BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Direct Energy Business, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 14-1277-EL-CSS
	)	
Duke Energy Ohio, Inc.,	)	
	)	
Respondent.	)	

INITIAL POST-HEARING BRIEF OF DIRECT ENERGY BUSINESS, LLC

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ATTORNEYS FOR DIRECT ENERGY BUSINESS, LLC

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I. INTRODUCTION

This case arises from Duke Energy Ohio's (Duke) violation of its Certified Supplier Tariff, P.U.C.O. Electric No. 20 (Supplier Tariff). The Supplier Tariff requires Duke to meter and report accurate information to PJM Interconnection LLC (PJM) about the amount of load consumed by Direct's customers. Duke failed to do so, and its failure directly caused Direct to incur unnecessary wholesale energy charges of over $1.6 million. Duke must now be held to account for its violations of Ohio law and the Supplier Tariff. The tariff language purporting to exculpate Duke from liability is invalid as a matter of law, under Rule 4901:1-10-02(G), OAC.

This case is ***not*** about PJM's "resettlement" process. It is about Duke's acts and omissions that triggered this process. If Duke had done what it was supposed to do under the Supplier Tariff, there would have been no need for Duke to seek resettlement in the first place. Duke is lucky that the resettlement process afforded Direct an opportunity to mitigate its damages. But Direct is still out over $1.6 million, and whether Duke followed PJM's resettlement procedures ***after*** it had already violated the Supplier Tariff does not change this fact.

Duke violated its Supplier Tariff, which also violates R.C. 4905.30 and 4905.32. These statutory and tariff violations, individually and cumulatively, amount to "inadequate service" under R.C. 4905.22 and "unjust and unreasonable" service under R.C. 4905.26, any of which entitles Direct to restitution under R.C. 4928.16.

II. FACTS

A. The Supplier Tariff.

Duke is an electric distribution utility and public utility under R.C. 4905.02 and 4905.03. Direct supplies competitive retail electric service to customers throughout Ohio, including Duke's service area. Duke provides services to Direct under the Supplier Tariff. The Supplier Tariff "sets forth the basic requirements for interactions and coordination between the Company,

as the provider of distribution services, and the Certified Supplier necessary for ensuring the delivery of Competitive Retail Electric Service from Certified Suppliers to their End-use Customers."[1]

Metering and data management require close coordination between utilities and suppliers. Duke meters all electricity delivered to end-users in its service territory, regardless of whether the end-user receives generation service under Duke's SSO or from a competitive retail electric supplier (CRES) such as Direct.[2] It is Duke's responsibility to "own, furnish, install, program, calibrate, test, and maintain all meters and associated equipment used for retail billing and settlement purposes in the Company's service area."[3] When customers leave the SSO and choose a CRES for generation service, Duke must "continue to read all meters in its service territory in accordance with the regularly scheduled Billing Cycles and off-schedule when the Company deems a read necessary."[4]

Duke's metering and load data serve many functions; two are particularly critical here. First, accurate meter reads are necessary for proper billing by Duke and Direct. For some accounts, Duke performs consolidated billing, meaning Duke bills for distribution service on its own behalf and for generation service on behalf of the CRES.[5] The customer at issue here, SunCoke, was dual-billed, meaning Duke billed the customer for distribution service, and Direct issued a separate bill for generation service.[6] Direct had to rely on meter data made available to it electronically from Duke to prepare bills for SunCoke.[7]

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[1] Direct Exhibit 4, Certified Supplier Tariff (Supplier Tariff), Section 2.1.
[2] *Id*. at Sections 10.1, 10.4, 10.7.
[3] *Id*. at Section 9.2.
[4] *Id*. at Section 9.2(a).
[5] *Id*. at Section 10.1.
[6] *Id*.; Direct Exhibit 2, Direct Testimony of Robert Kennelly (Kennelly Direct)), at 5.
[7] Kennelly Direct at 6.

