**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, 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 the Application of Duke Energy Ohio for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20. | ) | Case No. 14-842-EL-ATA |

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**DUKE ENERGY OHIO'S MEMORANDUM CONTRA APPLICATIONS FOR REHEARING**

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## INTRODUCTION

Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) has been offering electric generation service, since April 2015, under the terms of its third electric security plan (ESP), as approved in that above-captioned proceedings (ESP 3). Although ESP 3 was originally scheduled to expire on June 30, 2018, no replacement plan for the provision of electric generation service had been approved by that date. The Public Utilities Commission of Ohio (Commission), recognizing the need for uninterrupted generation service, extended the term of ESP 3 through its issuance of an Entry, on May 30, 2018. Then, after the filing of an application for rehearing by the Company, it also extended the term and dollar limits related to Rider DCI, in its Second Entry on Rehearing (Entry), on July 25, 2018.

Three intervening parties[1] (two jointly) have filed applications for rehearing (AFRs) of that Entry, seeking to overturn the Commission's wise decision. The Company hereby files its memorandum in opposition of those applications for rehearing, pursuant to O.A.C. 4901-1-35(B).

## II. DISCUSSION

Although the assignments of error spelled out in the two applications for rehearing differ slightly, the underlying arguments overlap substantially. Those underlying arguments will therefore be discussed concurrently, below.

### A. Summary of the Arguments

For purposes of the AFRs currently under consideration, it is critical to recognize what was, and what was not, decided by the Commission in the Entry from which these AFRs stem. In that Entry, the Commission considered the following:

- The OCC had applied for rehearing on three grounds:
  - That the Commission lacked authority under Ohio law to extend an ESP under the circumstances in this case. **The Commission denied rehearing on this ground.**
  - That extending the ESP causes irreparable harm to customers. **The Commission denied rehearing on this ground.**
  - That continuation of Rider DCI is unjust and unreasonable due to recent reliability issues. **The Commission denied rehearing on this ground.**
- Duke Energy Ohio had applied for rehearing of the cap for Rider DCI going forward. **The Commission granted rehearing on this ground, with modifications.**

[1] The Office of the Ohio Consumers' Counsel (OCC) and, jointly, the Ohio Manufacturers' Association and the Kroger Co. (collectively, OMAK).

Because the only change made to the previous decision was the cap on Rider DCI, that is the only matter that can be subject to rehearing at this time.[2] Nevertheless, OMAK included, in its AFR, matters that had already been reconsidered and denied by the Commission. The Company will address the substance of OMAK's arguments, although they should simply be dismissed by the Commission as inappropriate grounds for rehearing.

The following assertions – all of which are incorrect – are discussed in the AFRs:

- The Commission has no power to extend an ESP other than in the two circumstances specifically set forth in statute.[3]
- A standard service offer (SSO) is a part of an ESP, rather than an ESP being a type of SSO.[4]
- The Commission issued the Entry without record support.[5]
- The Company should have presented additional evidence in 2014.[6]
- The Commission's decision will negatively impact intervenors' willingness to settle cases.[7]
- The Commission decision will result in game-playing by utilities.[8]

**B. <u>The Commission Appropriately Extended ESP 3 in its Prior Entry on Rehearing.</u>**

OMAK, as part of its first ground for rehearing, argues that the Commission did not have statutory authority to extend ESP 3, as it did in its Entry issued on May 30, 2018. As noted above, this issue was previously asserted as a ground for rehearing. It

[2] *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, *et al.*, ¶ 23 ("As the Commission has previously found, R.C. 4903.10 'does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon rehearing of the same issue.'")(citations omitted).
[3] OMAK AFR, pp. 5-7.
[4] OMAK AFR, pp. 5, 7-8.
[5] OCC AFR, pp. 3-4; OMAK AFR, pg. 9.
[6] OCC AFR, pp. 4-6; OMAK AFR, pp. 9-10.
[7] OMAK AFR, pp. 10-11.
[8] OMAK AFR, pp. 11-12.

was denied by the Commission. To the extent OMAK is asserting this argument now, the Commission must deny it again, both because it has already been decided and because rehearing of this issue is being sought far beyond the 30-day statutory deadline.

The Company would, in the alternative, also disagree with OMAK's attempted statutory interpretation. OMAK suggests that it would have been illogical for the General Assembly to provide for the possible extension of an SSO when its replacement has been terminated or disapproved, "while remaining completely silent on such an extension when an ESP expires."[9] OMAK's argument might sound plausible if it were not for the fact that the General Assembly also established a mandatory deadline for the Commission's consideration of an application for an ESP.[10] If a company files an application for an ESP with that 275-day time frame in mind, an ESP can never expire without a new SSO in place. Thus, with this statutory provision, the General Assembly did actually account for ESP expirations. That the previous ESP expired in this case prior to the approval of a new one is not due to any expectation of the General Assembly that expiration would ever be appropriate.

This argument by OMAK should be dismissed as untimely and prohibited under the applicable statute. Alternatively, it should be rejected on its substance, just as it was previously.

[9] OMAK AFR, pg. 6.
[10] R.C. 4928.143(C)(1).

### C. The Commission Correctly Understands that an SSO Is either an ESP or an MRO, Rather than a Being a Portion Thereof.

