

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF APPLICATION OF
DUKE ENERGY OHIO, INC. FOR
AUTHORITY TO ESTABLISH A STANDARD
SERVICE OFFER PURSUANT TO R.C.
4928.143 IN THE FORM OF AN ELECTRIC
SECURITY PLAN, ACCOUNTING
MODIFICATIONS, AND TARIFFS FOR
GENERATION SERVICE.**

CASE No. 14-841-EL-SSO

**IN THE MATTER OF APPLICATION OF
DUKE ENERGY OHIO, INC. FOR
AUTHORITY TO AMEND ITS CERTIFIED
SUPPLIER TARIFF, P.U.C.O. No. 20.**

CASE No. 14-842-EL-ATA

ENTRY

Entered in the Journal on May 30, 2018

I. SUMMARY

{¶ 1} The Commission finds that Duke Energy Ohio, Inc.'s motion for an extension of its electric security plan should be granted.

II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke or the Company) is an electric distribution utility (EDU) as defined in R.C. 4928.01(A)(6) and a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an EDU shall provide consumers within its certified territory a standard service offer (SSO) of all competitive retail electric services necessary to maintain essential electric services to customers, including a firm supply of electric generation services. The SSO may be either a market rate offer (MRO) in accordance with R.C. 4928.142 or an electric security plan (ESP) in accordance with R.C. 4928.143.

{¶ 4} On May 29, 2014, pursuant to R.C. 4928.143, Duke filed an application for an SSO, in the form of an ESP (ESP 3).

{¶ 5} On April 2, 2015, the Commission issued its Opinion and Order approving Duke's proposed ESP, with certain modifications (ESP 3 Order). Pursuant to the ESP 3 Order, the ESP was approved for a three-year term lasting from June 1, 2015, to May 31, 2018. Further, Duke was directed to file its next SSO application by June 1, 2017. On May 1, 2015, and May 4, 2015, applications for rehearing of the ESP 3 Order were filed by numerous parties. By Entry on Rehearing dated May 28, 2015, the Commission granted rehearing for further consideration of the matters specified in the applications for rehearing. In a Second Entry on Rehearing issued March 21, 2018, the Commission granted in part and denied in part the applications for rehearing of the April 2, 2015 Opinion and Order. An Entry Nunc Pro Tunc issued March 28, 2018, clarified the Second Entry on Rehearing. A Third Entry on Rehearing was issued on May 9, 2018.

{¶ 6} On June 1, 2017, in accordance with the directives in the ESP 3 Order, Duke applied for an SSO in the form of an ESP in Case No. 17-1263-EL-SSO (ESP 4 Case). Initially, the attorney examiner scheduled the matter for hearing to begin November 13, 2017. Since that time, however, the attorney examiner granted several unopposed motions to continue the proceedings as the parties indicated there are ongoing settlement discussions. Thereafter, Duke, Staff, and several other parties filed a Stipulation that purports to resolve the issues in the ESP 4 Case, as well as other proceedings. The evidentiary hearing regarding that matter is currently set to begin on July 9, 2018.

{¶ 7} On December 5, 2017, and revised on December 6, 2017, Duke made a filing in the ESP 4 Case requesting to proceed with two auctions to procure generation for its SSO customers. Duke asserted that, because its application is still pending in the ESP 4 Case, the auctions are necessary in order to maintain an adequate supply of energy for its customers. By Entry on December 20, 2017, the Commission authorized Duke to go forward with the auctions.

III. DISCUSSION

{¶ 8} On March 9, 2018, Duke submitted a motion to continue the riders incorporated in ESP 3, including, specifically, Duke's Distribution Capital Investment Rider (Rider DCI). Memorandums in response were filed by the Ohio Energy Group (OEG), Ohio Consumers' Counsel (OCC), and, jointly, the Ohio Manufacturers' Association and the Kroger Company (Kroger/OMA). Duke filed replies to memorandums filed OCC and Kroger/OMA.

{¶ 9} On May 11, 2018, Duke filed a motion to extend the monetary cap associated with Rider DCI. OCC filed memorandum contra Duke's motion on May 15, 2018, to which Duke replied on May 21, 2018.

