUTHORITIES**

- I. There is no presumption in favor of approving the proposed ESP, nor are the non-applicants in this docket required to prove that the proposed ESP does not meet the statutory requirements. Rather, DEO bears the burden of affirmatively proving that its proposed ESP satisfies *all* legal requirements.**
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In evaluating DEO's proposed ESP it is important to do so within the proper legal context. DEO is statutorily mandated to provide consumers within its service territory with "a standard service offer of all competitive retail electric services **necessary** to maintain essential electric service..., including a firm supply of electric generation service." Ohio Rev. Code Ann. § 4928.141(A) (LexisNexis 2014). An SSO may take one of two forms: either a "market rate offer" or an ESP. *Id.*

An ESP "shall include provisions relating to the supply and pricing of electric generation service." *Id.* at § 4928.143(B)(1). In addition, the proposed ESP "may" include certain other specified categories of provisions. *Id.* at § 4928.143(B)(2). The ESP may not, however, contain provisions that fall outside of those listed in Section

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4928.143(B)(2). As the Ohio Supreme Court has stated:

By its terms, R.C. 4928.143(B)(2) allows plans to include only “any of the following” provisions. *It does not allow plans to include “any provision.” So if a given provision does not fit within one of the categories listed “following” (B)(2), it is not authorized by statute.*

*In re Columbus S. Power Co.*, 128 Ohio St. 3d 512, 2011 Ohio 1788 at ¶32, 947 N.E.2d 655, 664 (emphasis added).

Finally, it is important to remember that DEO bears the burden of affirmatively proving that its proposed ESP satisfies all of these statutory requirements. Ohio Rev. Code Ann. § 4928.143(C)(1) (LexisNexis 2014). In other words, there is no presumption in favor of the proposed ESP, nor is it incumbent upon Walmart and the other parties to this docket to prove that the ESP is **not** appropriate. Rather, the Company bears the burden of affirmatively proving that:

1. The proposed ESP, “including its pricing and **all other terms and conditions**...is more favorable in the aggregate as compared to the expected result under...[a market-rate offer],” *id.* (emphasis added);
2. That all of the provisions of the proposed ESP fall within one or more of the allowable categories, *id.* § 4928.143(B)(2); and
3. That all of the terms and conditions of the proposed ESP are “necessary to maintain essential electric service to consumers....,” *id.* at § 4928.141.

DEO has failed to carry its burden of proof in this docket. It has failed to affirmatively prove that the proposed ESP satisfies all of the requisite legal standards. In such instances, the Commission has only two options available: 1) disapprove the proposed ESP or 2) modify the proposed ESP so that it satisfies all of the requisite legal standards and approve the modified ESP. See *In re Columbus S. Power Co.*, *supra*, 947 N.E.2d at 666 (“Under R.C. 4928.143(C)(1), the commission must do one of three

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things when an ESP is filed: it must 'approve,' 'modify and approve,' or 'disapprove' the application.").

For the reasons set forth in more detail below, Walmart respectfully requests that the Commission either "disapprove" DEO's proposed ESP in its entirety, or "modify and approve" the proposed ESP as set forth below.

**II. DEO'S current and proposed ESP rate structures are extraordinarily complex. The Commission should consider ways to simplify DEO'S rate structure, including requiring DEO to file a base rate case and determining whether costs currently recovered through riders should be recovered through base rates.**

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Walmart is a knowledgeable electric customer, taking electric service from many utilities in many jurisdictions to operate its retail operations. Mr. Chriss is Walmart's Senior Manager, Energy Regulatory Analysis, and has experience in over 100 proceedings before 33 other regulatory commissions. Chriss Direct p. 1, ln. 3-4, and p. 2, ln.7.

Despite his extensive experience, Mr. Chriss characterizes DEO's current rates as "extraordinarily complex." *Id.* at p. 5, ln. 18-19. Further, Mr. Chriss testifies that DEO's ESP proposal "increases the complexity of an already extraordinarily complex set of rates." *Id.*

To illustrate Mr. Chriss offers the following example:

For instance, a bill analysis for a commercial shopping customer, under the [DEO] ESP proposal, requires examination of up to 11 riders in addition to the Company's base rates, and a number of those riders have rates that change quarterly. A commercial SSO customer would add four riders to that total.

*Id.* at p. 5, ln. 19 – p. 6, ln. 1.

