BEFORE
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

JOINT APPLICATION FOR REHEARING OF THE OHIO MANUFACTURERS' ASSOCIATION AND THE KROGER CO.

Kimberly W. Bojko (0069402)
CARPENTER LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: Bojko@carpenterlipps.com
(willing to accept service by email)

Counsel for Ohio Manufacturers' Association

Angela Paul Whitfield (0068774)
CARPENTER LIPPS & LELAND LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: paul@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Co.

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Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Manufacturers' Association (OMA) and the Kroger Company (Kroger) (collectively, Joint Applicants) hereby respectfully request rehearing of the Public Utilities Commission of Ohio's (Commission) July 25, 2018 Second Entry on Rehearing (July 25 Entry on Rehearing)[1] issued in the above-captioned matter. The Joint Applicants contend that the Order is unlawful, unjust, and unreasonable in the following respects:

1. The Commission erred in allowing Duke to modify its ESP without a hearing and without record support in order to collect charges from customers under Distribution Capital Investment Rider (Rider DCI) that were not permitted under the litigated, approved ESP in this proceeding in violation of Ohio law.

[1] Due to the nature of this issue, the Commission has actually issued two different Second Entries on Rehearing in this docket. The first came on March 21, 2018 and addressed the parties' applications for rehearing of the Commission's Opinion and Order *approving* the ESP. Then, on July 25, 2018, the Commission issued a Second Entry on Rehearing addressing applications for rehearing relating to Duke's request to *extend* its ESP (and riders) beyond the approved expiration date.

For these reasons, and as further explained in the Memorandum in Support attached hereto, the Joint Applicants respectfully request that the Commission grant this Application for Rehearing.

Respectfully submitted,

/s/ Kimberly Bojko
Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland, LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: Bojko@carpenterlipps.com
(willing to accept service by email)

Counsel for Ohio Manufacturers' Association

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)
Carpenter Lipps & Leland, LLP
280 Plaza, Suite 1300
280 North High Street
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: paul@carpenterlipps.com
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Duke initiated this case for the purpose of establishing a new electric security plan (ESP). The Commission approved an ESP for Duke by its Opinion and Order following a fully-litigated proceeding regarding a stipulation,[2] and then affirmed its decision in its Second Entry on Rehearing.[3] The ESP was approved subject to specific terms, limitations, and caps (ESP 3). All parties to this case had the opportunity to be heard on the terms of ESP 3 and argue for or against the Stipulation's approval. After weighing the evidence, the Commission issued its April 2, 2015 Opinion and Order, modifying and approving the ESP with various terms and conditions. Almost three years after the Order approving the ESP and when the ESP has run its course and is about to expire, Duke moved to change the terms of the approved ESP. Specifically, Duke moved to extend the monetary cap associated with Rider DCI. On May 30, 2018, the Commission extended ESP 3 pending the outcome of ESP 4, including an extension of the

[2] See Opinion and Order (April 2, 2015).

[3] Second Entry on Rehearing (March 21, 2018) (March 21 Entry on Rehearing).

original $35 million cap until August 1, 2018, but the Commission declined to increase the hard cap that was approved in ESP 3.[4] Nonetheless, on July 25, 2018, The Commission reversed itself and authorized Duke to continue Rider DCI beyond August 1, 2018 until the new ESP 4 is in place.[5] The Commission also established a new monthly cap of $5 million for Rider DCI,[6] which is in addition to the original $35 million cap set forth in the approved ESP.

By granting Duke's Application for Rehearing and allowing Duke to collect an additional $5 million per month above the approved caps for the Rider DCI from customers, the Commission has altered the terms—which the Commission had already determined to be just and reasonable—of the ESP without a hearing and with minimal input from other parties to this case. The Commission should not modify an ESP to allow Duke to collect additional monies from customers based solely on Duke's statement that the charge is necessary.

II. DISCUSSION

A. The Commission erred in allowing Duke to modify its ESP without a hearing and without record support in order to collect charges from customers under Distribution Capital Investment Rider (Rider DCI) that were not permitted under the litigated, approved ESP in this proceeding in violation of Ohio law.