Second, and just as important, this data permits accurate billing from PJM. Under the Supplier Tariff, Duke must provide aggregate load data to PJM. "The Company, acting as the designated Meter Data Management Agent for the Certified Supplier, will supply hourly load data to Transmission Provider, for the Certified Supplier."[8] This hourly load data tracks energy usage by all of the supplier's customers.[9] PJM uses this information to send weekly bills to CRES providers for load delivered on their behalf.[10] These invoice amounts are due upon receipt, but subject to later "resettlement" by PJM.[11]

These two different data sets—monthly usage information used for end-user billing, and hourly load information used by PJM to bill suppliers for energy delivered to their respective end-users—can be used to confirm that energy delivered and billed to end-users matches the energy scheduled and invoiced by PJM.[12] A material difference between these data sets is a sure sign that one or the other is faulty. And if either is faulty, someone will overpay or underpay for service. That is precisely what happened here.

B. Duke reported erroneous hourly load data to PJM.

SunCoke has operated a coke plant and cogeneration facility in Middletown, Ohio since 2011.[13] SunCoke was an SSO customer of Duke, but decided to switch to Direct for generation effective January 4, 2013.[14] Under an agreed dual-billing arrangement, Duke was responsible for billing distribution charges and Direct was responsible for billing generation charges.[15] There is no dispute that all Duke's enrollment procedures were followed.

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[8] Supplier Tariff, Section14.1
[9] Direct Exhibit 7, Direct Testimony of Timothy Abbott (Abbott Direct), at 6-7.
[10] *Id*. at 7.
[11] Kennelly Direct at 6.
[12] *Id*. at 10
[13] Abbott Direct at 2-3.
[14] *Id*. at 5; Kennelly Direct at 5.
[15] Kennelly Direct at 5-6.

Direct had electronic access to SunCoke's metering information. The metering data available from Duke showed usage within the range Direct had expected.[16] The invoices that Direct began receiving from PJM, however, were entirely unexpected.

PJM's invoices suggested that Direct's customers nearly doubled their energy consumption overnight, beginning January 4, 2013—the same day SunCoke switched to Direct.[17] PJM's invoices are based on hourly load data furnished by Duke, so beginning in February 2013, Direct began to question Duke about the data being provided to PJM.[18] Duke denied there were any problems, and continued to report information to PJM as usual.[19] By May 2013, Direct had confirmed for itself not only that there was a problem, but the source of it: Duke's January 2013 invoice to SunCoke showed distribution charges based on approximately 3,900 MWh, while PJM's invoice to Direct reflected usage exceeding 26,000 MWh.[20] Thus, Direct discovered that it was being billed by PJM for far more load than it was serving.

When confronted with the massive discrepancy between metered usage reported to Direct and hourly load information reported to PJM, Duke did not immediately investigate the discrepancy and eliminate it. Instead, Duke proceeded as if the inflated usage amounts reported to PJM were correct.[21] Additionally, in May 2013, Duke cancelled and rebilled SunCoke's February, March and April 2013 bills, triggering automatic rebills from Direct.[22] "This resulted

[16] *Id*. at 9-10.
[17] *Id*. at 7.
[18] Abbott Direct at 12.
[19] Kennelly Direct at 8; Abbott Direct at 13.
[20] Kennelly Direct at 9.
[21] Abbott Direct at 13.
[22] Kennelly Direct at 10.

in SunCoke receiving invoices from [Direct] for over $1.5 million when they are accustomed to seeing invoices in the $150,000 range."[23]

Finally, after several months of denial, Duke relented and admitted there was a problem. There are two meters at SunCoke's facility, and the data from these meters "was not subjected to the same adjustment that had been done by Duke" when SunCoke was Duke's SSO customer.[24] For reasons known only to Duke, Duke permitted a meter configuration that caused it to have to perform manual calculations to "net" energy delivered into and out of the facility.[25] Duke quit performing these calculations when SunCoke switched to Direct for generation service.[26] The unadjusted hourly load information being sent to PJM was wrong; it vastly overstated how much energy the customer was using. Incredibly, despite being confronted almost immediately with the discrepancy, Duke continued its "business-as-usual" approach through the July 2013 billing period, furnishing hourly load data to PJM that it either knew or should have known was not correct.[27]

Indeed, it appears that Duke had realized the hourly load data was inaccurate soon after Direct's initial inquiry in February 2013.[28] But rather than make timely adjustments to the load data (as it had when it provided SSO service), Duke opted to pursue a complex and "manual solution" whereby it continued to send unadjusted data to PJM for the March through July 2013 billing periods, and then invoked the PJM "Resettlement B" process to credit amounts Direct

[23] *Id*.
[24] Abbott Direct at 12-13; *see also id*. at 14.
[25] *Id*. at 4-5.
[26] *Id*. at 12-13; 14.
[27] *Id*. at 12-13; Kennelly Direct at 8-9.
[28] Abbott Direct at 12.

was forced to overpay.[29] It was not until the August 2013 billing period that Duke finally began to report adjusted, "net" hourly load data to PJM.[30]

C. Direct has not been made whole through the PJM resettlement process.

Duke knew there was a problem with the hourly load data it had furnished, and knew about the deadlines it needed to meet in order to remedy the financial impact to Direct. Having no skin in the game itself, Duke dragged its feet.