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To reduce the complexity of DEO's current and proposed rate structures, Mr. Chriss recommends that the Commission consider ways to simplify the rate structure, including requiring DEO to file a base rate case. *Id.* at p. 6, ln. 2-3. During cross-examination, Mr. Chriss expounded on, and clarified his proposal:

Q. ....And of the costs that are currently being recovered by the numerous riders that you're addressing, which of those costs do you believe should be included in base rates?

A. I would say anything that...is distribution related, things that are related directly to...[DEO's] distribution system...so the costs that are, for instance, in DCI...[or] perhaps the distribution, storm rider, those sorts of things.

Q. So you're proposing that those items should not be in riders because they are distribution related.

A. Ultimately they should end up in base rates....

....

A. ....[T]o the extent that opportunity can be taken to put those costs into base rates and update the other financial metrics around Duke's base rates, that's a good thing.

(10/30/14 tr., p. 2098, ln. 2 – p. 2099, ln. 8).

No rebuttal was offered in response to Mr. Chriss' recommendation.

The Commission certainly has the authority to implement Mr. Chriss' recommendation. The Commission has general supervisory authority over DEO, including the power to examine its books and records, i.e., to direct that DEO file a general base rate case. Ohio Rev. Code Ann. § 4905.06 (LexisNexis 2014). The Commission is also charged with the obligation and authority to implement Ohio's electric services policy, which requires that electric consumers have the information needed to make "**effective** customer choices." See *id.* at § 4928.02(C) & (E) (emphasis

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added); *see also id.* at § 4928.06 (A) (“the public utilities commission shall ensure that the policy specified in section 4928.02 of the Revised Code is effectuated.”). Finally, as noted previously, the Commission has the authority to “modify” DEO’s proposed ESP to requiring DEO to file a general rate case.

But aside from the cited legal authority, Mr. Chriss’ recommendation is supported by sound public policy. A competitive electric service marketplace does not require that electric utility rate structures be “extraordinarily complex.” In fact, such rate structures can impede the goal of “effective customer choices” with which the Commission is charged. Neither does a competitive electric service marketplace require the use of numerous and confusing riders for an electric utility to recoup its costs.

A better policy is to simplify electric utility rate structures, where possible, and provide customers with clear information to enable effective choices. This will facilitate, rather than impede, Ohio’s competitive electric marketplace.

For these reasons, if the Commission approves the Company’s proposed ESP, Walmart respectfully requests that the Commission also adopt Mr. Chriss’ recommendation: direct that DEO file a base rate case by May 31, 2018, and consider whether costs currently collected through various riders should be collected through base rates.

**III. If the Commission approves DEO’s distribution capital investment rider, it should also require DEO to file a base rate case no later than the conclusion of the proposed ESP term.**

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In a similar, but separate recommendation, Mr. Chriss recommends that if DEO’s proposed Distribution Capital Investment Rider (“Rider DCI”) is adopted, the

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Commission should also require DEO to file a base rate case no later than May 31, 2018, the conclusion of the proposed ESP term. Chriss Direct p. 3, ln. 16-18, and p. 6, ln. 6 – p. 7, ln. 19.

During cross-examination, Mr. Chriss explained the reasoning underlying his proposal: In Mr. Chriss' expert opinion, if DEO's Rider DCI is approved there is a real danger that DEO will recover more than 7.2% of its distribution revenue requirement. (10/30/14 tr. p. 2100, ln. 1-18). Mr. Chriss went on to clarify that if Rider DCI is approved, "the risk of recovery around those [distribution] revenues and the regulatory lag that they would otherwise see without the rider is there or is reduced." (*Id.* at ln. 22-25).

DEO attempted to discredit Mr. Chriss' conclusion by implying that it had no analytical basis. (*Id.* at ln. 13-18). However, Mr. Chriss testified that his conclusion was based upon an analysis of DEO's own exhibits provided in this docket. (*Id.* at 11-12). No rebuttal to Mr. Chriss' testimony was offered. No other party opposed Mr. Chriss' recommendation on this point.

Therefore, Walmart respectfully requests that if the proposed Rider DCI is approved, the Commission also require DEO to undergo a base rate review no later than May 31, 2018, the conclusion of the proposed ESP term.

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**IV. The Commission should reject the proposed Price Stabilization Rider.**

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As part of its proposed ESP, DEO is requesting approval of a Price Stabilization Rider ("Rider PSR"). As proposed Rider PSR would be a non-bypassable mechanism to charge or credit all DEO distribution customers for the "economic value" of DEO's share

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of the Ohio Electric Cooperative's ("OVEC") coal-fired generation assets. See Direct Testimony William Don Wathen Jr. On Behalf Of Duke Energy Ohio, Inc., (May 29, 2014), p. 11, In. 19-21 (hereinafter "Wathen Direct").

