

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of Application of Duke Energy)
Ohio, Inc. for Authority to Establish a) Case No. 14-841-EL-SSO
Standard Service Offer Pursuant to R.C.)
4928.143 in the Form of an Electric Security)
Plan, Accounting Modifications, and Tariffs)
for Generation Service.)

In the Matter of Application of Duke Energy) Case No. 14-842-EL-AAM
Ohio, Inc. for Authority to Amend its)
Certified Supplier Tariff, P.U.C.O. No. 20.)

**JOINT MEMORANDUM CONTRA MOTION OF DUKE ENERGY OHIO, INC.
TO CONTINUE THE RIDERS INCLUDED IN THE ELECTRIC SECURITY PLAN
BY OHIO MANUFACTURERS' ASSOCIATION AND THE KROGER CO.**

I. INTRODUCTION

On March 9, 2018, Duke Energy Ohio, Inc. (Duke) filed a motion to continue all the riders that were part of its electric security plan (ESP III) approved by the Public Utilities Commission of Ohio (Commission) in 2015. Significantly, by Commission Opinion and Order and the express terms of Duke's ESP III, these riders are set to expire on May 31, 2018.¹ In essence, in its motion to continue, Duke wants the Commission to amend and modify its April 2, 2015 Opinion and Order to extend ESP III until such time as a new standard service offer can be implemented.² However, Duke has failed to make the requisite showing that such an amendment or modification of a prior Commission order is just and reasonable. Duke has also failed to establish that each rider is "necessary to maintain essential electric service to consumers . . ." as required for a standard service offer pursuant to R.C. 4928.141. Without such mandated

¹ Opinion and Order at 51 (April 2, 2015), affm'd Second Entry on Rehearing (March 21, 2018).

² Motion to Continue at 2 (March 9, 2018).

showings, Duke is not entitled to a modification of the Commission's prior order, and the motion to continue should be denied.

This is especially true with respect to the Distribution Capital Investment Rider (Rider DCI). Pursuant to the Commission's Opinion and Order, Rider DCI is mandated to expire on May 31, 2018. It is also capped at \$35 million for the first five months of 2018. The purpose of the cap is to establish the maximum amount Duke can collect under Rider DCI before the expiration date, but Rider DCI terminates on either the date the \$35 million cap is reached or May 31, 2018, whichever occurs **earlier**. Duke's contention that Rider DCI does not have a "definite termination date" is simply not accurate and cannot be used as justification for requesting that the Commission extend Rider DCI until August 1, 2018. The termination date for Rider DCI is May 31, 2018. Just because Duke projects that it may not spend and collect from customers the full amount authorized under the cap at the time of the termination date, that projection does not justify an extension of Rider DCI through August 1, 2018. Indeed, this would create a slippery slope as Duke has already indicated it likely will be seeking an adjustment to the amount of the Rider DCI cap "for periods commencing August 1."³ The Commission should not open the door to such modifications, particularly when there has been no showing by Duke that the modifications are just, reasonable, and necessary to the standard service offer.

Accordingly, Duke's Motion to Continue should be denied. A carte blanche continuance of the entire ESP III is not warranted. At a minimum, the Commission should only continue those riders necessary to provide consumers with "a standard service offer of all competitive retail electric services necessary to maintain essential electric service."⁴ Placeholder riders, such

³ Motion to Continue at n.7.

⁴ R.C. 4928.141.

as the Price Stabilization Rider (PSR), are also not necessary to provide consumers with a standard service offer. Thus, if the Commission is inclined to continue ESP III, the Commission should only continue those terms and provisions necessary and essential to the standard service offer.

Pursuant to Ohio Adm. Code 4901-1-12(B)(1), the Ohio Manufacturers' Association (OMA) and The Kroger Co. (Kroger) hereby file this Joint Memorandum Contra Duke's Motion to Continue the Riders Included in its ESP III.