1. The Commission's Statutory Analysis is Flawed.

The Commission's analysis is premised on the authority that it finds in the Ohio Revised Code to extend Duke's standard service offer (SSO). The Commission's analysis, however, goes far beyond what the General Assembly provided for and unreasonably and unlawfully allows Duke to extract additional Rider DCI costs from its customers. Specifically, the Commission errors in improperly equating the continuation of Duke's standard service offer with the continuation of all charges under ESP 3.

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4 Entry at ¶21 (May 30, 2018).

5 Second Entry on Rehearing at ¶20 (July 25, 2018).

6 Id.

R.C. 4928.141(A) requires that electric distribution utilities provide an SSO, but it does not require that the SSO be provided in the form of an ESP. Rather, the law provides that an electric distribution utility may satisfy the requirements of R.C. 4928.141 through either an ESP under R.C. 4928.143 or the market rate offer (MRO) under 4928.142.[7] Duke, through this case, established its SSO through an ESP.

The Commission recognizes that there is no provision in the Ohio Revised Code that authorizes extending an SSO during the interim period between the expiration of one ESP and the commencement of a new ESP. Yet, Commission proceeds as if the extension of the entire ESP is ordained by statute because the statute authorizes an extension in other cases that the Commission believes are similar. Specifically, the statute authorizes the extension of the "provisions, terms, and conditions of the utility's most recent standard service offer" when the utility terminates its application or if the Commission disapproves an application by the utility.[8] The inclusion of R.C. 4928.143(C)(2) in the statute governing ESPs indicates that the General Assembly considered the possibility that there may be some cases in which the Commission should be authorized to extend an ESP, and spelled out those provisions in proscribing the Commission's authority to do so.

Had the General Assembly wanted to similarly allow for the extension of an SSO when it expires before a new ESP is in place, it would have included that circumstance alongside those discussed above. It would be illogical for the authors of R.C. 4928.143 to delineate so clearly the procedures for allowing extensions of the SSO when an application is terminated or disapproved while remaining completely silent on such an extension when an ESP expires. Thus, the absence of such a provision should not be taken as a sign that this case should be

7 R.C. 4928.141(A).

8 R.C. 4928.143(C)(2).

treated the same as those discussed in the statute, but rather as plain textual evidence that the statute does not allow the extension of the SSO under the situation at hand.

Nonetheless, the Commission extrapolated authority that the General Assembly never created by writing an additional provision for extending an SSO into the statute and using this delegation of power to itself as authority to not only extend the SSO provided for in the ESP approved in this case, but also other charges included in the now-expired ESP.

But even if the Commission's decision to analogize the current situation to the distinct cases provided for in R.C. 4928.143(C)(2), that provision still does not allow for continued charges under Rider DCI over and above the cap approved by the Commission in ESP 3. Notably, the provision under which the PUCO finds authority for the extension of Rider DCI that is at issue here says that the Commission "shall issue such order as is necessary to continue the provisions, terms, and conditions of the utility's *most recent standard service offer* . . ."[9] The provision does not allow for the continuation of all provisions of the ESP or modification of some of the provisions of the ESP. R.C. 4928.143(C)(2)(b) references the SSO, and the SSO can be established independent of the riders contained in an ESP. Therefore, the Commission can infer that the SSO that the statute authorizes continuing is not synonymous with a previously-approved ESP.

R.C. 4928.143 clearly spells out the types of provisions and charges that may be included in an ESP.[10] Those charges, many of which apply to customers who do not take service under the SSO, make evident the reality that although the ESP establishes the SSO required under R.C. 4928.141, it can also include other charges. Rider DCI is a prime example of this proposition. All of Duke's customers, whether or not they take their service under the SSO, are charged under

[9] R.C. 4928.143(C)(2)(b) (emphasis added).

[10] See R.C. 4928.143(B).