A. *Request to Extend ESP 3*

{¶ 10} In Duke's motion to extend ESP 3, Duke states that is unlikely that the ESP 4 Case will be resolved with a new SSO in place before ESP 3 concludes on May 31, 2018. While the Commission already authorized Duke to procure generation for its SSO customers, the Company asserts that the riders associated with ESP 3 need to continue in order to prevent a situation where Duke is unable to fulfill its statutory obligation to provide an SSO. Thus, Duke requests the Commission allow the provisions, terms, and conditions of the current ESP to continue until the next SSO is implemented. Regarding Rider DCI, Duke notes that the Company is requesting to continue the rider in the ESP 4 Case and a temporary suspension of the Rider DCI could delay the completion of certain projects and unnecessarily complicate matters involving intricate resource coordination. According to Duke, Rider DCI helps improve service reliability and allows the Company to make proactive investments that benefit customers. In its request, Duke seeks to extend Rider DCI until the earlier of August 1, 2018, and the date ESP 4 is implemented. Duke notes that there is presently a \$35 million cap on Rider DCI and the Company is not asking to increase that cap at this time. Duke maintains that, because the Company is not seeking to increase the cap, no party would be prejudiced by the extension. Duke submits that while the Ohio

Revised Code does not contemplate what should happen when an SSO expires without a subsequent SSO to replace it, R.C. 4928.143 permits an existing SSO to continue if an SSO application is withdrawn by a utility or denied by the Commission. Further, Duke notes the Commission previously allowed another utility to continue its SSO past its expiration date in *In re Dayton Power & Light Co.*, Case No. 12-426-EL-SSO, et al., Entry at 3-4 (Dec. 19, 2012) (DP&L Extension Case).

{¶ 11} OEG filed a memorandum in support on March 12, 2018. OEG affirms that it does not oppose Duke's motion and requests that Duke's extension request apply to all provisions, terms, and conditions associated with ESP 3. Specifically, OEG asks that the large customer interruptible load program continue until a new SSO is implemented.

{¶ 12} In response, on March 19, 2018, OCC filed memorandum contra Duke's request. OCC first argues that Duke's motion should be denied because the Ohio Revised Code does not explicitly permit the Commission to extend an ESP past its expiration date if a new SSO has not been approved. OCC notes R.C. 4928.143 directs the Commission to continue an SSO only when a utility terminates its SSO application or when the Commission denies a utility's SSO application. OCC submits that neither situation is applicable here. Further, OCC argues that those situations only allow the Commission to extend an SSO, which, according to OCC, is different from an ESP. OCC maintains that provisions such as Rider DCI are unique to an ESP and do not relate to the actual SSO, which, reasons OCC, is strictly the supply and pricing of generation service.

{¶ 13} OCC further states that because the ESP 3 Order already determined the end date of the ESP, Duke's motion for an extension is inappropriate. According to OCC, Duke's motion is a request for the Commission to modify its order and the proper avenue to do that is through an application for rehearing. Thus, as applications for rehearing must be submitted within 30 days of a Commission order, OCC suggests that Duke's request is late and improper. Along those lines, OCC also argues that the doctrines of res judicata and collateral estoppel preclude Duke from seeking an extension of the ESP. According to OCC,

ESP 3 was already litigated and the Commission issued a ruling on the merits. OCC thus rationalizes that Duke is wrongfully attempting to re-litigate the issues that resulted in the ESP 3 Order.

{¶ 14} Finally, OCC suggests that, if the Commission permits Duke to extend the ESP, the Company should be required to amend tariff language to allow customer refunds for unjust charges. Citing a recent decision of the Supreme Court of Ohio, OCC asserts that a continuation of Duke's riders, without modifications, threatens consumers with the prospect of paying unreasonable and unlawful charges. Citing *In re Rev. of Alternative Energy Rider Contained in Tariffs of Ohio Edison Co.*, Slip Opinion No. 2018-Ohio-229 (*Ohio Edison Case*). OCC thus makes three recommendations for the Commission's consideration: (1) end the automatic approval process for riders that are updated quarterly; (2) direct Duke to modify the tariffs to state that the rider is being collected subject to refund; and (3) order that tariffs for riders subject to prudence reviews be amended to include language that the rate is subject to refund.