II. ARGUMENT

A. This Memorandum Contra is Not Time Barred By a Four-Year Old Entry that was Issued "In Light Of The Time Frame For These Proceedings."⁵

Before addressing the substantive issues with Duke's motion to continue, OMA and Kroger feel compelled to respond to a procedural issue raised by both Duke and Ohio Energy Group (OEG). Specifically, Duke and OEG have taken the position that, in light of an attorney examiner's entry that was issued in this proceeding nearly four years ago at a time where the statutory deadline to consider an ESP application was looming, any memorandum contra to subsequent motions made in the same proceeding must also be filed within five days.⁶ Contrary to Duke and OEG's contentions, the procedural schedule established by the June 6, 2014 Entry is no longer applicable. Thus, the timing for this memorandum contra is governed by Ohio Adm. Code 4901-1-12(B)(1). OMA and Kroger's joint memorandum contra was filed in accordance with Ohio Adm. Code 4901-1-12(B)(1) and is thus timely.

⁵ Entry at ¶ 5 (June 6, 2014).

⁶ See Reply of Duke Energy Ohio, Inc., to Memorandum Contra Its Motion to Continue Riders (March 22, 2018) ("Duke's Reply"); Reply of the Ohio Energy Group (March 20, 2018).

A brief review of the history of this proceeding and a straight-forward reading of the June 6, 2014 Entry confirm that the five-day deadline for memorandum contra is not applicable at this time, nearly four years after the Entry was issued.

On May 29, 2014, Duke filed its application for a standard service offer pursuant to R.C. 4928.141.⁷ On June 6, 2014, the Attorney Examiner in this proceeding held that Duke's application "is for an electric security plan [ESP III] in accordance with R.C. 4928.143."⁸ Thus, as Duke's Reply correctly noted, "[t]his case proceeded on a statutorily limited timeline" as of May 29, 2014.⁹ Specifically, that timeline was governed by R.C. 4928.143(C)(1), which states in pertinent part:

. . . The commission shall issue an order under this division for an initial application under this section not later than one hundred fifty days after the application's filing date and, for any subsequent application by the utility under this section, not later than two hundred seventy-five days after the application's filing date. . . .¹⁰

Thus, due to the Commission's statutory mandate to issue an order on Duke's ESP application within 275 days, an abbreviated pleading schedule and discovery response time were required for the consideration of Duke's ESP application within the 275-day period.

Duke, however, fails to appreciate the limited scope of the Entry, instead hoping to impose an abbreviated pleading schedule on motions that have nothing to do with the whole purpose of the abbreviated procedural schedule, which was to allow the Commission to meet the statutorily imposed deadline to rule on Duke's ESP application. In fact, the plain language of the June 6, 2014 Entry contradicts Duke's position as the Entry expressly notes that the revised procedural schedule was only required "[i]n light of the time frame for these proceedings,"

⁷ Application (May 29, 2014).

⁸ Entry at ¶ 2 (May 6, 2014) (the "Entry").

⁹ See Duke's Reply at 1.

¹⁰ R.C. 4928.143(C)(1).

referring to the 275-day timeline set by statute.¹¹ Thus, the procedural schedule set in the June 6, 2014 Entry – including the five-day deadline for memoranda contra – was only applicable for that statutorily-abbreviated time frame. While the Attorney Examiner has never amended or supplemented the June 6, 2014 Entry, such would be unnecessary, as the “time frame for these proceedings” – that is, the Commission’s consideration of Duke’s application for ESP III – terminated with the Commission’s April 2, 2015 Opinion and Order, ruling on Duke’s ESP application.

The Supreme Court of Ohio has held that R.C. 4928.143(C)(1) “effectuates the proper, orderly, and prompt **resolution of initial ESP applications**.”¹² Thus, contrary to Duke’s and OEG’s positions, the procedural schedule set pursuant to R.C. 4928.143(C)(1) is limited only to the **initial** review of ESP applications – it does not have wide-ranging implications throughout the remainder of the proceeding. Because Duke’s initial ESP application has been resolved (subject to appeal), “the time frame for these proceedings” which precipitated the June 6, 2014 Entry’s abbreviated procedural schedule no longer exists.

Since the Entry’s abbreviated procedural schedule no longer applies, this memorandum contra is timely. Under Ohio Adm. Code 4901-1-12(B)(1), “[a]ny party may file a memorandum contra within fifteen days after the service of a motion.”¹³ Duke’s Motion to Continue was filed on March 9, 2018. Therefore, all parties have until March 26, 2018 to file a Memorandum Contra to Duke’s Motion to Continue.