There is no dispute that the PJM invoices to Direct for the January through July 2013 billing periods were overstated. Duke admits that the load data sent to PJM had not been netted.[31] Duke eventually implemented an IT solution to net hourly load data before sending it to PJM, but this did not occur until the August 2013 billing period.[32] In the meanwhile, PJM's "Resettlement B" process provided a mechanism to reverse and credit the March through July 2013 invoices.[33] But there is a 60 day limit to resettling invoices through this process, and the January and February invoices were beyond this limit.[34] Duke attempted to seek resettlement for these months through an informal, non-mandatory, and unofficial "Resettlement C" process, but to no avail.[35]

Direct remains stuck with the financial impact of the PJM invoices for January and February 2013. By furnishing erroneous information to PJM, Duke caused Direct to pay over $1.6 million more for wholesale energy charges than it should have.[36]

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[29] *Id*. at 13.
[30] *Id*.
[31] *Id*. at 14.
[32] *Id*. at 13.
[33] *Id*.
[34] *Id*. at 7-8.
[35] *Id*. at 11, 13-14.
[36] Kennelly Direct at 12.

D. Duke then failed to follow through with consolidated billing.

Duke's missteps are not limited to the furnishing of erroneous load data to PJM. Duke also mismanaged SunCoke's enrollment in consolidated billing.

By the fall of 2013, SunCoke's frustration led it to ask Direct to switch to consolidated billing when its renewal contract began in January 2014.[37] What should have been a seamless and routine switch turned out to be anything but. Duke did not include any of Direct's charges on SunCoke's January, February, or March invoices.[38] When Direct contacted Duke to find out what had happened, Duke responded that its systems could not process consolidated bills for large customers with cogeneration; this would require manual calculations, which Duke was not willing to do.[39] SunCoke was forced not only to pay a very large "true up" bill, but to also revert to dual billing.[40]

E. The Complaint and request for relief.

Direct's Complaint alleges two counts. Count I alleges violations of the metering standards proscribed in OAC Chapter 4901:1-10. Count II alleges violations of R.C. 4905.32 and 4928.35(C). Based on the factual development of the case through discovery and testimony, the evidentiary record lends itself to a more straightforward analysis than presented in the Complaint. As in any complaint proceeding against an electric utility, the ultimate question is whether the duty to render "adequate service," as required by R.C. 4905.22, has been met, or inversely whether R.C. 4905.26's prohibition against unjust, unreasonable, and inadequate service has been violated. The record here demonstrates that Duke violated this statute in

[37] *Id*. at 11.
[38] *Id*.
[39] *Id*. at 11-12.
[40] *Id*. at 12.

numerous ways. Accordingly, this brief frames Duke's violations in the context of "inadequate service" under R.C. 4905.22 and R.C. 4905.26.

The Complaint asks the Commission to order Duke: (i) to require all other suppliers affected by Duke's failure to provide accurate information to PJM to consent to resettlement of the January and February 2013 invoices; (ii) alternatively, to pay restitution; (iii) to pay interest of $307 per day from March 1, 2013; (iv) to pay Direct attorneys' fees incurred in bringing this action; (v) to investigate the cause of the data reporting errors and develop a plan to prevent their re-occurrence; and (vi) to levy fines against Duke as permitted under R.C. 4905.54. To avoid the need for ongoing supervision and involvement by the Commission, Direct is limiting its request for relief to a final order that: (i) finds that Duke has violated R.C. 4905.22, R.C. 4905.30 and R.C. 4905.32; and (ii) orders Duke to pay restitution of $1,628.884, plus carrying costs at the rate of $307 per day from March 1, 2013 to the date the final order issues.

III. ARGUMENT

There can be no dispute that Duke committed egregious errors in reporting load data to PJM. The dispute is whether Duke has any accountability under Ohio law to remedy its mistakes.