{¶ 15} On March 26, 2018, Kroger/OMA additionally filed a memorandum contra. Kroger/OMA submit that Duke failed to demonstrate that the Company's request is just and reasonable. Kroger/OMA state that the Commission previously ordered that ESP 3 should conclude on May 31, 2018. For the Commission to deviate from its prior order, Kroger/OMA assert the Supreme Court of Ohio requires sufficient justification. Citing *In re Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, ¶ 30. Kroger/OMA aver that the Commission's directives are limited to what is necessary to maintain essential electric service to consumers. According to Kroger/OMA, for any rider to continue past ESP 3's expiration date, Duke must demonstrate how each rider is needed to maintain essential electric service. Regarding Rider DCI specifically, Kroger/OMA explain that the Commission only approved the \$35 million cap for the first five months of the year and that it is inappropriate to extend that deadline just because Duke has not yet reached that cap. In addition, Kroger/OMA clarify that this situation is different from the DP&L Extension referenced by Duke because, in that case, all parties were in agreement. Accordingly,

Kroger/OMA argue that because Duke has not sufficiently explained why each rider should continue, the Company's motion should be denied.

{¶ 16} In its reply, Duke maintains that the Commission should continue the riders. Duke submits that continuing the riders is reasonable and necessary under the circumstances. According to Duke, in extending an ESP, this includes all of the provisions, directives, and approvals included in the Commission ESP 3 authorization. Duke further argues that Kroger/OMA's reliance on *In re Ohio Power Co.* is misplaced. In that case, states Duke, the Supreme Court found the Commission modified an ESP after it was terminated and deprived the EDU of its right to withdraw its application. Duke submits that situation is not relevant here, where Duke is requesting the extension. Further, Duke contends the Commission is only extending the ESP and is not changing any provisions.

B. Request regarding Rider DCI's monetary cap

{¶ 17} On May 11, 2018, Duke filed an additional motion regarding the monetary cap associated with Rider DCI. Duke notes that, since its original motion to extend ESP 3, a procedural schedule has been established for ESP 4. Duke states a hearing is now scheduled for July and a new ESP would likely not be authorized until later in the year. The Company avers that its original March 9, 2018 motion anticipated a resolution by August 2018 and requested to extend Rider DCI's \$35 million cap until that time. However, because a new ESP will not be authorized until after August, Duke now requests to extend the cap. Duke maintains that a \$35 million cap was approved in ESP 3 for the first five months of 2018. Duke asserts this averages to \$7 million per month and thus requests to maintain this monthly average cap until a new ESP is put into effect. According to Duke, if it does not get this recovery there will be negative repercussions. Duke states that it will either have to continue distribution capital investments without recovery and risk credit downgrades or discontinue capital investment and risk reliability degradation.

{¶ 18} In its memorandum contra, OCC asks that Duke's motion be denied. Therein, OCC reiterates many of its previous arguments regarding Duke's initial request to extend

ESP 3. OCC against states that Duke's motion is an untimely request for rehearing and is precluded by the doctrines of collateral estoppel and res judicata. OCC also reasserts that there is no specific law that permits Duke to extend the ESP and to increase rates. Finally, OCC asks that, if the Company is permitted to continue recovery for Rider DCI, that Duke's \$7 million request be reduced to account for the new, lower corporate income tax rate.

C. Commission Conclusion

{¶ 19} The Commission finds that Duke's current ESP should be extended. With a hearing date of July 9, 2018, it is evident that ESP 4 will not be resolved until after ESP 3's scheduled conclusion date of May 31, 2018. As discussed by the parties, the Revised Code does not provide specific guidance regarding a gap between an expiring SSO and still-pending SSO application. However, if the Commission disapproves an SSO application, or if an EDU withdraws a Commission-modified SSO application, R.C. 4928.143(C)(2)(b) states that, in the absence of an operating SSO, the Commission shall order the most recent SSO to continue. Extending the ESP here is not dissimilar from those situations contemplated by the General Assembly and, further, we find it is consistent with Commission precedent in the DP&L Extension Case.