Rider DCI. Duke's own statements regarding this issue further demonstrate that even it does not consider the riders approved as part of the ESP in this proceeding to be part of the SSO, but rather considers them separate from the SSO that the Commission established through this ESP. In its Motion to Continue the Riders Included in the Electric Security Plan, Duke states that, in this proceeding the Commission has approved "a competitive procurement process for SSO supply *and* a series of riders as provided for under R.C. 4928.143."[11] The Commission also recognizes the distinction in its Second Entry on Rehearing when it states, "we are continuing the previously-approved *ESP* until another *SSO* comes into effect."[12] This language indicates that the Commission (correctly) believes that an ESP and an SSO are not synonymous.

Given that Rider DCI is not a provision of the SSO and that the statute the Commission cites for its authority to extend Rider DCI makes no reference of riders and only mentions the SSO, the Commission's statutory analysis on this issue is deficient. There is no basis in Ohio law for the Commission to extend an electric distribution utility's rider and allow for additional charges to customers simply because the utility failed to secure a new ESP prior to the expiration of the old one. Thus, the Commission should grant rehearing and reverse its decision to allow the collection of additional charges from customers.

Nonetheless, even if the Commission believes it is necessary to continue Rider DCI as a provision, term, and condition of the utility's most recent standard service offer, the statute does not allow for modifications to some of the provisions of the ESP. Modifying the Rider DCI cap that was set forth in ESP 3 is not consistent with R.C. 4928.143(C)(2)(b). Additionally, the

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[11] Motion of Duke Energy Ohio, Inc., to Continue the Riders Included in the Electric Security Plan Approved Herein at 1 (March 9, 2018).

[12] Second Entry on Rehearing (July 25, 2018) (emphasis added).

Commission made such modification without record support on rehearing in violation of R.C. 4903.09 and R.C. 4903.10.

R.C. 4903.09 requires that the Commission develop a record in contested cases and then render any decision that it makes based on that record.[13] Duke's request was for the recovery of costs in amounts above those considered during the initial hearing on this matter and for a period longer than was previously contemplated by Duke, the Commission, or the parties. The Commission's decision to extend the caps on Rider DCI and allow Duke to collect additional charges from its customers was made without record support. The decision necessarily lacked record support because the Commission did not develop a record on this issue at all. It never held a hearing, never provided for testimony from parties opposing the extension or increase in the Rider DCI caps, and never allowed those parties to cross-examine any witnesses from Duke who supported the extension and increase of these caps. Clearly, the lack of a record regarding Duke's request (and the lack of discussion of these additional charges at the initial hearing in this proceeding) would foreclose any possibility that the Commission relied on record evidence when it issued this decision.

R.C. 4903.10 provides that, on rehearing, the Commission shall not take any evidence "that, with reasonable diligence, could have been offered upon the original hearing." Duke could have asked for a longer period of recovery under Rider DCI or for a provision that would govern in the event that ESP 4 was not established when ESP 3 expired. Nothing prevented Duke from addressing this situation at the initial hearing. Indeed, if Duke wished to extract additional charges from customers after the expiration of ESP 3, it should have requested such

[13] See also Ohio Consumers' Counsel v. Pub. Util. Comm., 111 Ohio St.3d 300, 2006-Ohio-5789, 856 N.E.2d 213 at ¶ 28.

during the initial phase of the hearing. But Duke did not. Therefore, the Commission's decision to extend the caps on Rider DCI violates R.C. 4903.10.

2. The Commission's Decision to Allow Increased Collection from Customers Through Rider DCI Undermines the Ability of Parties in Future Proceedings to Rely on Settlements or Decisions that Require Utilities to Adhere to Established Caps on Collection.