Instead of accepting responsibility for its mistakes, Duke points to "system limitations and the unique metering configuration at SunCoke" as an excuse for providing inaccurate hourly load data to PJM.[41] Neither "system limitations" nor a "unique metering configuration" prevented Duke from providing accurate information to PJM when Duke supplied SunCoke, so this excuse explains nothing. Duke is required to render "adequate service" under R.C. 4905.22, which at a minimum means service rendered in accordance with its Supplier Tariff. Duke did not comply with the Supplier Tariff.

[41] Abbott Direct at 13.

Direct has the burden to establish, by a preponderance of the evidence, that it is entitled to the relief requested in the Complaint. *Luntz Corp. v. Pub. Util. Comm.*, 79 Ohio St. 3d 509, 513-514 (1997); *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 49 Ohio St. 3d 123, 126 (1990). That burden is easily met here.

A. Duke is required to furnish "adequate service" in accordance with the Supplier Tariff and Ohio law.

R.C. 4905.22 requires "every public utility" to provide and furnish "necessary and adequate service and facilities" that are "in all respects just and reasonable." On the other side of the coin, R.C. 4905.26 prohibits service that is "in any respect" (among other things) "unjust," "unreasonable," "inadequate," or "in violation of law." "'Inadequate service' is not defined in R.C. Title 49, that determination being left to the commission and dependent upon the facts of each case.'" *Miami Wabash Paper LLC v. Cincinnati Gas & Elec.*, Case No. 02-2162-EL-CSS, Sept. 23, 2003 Opinion and Order, at 6, quoting *Ohio Bell Telephone Co. v. Pub. Util. Comm.*, 14 Ohio St.3d 49, 50 (1984).

Statutes, rules, tariffs, and Commission orders generally define the basic requirements of legally adequate service. *See, e.g.*, *Miami Wabash* at 21-22 (analyzing utility duties under administrative rules and tariffs). But these regulatory mandates represent the floor, not the ceiling, for the level of service required. *See, e.g.*, OAC 4901:1-10-02(A)(2) (purpose of electric service and safety standards is "to provide minimum standards for uniform and reasonable practices"). An unexcused violation of rules and tariffs establishes a prima facie case of inadequate service; compliance with rules and tariffs, however, does not conclusively establish that service was rendered adequately. "[T]he issue remains whether the service . . . can be considered inadequate on some other basis." *Walters v. Ohio Power Co.*, Case No. 87-1715-EL-CSS (Apr. 14, 1988 Opinion and Order), at [3]; *rev'd on other grounds by* Oct. 18, 1988 Entry

on Rehearing. An act or practice found "unreasonable but not a violation of any regulation" may nevertheless constitute "inadequate service" under R.C. 4905.22. *Ohio Bell*, 14 Ohio St.3d at 49-50 (affirming Commission finding of inadequate service not tied to specific tariff or rule violation).

There is no dispute that the Supplier Tariff governs the relationship between Direct and Duke.[42] "[O]nce approved, a tariff has the same binding effect as a law." *In re Complaint of Reynoldsburg*, 2012-Ohio-5270, ¶ 41, 134 Ohio St. 3d 29, 38. Moreover, "tariffs do not exist in a vacuum and cannot be divorced from the statutes that authorize them . . . ." *Id*. at ¶ 39. "The meaning and effect of particular [tariff] provisions are to be ascertained from the words employed and the connection in which they are used, the subject matter, and the evident purpose of such provisions." *Myers v. Pub. Util. Comm.*, 1992-Ohio-135, 64 Ohio St. 3d 299, 301 quoting *Saalfield Pub. Co. v. Public Util. Comm.*, 149 Ohio St. 113, 118 (1948).

To provide legally adequate service, Duke must—at a minimum—comply with the Supplier Tariff. It did not. This alone is sufficient to establish that Duke has violated R.C. 4905.22.

1. Duke violated Section 14.1 of the Supplier Tariff.

Among the services governed by the terms of Duke's Supplier Tariff are metering services and reporting services. Duke clearly violated these tariffs in its provision of service to Direct.

Duke must report hourly load data to PJM, so PJM may track how much energy each CRES provider's customers consume in the aggregate, and bill the suppliers accordingly.[43] Under Section 14.1, Duke, "acting as the designated Meter Data Management Agent for the

[42] Supplier Tariff, Section 2.1.
[43] Abbott Direct at 7.