As the Commission is well aware, all parties to this proceeding have been operating under Duke’s ESP III for almost three years. Because the Commission’s April 2, 2015 Opinion

¹¹ Entry at ¶ 5.

¹² *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 43 (2011), citing *State ex rel. Jones v. Farrar*, 146 Ohio St.3d at 472 (“R.C. 4928.143(C)(1)’s deadline effectuates ‘the proper, orderly, and prompt’ resolution of initial ESP applications.”) (emphasis added).

¹³ Ohio Adm. Code 4901-1-12(B)(1).

and Order remains in effect (subject to appeal), Duke and OEG cannot be allowed to turn back the clock to impose a procedural schedule that was pre-conditioned on the Commission's April 2, 2015 Opinion and Order having not been issued.

B. In the Alternative, OMA and Kroger Request Leave to File Out-of-Time for Good Cause Shown.

Nonetheless, if the Commission believes the June 6, 2014 Entry is applicable to Duke's Motion to Continue filed nearly four years later, OMA and Kroger respectfully request leave to file this memorandum contra out of time for good cause shown. Granting such leave to OMA and Kroger will not harm or prejudice any party, nor will it impede this proceeding. The Commission routinely grants motions for out-of-time filings for good cause shown absent a showing of prejudice.¹⁴ The Commission has granted late filings of memoranda contra in similar circumstances to those present here – even where a party files late for “clearly unwarranted” reasons.¹⁵ That said, OMA and Kroger submit that, even if they misinterpreted the June 6, 2014 Entry and the scope of its effect under R.C. 4928.143(C)(1) and the applicability of Ohio Adm. Code 4901-1-12 to Duke's Motion, their interpretation was reasonable given the circumstances of this proceeding.¹⁶ Thus, OMA and Kroger respectfully request that the Commission grant them leave to file this memorandum contra out-of-time for good cause shown.

¹⁴ Ohio Adm. Code 4901-1-13(A) states that “[e]xcept as otherwise provided by law, and notwithstanding any other provision in this chapter, continuances of public hearings and extensions of time to file pleadings or other papers may be granted upon motion of any party for good cause shown, or upon motion of the commission, the legal director, the deputy legal director, or an attorney examiner.”

¹⁵ See, e.g., *In the Matter of the Application of Water & Sewer LLC for an Increase in Rates and Charges*, Case No. 03-318-WS-AIR, Entry at ¶ 9 (October 30, 2003) (“While this reliance was clearly unwarranted, the company will not be harmed by allowing the Hogans to present the same arguments as were presented by Mr. Koewler. The late filing of a memorandum contra by the Hogans will be allowed.”).

¹⁶ See, e.g., *In the Matter of the Complaint of Kelly Rashedi*, Case No. 16-718-GA-CSS, Entry at *1 (July 20, 2016) (“Therefore, under the circumstances, the Commission finds that Constellation's motion to file its answer out-of-time should be granted.”); *In the Matter of City of Toledo*, Case No. 14-1944-EL-CSS Entry at ¶ 8 (January 6, 2016) (“Initially, the Commission finds that Toledo's motion for leave to file a memorandum in opposition to FES' motion to dismiss out of time is reasonable and should be granted.”).

C. Duke Seeks to Amend the Commission’s April 2, 2015 Opinion and Order, But Has Failed to Establish that Such Amendment Is Just, Reasonable, and Necessary to Provide a Standard Service Offer to Consumers.

By way of its Motion to Continue, Duke is asking the Commission to amend its April 2, 2015 Opinion and Order to extend Duke’s ESP III beyond its termination date of May 31, 2018. The Supreme Court of Ohio, however, has expressly rejected the Commission’s authority to do so, noting that it would “hardly be a just and reasonable result.”¹⁷ Duke has failed to show how such a result, i.e., the extension of all the riders in ESP III, would be just and reasonable. At the very least and to the extent Duke is asking the Commission to depart from its prior order, Duke must explain how this new course is also substantively reasonable and lawful, but it has not. The Court stated: “And if the commission does see fit to depart from a prior order, the commission ‘must explain why,’ and ‘the new course also must be substantively reasonable and lawful.’”¹⁸

Duke has not provided the proper justification and rationale for the Commission to form a basis for departing from its prior order, which approved the term of the ESP III to expire on May 31, 2018. Instead, Duke, correctly recognizing that the situation at hand is not expressly provided for in the statutes, relies upon R.C. 4928.143(C)(2)(b) to argue that an expiration of an ESP by its terms is akin to a utility proactively terminating an ESP application. Duke asserts that in such an analogous situation, the Commission should continue the most recent standard service offer. Duke then translates that into the continuation of every single rider included in ESP III. Duke’s reasoning, however, is flawed.