{¶ 20} We find no merit in OCC's arguments that Duke's request is precluded by the doctrines of res judicata and collateral estoppel or that the motion serves as an untimely request for rehearing. OCC's memorandum contra asks the Commission to consider the words of U.S. Supreme Court Justice Brandeis that "The logic of words should yield to the logic of realities."¹ The reality here is that Duke's current ESP is set to expire without an authorized ESP to replace it. Duke is not seeking to re-litigate the ESP; instead, logically, Duke is seeking to address an approaching dilemma. There is similarly no merit in OCC's contention that an ESP is not an SSO. As the Commission has summarized in numerous orders, R.C. 4928.141 states that the required SSO may be in form of either an MRO or an ESP. R.C. 4928.143 begins by expressly stating "For the purpose of complying with

¹ OCC Memorandum Contra at 9, citing *DeSanto v. Pennsylvania* (1927), 273 U.S. 34, 43.

section 4928.141 of the Revised Code, an electric distribution utility may file an application for public utilities commission approval of an electric security plan* * *.” Thus, the SSO is not a subset of an ESP; rather, the ESP is the form of the SSO. We also decline to adopt Kroger/OMA’s rationale that Duke must demonstrate in its application that each rider of ESP 3 is “necessary to maintain essential electric service,” as described in R.C. 4928.141. A full reading of R.C. 4928.141 directs each utility to offer an SSO of all competitive electric services “necessary to maintain essential electric service;” thus, the entire SSO package that is offered and approved, be it an ESP or an MRO, is what is considered necessary to maintain essential electric services. Therefore, the Commission concludes that is reasonable to continue ESP 3 through the interim period until a new SSO is authorized.

{¶ 21} Accordingly, Duke’s motion to extend ESP 3 should be granted. The Commission finds Duke is authorized to continue the provisions, terms, and conditions of its current ESP until another SSO is implemented. Specifically, Duke is permitted to extend its Rider DCI. The continuation of the ESP and Rider DCI allows the Company to maintain essential electric service and continue proactive investment in the electric grid, as previously discussed by the Commission. ESP 3 Order at 72. Regarding Rider DCI, the original \$35 million cap is extended until August 1, 2018, as initially requested by Duke. At this time, the Commission declines to increase the hard cap that was approved in ESP 3. However, this does not preclude the Commission, if and when ESP 4 is approved, from considering requests for recovery for capital investments made after August 1, 2018. As to OCC’s request for revised tariff language, we note that the Commission previously addressed these concerns regarding Duke’s riders and finds no further action is warranted at this time. *See In re Duke Energy Ohio, Inc.*, Case No. 17-2088-EL-RDR, et al., Finding and Order at 3 (March 28, 2018).

IV. ORDER

{¶ 22} It is, therefore,

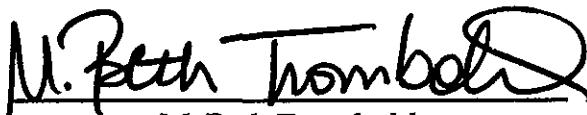
{¶ 23} ORDERED, That Duke's ESP be extended in accordance with paragraph 21. It is, further,

{¶ 24} ORDERED, That a copy of this Entry be served upon all parties of record.

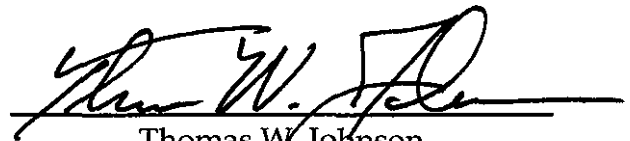
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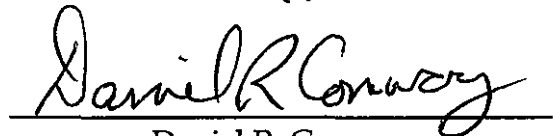
Asim Z. Haque, Chairman



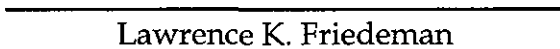
M. Beth Trombold



Thomas W. Johnson



Daniel R. Conway



Lawrence K. Friedeman

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Barcy F. McNeal
Secretary