Certified Supplier, will supply hourly load data to Transmission Provider, for the Certified Supplier."

Duke knew or should have known that the hourly data was inaccurate when the issue was brought to its attention in February 2013. But Duke took no action to correct the problem for around half a year. It continued to provide unadjusted hourly load figures to PJM until implementing a solution to the problem for the August 2013 and subsequent billing periods.[44]

Duke's actions violate Section 14.1 of the Supplier Tariff. Implicit in the requirement to "supply hourly load data" is a duty to take reasonable measures to ensure the accuracy of the data provided. In this case, the evidence is undisputed that Duke failed to report accurate hourly load data to PJM—Duke's belated attempt to resettle proves this, as does its testimony, discussed in the next section.[45] Duke collected data about the quantity of energy "actually consumed" by SunCoke, but the hourly data Duke furnished to PJM for the January through June 2013 periods reflected a totally different quantity, far in excess of that "actually consumed." Duke did not fulfill its responsibility to provide *accurate* hourly load data to PJM, and this constitutes a clear violation of the Supplier Tariff.

It does not take express tariff provisions to understand that a duty to measure and report information means to measure and report it accurately and consistently. The tariff provisions only confirm the obvious: Duke failed to provide reasonable and adequate service when it reported excessive load information to PJM, and continued to do so even after learning the information was incorrect.

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[44] *Id*. at 13.

[45] Duke's email to suppliers during the Resettlement C attempt acknowledge, "[d]ue to this error, another LSE has been overcharged by PJM for load settlement services for January and February." Kennelly Direct, Ex. 3, at 3.

2. Duke has no credible defense for its violation of the Supplier Tariff.

Duke does not have much to offer by way of explanation. It discusses a "unique" metering configuration at SunCoke involving two meters; one to measure the output of the customer's cogeneration facility, the other to measure electricity delivered to the customer to run its facility.[46] Duke's "meter management and data systems were not developed for arrangements like that," but Duke permitted this arrangement when it accepted SunCoke as an SSO customer.[47] During that time, Duke calculated the customer's bills manually to "net" the energy inflows and outflows.[48] When SunCoke switched to Direct, however, the metering data "was not subjected to the same adjustment that had been done by [Duke] when issuing [Duke's] bill to SunCoke."[49]

In other words, when SunCoke was a Duke SSO customer, Duke made sure that the load responsibility it was reporting about itself to PJM was an adjusted net figure that coincided with SunCoke's metered usage. But when Direct became the supplier, Duke paid no attention to the hourly load data reported to PJM. After the load anomaly was brought to its attention in February 2013, Duke confirmed both the existence and source of the problem, but continued to provide inaccurate information to PJM anyway. Duke did not fix the problem until the August 2013 billing period, but the financial consequences to Direct remain unaddressed.

[46] Abbott Direct at 3.
[47] *Id*. at 4.
[48] *Id*.
[49] *Id*. at 12-13.

Pointing to a "unique" metering configuration is no excuse for Duke's failure to ensure that it was providing accurate data about Direct's load responsibility. To begin with, this configuration was not an obstacle to accurate metering and billing when SunCoke received SSO service from Duke.[50] And regardless, under Section 9.2 of the Supplier Tariff, "[t]he Company will own, furnish, install, program, calibrate, test, and maintain all meters and associated equipment used for retail billing and settlement purposes in the Company's service area." Duke permitted the unique arrangement, so any extra effort required to ensure compliance with the Supplier Tariff was of Duke's own doing.

One could conceive of situations where a utility's failure to follow a tariff provision to the letter results in no prejudice, and therefore does not constitute inadequate service under R.C 4905.22 or R.C. 4905.26. This is not such a case. The prejudice to Direct from Duke's violation is apparent, and there is no valid excuse for Duke's failure to perform duties required of it by the Supplier Tariff.

3. Duke failed to implement consolidated billing to an eligible customer.

Duke also violated Section 10.1 if the Supplier Tariff. This, too, constitutes a violation of R.C. 4905.22.