R.C. 4928.143(C)(2)(b) expressly provides for what happens if the ESP *application* is terminated by the utility. The statute does not provide for or allow a utility to simply continue all

¹⁷ *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060, ¶ 30 (2015).

¹⁸ *Id.* at ¶ 17.

provisions of its current ESP at the expiration of the current ESP. Thus, in the context of an ESP expiring by its own terms, the Commission is limited to ordering that which is “necessary to maintain essential electric service” to consumers. Duke has made no showing in its Motion to Continue as to what is necessary to maintain essential electric service. It cannot be said that placeholder riders, such as the PSR, are necessary to maintain essential electric service.

Absent Duke establishing how each and every single rider in ESP III is necessary to maintain essential electric service and absent Duke demonstrating that a modification to its ESP III and the Commission’s Opinion and Order is warranted, Duke’s motion to continue cannot be granted.

Further, Duke’s reliance upon the Commission’s decision in *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, et al., as support for extending the ESP is misplaced. In that proceeding, all the parties agreed to extend and continue the ESP in place except for one rider.¹⁹ As such, that decision does nothing to alleviate the burden upon Duke to establish how every single rider in ESP III is necessary to maintain essential electric service as required by a standard service offer and that an amendment or modification to its ESP and the Commission’s Opinion and Order is just, reasonable, and warranted.

D. The Deadline for Rider DCI Should Not be Extended until August 1, 2018 as the \$35 Million Cap was Limited to the First Five Months of 2018.

Pursuant to the Commission’s Opinion and Order, Rider DCI is mandated to expire on May 31, 2018. The PUCO approved the rider and capped the costs collected under that rider in the amount of \$35 million for the first five months of 2018. Yet, in its motion to continue, Duke

¹⁹ *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 08-1094-EL-SSO, et al., Entry (December 19, 2012), at ¶ 5 (“While **the parties agree** that DP&L’s current ESP should continue until a subsequent offer is authorized . . .”) (emphasis added).

seeks to extend the deadline of May 31, 2018 for Rider DCI until August 1, 2018, and expressly reserves the right to seek to increase the cap for Rider DCI above the Commission-ordered \$35 million cap after August 1, 2018. The purpose of the cap is to establish the maximum amount Duke can collect under Rider DCI before the expiration date, but Rider DCI terminates on either the date the \$35 million cap is reached or May 31, 2018, whichever occurs **earlier**. The maximum period that Rider DCI is authorized to exist and collect costs from customers is May 31, 2018. Projecting that it may not spend and collect the full amount authorized under the cap at the time of the termination date, is not justification for authorizing an extension of Rider DCI until August 1, 2018. For the reasons set forth above, the Rider DCI amendment should be rejected. Duke has made no showing whatsoever that such an amendment to Rider DCI, the ESP III, and the Commission's Opinion and Order would be just and reasonable.

Accordingly, OMA and Kroger submit that the amendment to Rider DCI requested (extend beyond May 31, 2018) and the amendment to Rider DCI to reserve the right to request an increase in the approved cap at a future date should be rejected as unjust and unreasonable modifications to Duke's ESP III and the Commission's April 2, 2015 Opinion and Order.

III. CONCLUSION

Accordingly, for the foregoing reasons, OMA and Kroger respectfully request that Duke's Motion to Continue be denied. A carte blanche continuance of the entire ESP III is not just, reasonable, or warranted. At a minimum, OMA and Kroger respectfully request this Commission only continue those riders necessary to maintain essential electric service as required of a standard service offer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Joint Memorandum Contra was served via electronic transmission upon the parties this 26th day of March, 2018.

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