A cap is only a cap if it is adhered to. Duke was approved to collect funds from customers under Rider DCI subject to a $35 million cap. Duke's customers, therefore, were assured that the creation of Rider DCI, as approved in ESP 3, would not cost them more than $35 million under the term of ESP 3. Moreover, customers would have been justified in expecting that any future charges under Rider DCI would only arise through a separate proceeding to establish a new ESP and new caps on Rider DCI. But by allowing Duke to recover amounts over and above the cap approved in this proceeding, the Commission disregarded that expectation and effectively told customers of regulated utilities across the state that, if a utility asks, the Commission could render any cap on collection from customers illusory. This precedent will reverberate throughout future proceedings as parties attempting to settle a case or advocate at hearing must now account for the fact that a provision or term included in the final order on the proceeding could change several years later, and do so without a hearing.

The Commission justifies its alteration of the cap on Rider DCI by stating that the continuation of Rider DCI is necessary for Duke "to maintain essential electric service during this temporary period."[14] Duke has not provided record evidence sufficient to justify this conclusion. Duke has not explained which components of its electric service, if any, would be changed if it is unavailable to collect under Rider DCI until a new ESP is approved. The only evidence that the Commission cites is Duke's documentation that without increased Rider DCI

[14] Second Entry on Rehearing at ¶ 20 (July 25, 2018).

caps, its return on equity will decrease from 9.84% to 1.90%.[15] This information, in and of itself, does not demonstrate that Duke will be unable to provide safe and reliable service, only that Duke will earn a lower profit during the months between the expiration of ESP 3 and the institution of its next ESP.

Duke could have included a request for a provision to extend some or all of the approved ESP terms in the event that a replacement ESP was not approved before the ESP expired, but chose not to. The Commission could have apprised customers of the possibility that charges above the approved caps could occur, but it instead referred to the Rider DCI cap as a "hard cap on how much the Company can recover in a year."[16] If either of these things had occurred, customers would have had an opportunity to negotiate, litigate, or ask for rehearing on measures to extend the cap in the event of the expiration of a yet-unsucceeded ESP. But stakeholders did not have the opportunity to do so at settlement meetings or at a hearing. Instead, the Commission now forces customers to pay additional charges based only on Duke's claims that the additional recovery is necessary.

This precedent will not only make stakeholders distrustful of caps on future recovery, but also improperly incents utilities to artificially extend an ESP when doing so would be more advantageous than moving on to the next ESP. For example, a utility that determined it would collect less revenue under a new ESP would now be well-served to draw out the process for approving the new ESP and then ask the Commission to extend the charges under the current ESP, whether or not the full amount of those charges is necessary for safe and reliable electric service or were even requested in the subsequent proceeding. Offering utilities a mechanism by which they can game the system to extract extra charges from customers makes those customers

[15] Id.

[16] Opinion and Order at 72 (April 2, 2015).

vulnerable to future attempts by utilities to charge customers more than was initially approved by the Commission.

III. CONCLUSION

The Commission's July 25, 2018 Second Entry on Rehearing does a disservice to Duke's customers. It allows Duke to exceed previously approved caps without demonstrating the necessity for doing so at a hearing. Moreover, the Second Entry on Rehearing lacks a statutory basis and, thus, exceeds the authority granted to the Commission by Ohio's General Assembly. Accordingly, OMA and Kroger request rehearing on the Commission's decision to grant Duke's Application for Rehearing and allow Duke to extend Rider DCI, increase the hard cap approved in ESP 3, and collect additional funds from customers.

Respectfully submitted,

/s/ Kimberly Bojko
Kimberly W. Bojko (0069402)
Carpenter Lipps & Leland, LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: Bojko@carpenterlipps.com
(willing to accept service by email)

Counsel for Ohio Manufacturers' Association

/s/ Angela Paul Whitfield
Angela Paul Whitfield (0068774)
Carpenter Lipps & Leland, LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Email: paul@carpenterlipps.com
(willing to accept service by email)

Counsel for The Kroger Co.

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on August 24, 2018

/s/ Kimberly W. Bojko
Kimberly W. Bojko

Summary: Application Joint Application For Rehearing Of The Ohio Manufacturers' Association And The Kroger Co. electronically filed by Mrs. Kimberly W. Bojko on behalf of Ohio Manufacturers' Association and The Kroger Co.