The Supplier Tariff allows customers to choose consolidated billing on both a "rate ready" and "bill ready" basis, provided a supplier's price plans "are ones that are considered standard rates, as set forth in in Section 10.6 hereof."[51] Section 10.6 defines "standard rates" as any of the following: (i) volumetric rates, (ii) flat rates, (iii) multi-tiered rates, (iv) time-of-use rates, and (v) percentage-off rates.

[50] *Id*. at 4-5.
[51] Supplier Tariff, Section 10.1.

As a result of SunCoke's frustration with the billing issues endured during the first half of 2013, the customer decided to switch to a fixed volumetric rate plan with utility consolidated billing, beginning in 2014.[52] Direct processed this change with Duke, and Duke raised no issues. It was not until after Duke had failed to include Direct's charges on SunCoke's bills for the first three months of 2014 that Duke decided the account was ineligible for consolidated billing. "They said it would be a completely manual process and they were not willing to do that."[53] SunCoke and Direct had no choice but to switch back to dual billing.[54]

It is true that "[n]othing in this Certified Supplier Tariff shall require the Company to bill customers manually."[55] But this sentence is a limited exception to the general rule established in Section 10.1. Consolidated billing "will be provided by the Company only if the price plans offered by the Certified Supplier are ones that are considered standard rates, as set forth in Section 10.6 hereof."[56] The disclaimer about manual billing appears in the next sentence. The sentence immediately following confirms that the disclaimer applies only to non-standard rates: "Thus, if the Certified Supplier is offering price plans that are not considered by the Company as standard rates, the Company will provide the Certified Supplier with sufficient meter data on a timely basis so that the Certified Supplier can bill the customer directly under the separate billing method or can opt for Company Consolidated and Bill-Ready Billing."[57]

In short, Section 10.1 says that if a supplier's price plan meets any of five different categories of a "standard rate," the utility will provide consolidated billing. If the price plan is

[52] Kennelly Direct at 11.
[53] *Id*.
[54] *Id*.
[55] Supplier Tariff, Section 10.1.
[56] *Id*.
[57] *Id*.

not a standard rate, then manual billing may be required, and the account is ineligible for company consolidated rate-ready billing.

The enrollment submitted to and accepted by Duke for utility consolidated rate-ready billing, effective January 2014, unquestionably involved a "price plan" meeting Duke's definition of a "standard rate." Because the fixed volumetric price plan was a standard rate, Duke was required to provide rate-ready consolidated billing, regardless of whether doing so involved any manual effort on Duke's part. By refusing to offer rate-ready consolidated billing for an eligible account, Duke violated Section 10.1 of the Supplier Tariff.

4. Duke's tariff violations also constitute violations of R.C. 4905.30 and 4905.32.

R.C. 4905.30 requires public utilities to "print and file with the public utilities commission schedules showing all rates . . . and charges for service of every kind furnished by it, ***and all rules and regulations affecting them***." (Emphasis added.) Not surprisingly, utilities are not only required to file tariffs, but must actually provide service in accordance with their terms. Thus, R.C. 4905.32, in addition to prohibiting the charging of rates that vary from approved tariffs, also provides that "[n]o public utility shall . . . extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service."

Direct has shown above that by reporting inaccurate and inconsistent load data to Direct and PJM, it violated its tariff provisions. In doing so, Duke violated R.C. 4905.30 and 4905.32 as well.

B. Direct is entitled to relief for Duke's violations.

Duke's service was inadequate, unreasonable, and in violation of its tariffs. The Commission should issue an order holding that Duke violated R.C. 4905.22, R.C. 4905.26, R.C.

4905.30, and R.C. 4905.32 in the provision of service to Direct. This finding entitles Direct to remedies under Ohio law.

1. The tariff language purporting to hold Duke harmless for actions taken as Meter Data Management Agent is invalid.

Section 14.1 includes a sentence stating, "[t]he Company will be held harmless for any actions taken while performing Meter Data Management Agent responsibilities."[58] This provision purports to exculpate Duke from liability for failing to perform its duties under the Supplier Tariff. The provision is invalid under OAC 4901:1-10-02.