The proposed Rider PSR should be rejected for a number of reasons. First, there simply has been no showing by the Company that this provision is "necessary to maintain essential electric service to consumers....," as required of all SSOs, including the proposed ESP. Ohio Rev. Code Ann. § 4928.141(A) (LexisNexis 2014). Instead, DEO characterizes Rider PSR as "simply a financial arrangement intended to act as a hedge against price volatility that exists in the PJM...power markets." Wathen Direct p. 12, In. 7-9.

Financial hedging arrangements are not "necessary" to maintain essential electric service to DEO's customer and Rider PSR should, accordingly, be rejected on that basis alone.

Secondly, however, the proposed Rider PSR cannot be justified as a provision "relating to the supply and pricing of electric generation service" under Section 4928.143(B)(1) because, by DEO's own admission, Rider PSR is not an offer of electric generation service:

**Q. IS THE COMPANY'S PROPOSAL AN OFFER OF GENERATION SERVICE TO RETAIL CUSTOMERS?**

A. No. The capacity and energy available from OVEC will not displace any of the capacity and energy procured for SSO service and will not displace any of [the] capacity and energy provided by CRES providers. It is simply a financial arrangement intended to act as a hedge against price volatility that exists in the PJM...power markets.

Wathen Direct p. 12, In. 3-9 (emphasis in original).



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If Rider PSR is not an offer of generation service, it cannot be justified as a provision "relating to the supply and pricing of electric generation service," under Section 4928.143(B)(1).

A third reason for rejecting Rider PSR is that financial hedging arrangements do not fall within the allowable categories of ESP provisions. That is, Section 4928.143(B)(2) sets forth nine categories of allowable ESP provisions. There is no category for financial hedging arrangements such as Rider PSR. "[I]f a given provision does not fit within one of the categories listed 'following' (B)(2), it is not authorized by statute." *In re Columbus S. Power Co.*, *supra*, 947 N.E.2d at 664.

A fourth reason for rejecting Rider PSR is that it effectively transfers the risk of DEO's ownership share of OVEC to the Company's retail customers. As explained by Mr. Chriss on behalf of Walmart:

Regardless of prices in the energy or capacity market or the performance, efficiency, or the economics of the OVEC generation assets relative to the broader base of generation in the market, the PSR will provide DEO with revenue assurance for some, if not all, of its cost exposure for its share of OVEC and will provide OVEC's generation assets, which operate in the wholesale market, cost recovery assurance not afforded to all other generators in the market. This concern grows with the potential for environmental regulations increasing the costs related to the OVEC generation assets, which consist of two coal-fired units.

Chriss Direct p. 9, ln.23 – p. 10, ln. 8.

The Company attempts to characterize Rider PSR as benefiting its electric consumers. The real beneficiary of Rider PSR, however, is DEO. At a minimum, Rider PSR, as proposed, will provide the Company with a competitive advantage over other wholesale market generators that do not have revenue assurance from retail electric consumers. There is also a very real likelihood – if not a probability – that Rider PSR will

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saddle DEO's retail electric customers with the cost of environmental regulations related to the Company's share of the OVEC generation assets.

**CONCLUSION**

WHEREFORE, for all the above and foregoing reasons, Walmart respectfully requests that the Commission consider ways to simplify DEO's rate structure, including requiring DEO to file a base rate case by May 31, 2018. A base rate case will allow the Commission to examine whether the multiple costs currently recovered by numerous riders should be recovered through DEO's base rates.

In addition, Walmart respectfully requests that if the Commission approves DEO's proposed Distribution Capital Investment Rider, it should also require the Company to file a base rate case no later than May 31, 2018, the conclusion of the proposed ESP term.

In addition, Walmart respectfully requests that the Commission reject the proposed Price Stabilization Rider. There has been no showing that Rider PSR meets the legal requirements for inclusion in an ESP, and Rider PSR will effectively transfer the risks – and costs – of DEO's ownership share of OVEC to the Company's retail customers.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies and affirms that on the 15<sup>th</sup> day of December, 2014, a true and correct copy of the foregoing instrument was served via electronic mail and/or first class mail, postage prepaid, to the following persons:

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A handwritten signature in black ink, appearing to read "Rick D. Leland", is written over a horizontal line.

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Summary: Brief Initial Post-Hearing Brief Of Wal-Mart Stores East, LP, And Sam's East, Inc. electronically filed by Mr. Rick D Chamberlain on behalf of Wal-Mart Stores East, LP and Sam's East, Inc.