In Case No. 06-0653-EL-ORD, the Commission codified its "longstanding policy and previous Supreme Court decisions that have held that a public utility cannot, through the use of an exculpatory clause, limit its liability for damages resulting from its own negligence." Finding and Order at 6 (Nov. 5, 2008). The Commission thus enacted a rule invalidating all present and future exculpatory provisions:

> No tariff of an electric utility shall incorporate exculpatory clauses that purport to limit or eliminate liability on the part of the electric utility to its customers or others as a result of its own negligence when providing a regulated service. No electric utility tariff shall incorporate provisions which purport to establish liability on the part of the electric utility's customers for acts or failures to act involving an electric utility's facilities, which are beyond the control of the customer. Any contrary provisions in an electric utility's tariff now on file with the commission shall be eliminated.

Ohio Admin. Code 4901:1-10-02(G).

Duke is an "electric utility." Direct is a "customer" of Duke for purposes of the Supplier Tariff. Duke's services under the Supplier Tariff are "regulated." In claiming that it will be "held harmless" for its performance of these duties, Duke is purporting to "limit or eliminate liability." The Commission's rules plainly do not permit this. The exculpatory language in Section 14.1 is invalid.

[58] Supplier Tariff, Section 14.1.

This case demonstrates why the Commission's rule is sensible and necessary. Direct has no option but to rely on Duke to provide the services at issue in this case. The Supplier Tariff forces Direct to use Duke as its Meter Data Management Agent. The tariff also forces Direct to rely on Duke's metering equipment; to rely on Duke to read the meters; and to rely on Duke to report accurate information to PJM.[59] Duke does not perform these duties gratuitously; it gets paid to perform them, both through rates that recover the cost of providing these services as well as through fees charged to suppliers. Duke cannot retain the benefits that go along with providing these services, and then disclaim any liability when it provides them in a negligent and unreasonable manner. Moreover, as the only party able to prevent the problems that resulted in harm to Direct, holding Duke responsible is reasonable and equitable.

Duke has an affirmative duty to fulfill its responsibilities under the Supplier Tariff. It cannot be "held harmless" where, as here, it fails to do so.

2. The Commission may order restitution under R.C. 4928.16.

The Commission has the authority to order Duke to compensate Direct and make it whole for the harm it suffered from Duke's metering and reporting errors. Under R.C. 4928.16(B)(1), the Commission may "[o]rder . . . restitution to customers . . . in any complaint brought pursuant to division (A)(1) or (2) of this section." As a CRES provider, Direct is a "customer" of Duke's under the Supplier Tariff and other service agreements. The present proceeding is a complaint filed pursuant to R.C. 4928.16(A) and R.C. 4905.26. The amount of the financial harm caused by Duke's failure to provide reasonable service is known and supported by the evidence, and restitution encompasses "[c]ompensation or reparation for the loss caused to another." Black's Law Dictionary at 1315 (7th ed. 1999). Accordingly, restitution is permissible and reasonable here.

[59] Supplier Tariff, Sections 9.2, 10.1, 10.4, 14.1.

Mr. Kennelly's damages presentation and calculation is unrebutted. As shown in RK Attachment 4, Direct has paid $1,628.884 to PJM that cannot be recovered through resettlement by PJM.[60] At a 7% cost of money, Direct's carrying cost on this amount is $307 per day.[61] The Commission has all the information it needs to order restitution.[62]

IV. CONCLUSION

The record shows that Duke did not take its obligations seriously. One of its basic, fundamental responsibilities under the Supplier Tariff is to report accurate load data to PJM. That did not happen. And rather than fix the problem, Duke compounded it by rebilling Direct's customer the wrong amounts, dragging its feet to start the PJM resettlement process, and dropping the ball on the customer's enrollment in consolidated billing. While Direct appreciates the resettlement efforts that resulted in it being made partially whole, Ohio law requires that Direct be made fully whole. Duke was the only party in a position to prevent the loss that Direct incurred. Duke must compensate Direct for that loss.

[60] *See also* Kennelly Direct at 12.
[61] *Id*.
[62] As an alternative to restitution, the Commission could defer any consideration of damages to a court of competent jurisdiction, which would permit Direct to seek treble damages under R.C. 4905.61. *Milligan v. Ohio Bell Tel. Co*., 56 Ohio St. 2d 191, 191(1978). Direct is not interested in "punishing" Duke; Direct simply wishes to (and is entitled to) be made whole.

Dated: August 11, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Initial Post-Hearing Brief was served by electronic mail this 11th day of August, 2017, to the following:

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Summary: Text Initial Post-Hearing Brief electronically filed by Ms. Rebekah J. Glover on behalf of Direct Energy Business, LLC