OMAK peppers its discussion of the Commission's extension of ESP 3 with odd suggestions that an SSO is merely a portion of an ESP, rather than an ESP being one of the two types of SSOs that are allowed under Ohio law.[11]

Earlier in this debate, OCC attempted to convince the Commission of this flawed view of the law.[12] The Commission firmly denied that view:

> 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 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.[13]

R.C. 4928.141 could not be any clearer that the *only* standard service offers permitted by the General Assembly are an MRO approved under 4928.142 or an ESP approved under 4929.143:

> Only a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for the purpose of section 4928.14 of the Revised Code.

Duke Energy Ohio did not have an MRO approved by the Commission. Moreover, the Commission has not yet ruled upon the Company's application to establish its new ESP; therefore, the only logical solution to comply with Ohio law was to extend the provisions, all provisions, of the previously approved ESP. Authorizing anything other than an ESP or an MRO as a SSO is directly and intentionally violating Ohio law.

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[11] R.C. 4928.141.
[12] Memorandum Contra Duke Energy Ohio, Inc.'s Motion to Continue Charging its Customers for Riders by the Office of the Ohio Consumers' Counsel, pp. 5-7 (March 19, 2018).
[13] Entry, ¶ 20 (May 30, 2018).

Nonetheless, OCC did not seek rehearing of that argument in its application for rehearing filed on June 29, 2018. Thus, the issue was not in contention in the Commission's July 25, 2018, Entry on Rehearing, from which the parties are now appealing. OMAK, in raising this suggestion again in its most recent application for rehearing, is attempting to use some sleight of hand to reintroduce this previously debunked approach. Uncalled-for repetition does not make the argument true.

Rehearing on this ground is late-filed and substantively incorrect. It must be denied.

**D. <u>The Commission Relied on Sufficient and Appropriate Facts.</u>**

Ohio law provides that, "[i]n all contested cases . . ., a complete record of all the proceedings shall be made . . . and the commission shall file . . . findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact."[14] OCC and OMAK interpret this language to mean that the Commission cannot take into account anything that was not testimony in a hearing or exhibits admitted into the record. The Supreme Court disagrees.

The Court has repeatedly stated that it does not read that literally; strict compliance with the terms of the statute is not required.[15] In the landmark case on this topic, after agreeing that strict compliance is not required and indicating that a Commission order must set forth "the facts in the record upon which the order is based, and the reasoning followed," the Court went on to evaluate what was actually in the record in that case. It identified the application in the case, comments filed by OCC and another entity, the applicants' responses to the comments, and correspondence to

[14] R.C. 4903.09.
[15] *See, e.g., Indus. Energy Users-Ohio v. Pub. Util. Comm.*, 2008-Ohio-990 ¶ 30, 117 Ohio St.3d 486.

Commission Staff – all of which the Court considered to be part of the "record." Ultimately, the Court found that the record was insufficient to support the Commission's decision, but that was not because the Commission should not have been relying on parties' comments. Rather, it was insufficient because the decision relied on staff's "review," "findings," and "recommendations" – even though none of that information was in the record.[16]

The *Tongren* opinion is instructive in the present situation. OMAK claims that there "necessarily" is no record support, because there was no hearing on the extension of Rider DCI or the increase in the applicable cap, there was no testimony, and no cross-examination. OCC suggests that the Commission's decision was based only on the Company's statement, in an application for rehearing, that its return on equity would fall, without the continuation of Rider DCI, from 9.84 percent to 1.90 percent. Because this statement was not subject to discovery or cross-examination, OCC claims that the decision violates R.C. 4903.09.

Both of these positions are incorrect, as is made clear in *Tongren*. The *Tongren* Court found a violation of the law not because there was no hearing, no discovery, and no cross-examination, but because the case docket reflected absolutely nothing about Staff's position. The Court referenced parties' comments, filed in the docket, as part of the record. Here, the Company's statements in the referenced application for rehearing are analogous to the comments filed in the *Tongren* case. And certainly OCC and OMAK had the opportunity to respond to that application for rehearing – and indeed did so.

It should also be recognized that the projected drop in the Company's return on equity was not the only basis for the Commission's decision. In addition, the

[16] *Tongren v. Pub. Util. Comm.*, 85 Ohio St.3d 87, 89-90 (1999).

Commission specifically referenced, as justification for its conclusion, the facts that (1) the Company had not yet recovered the revenue requirement for capital that had already, during ESP, been invested; and (2) there is a three-month lag between the making of an investment and the adjustment of rates to collect on that investment, meaning that termination of Rider DCI on August 1, 2018, would result in the Company only having recovered one month of investment made up through March 31, 2018, which was clearly during the ESP 3 term.[17]

Finally, both OCC and OMAK seemingly fail to comprehend that no new evidence is required to calculate the impact on the Company's return that would result from termination of Rider DCI. The Company's Rider DCI was approved as part of an ESP in accordance with 4928.143. That ESP was fully litigated. The approved DCI process included annual reconciliation and prudency reviews. Moreover, the Company is also required to file annual cases to ensure that the Company is not experiencing significantly excessive earnings. A simple examination of the annual filings made by the Company demonstrates the adverse impact to the Company's financial condition that would occur by eliminating or suspending the Rider DCI from the Company's authorized SSO.

As required by R.C. 4903.09, the Commission clearly set forth the basis for its decision – a basis that can be found in the docket, as allowed by the Ohio Supreme Court.

### E. The Commission Is Not Prohibited from Considering the Company's Arguments on Rehearing.

Both OCC and OMAK argue that the Commission was prohibited, under R.C. 4903.10, from basing its decision to allow the extension of Rider DCI and its caps on the

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

Company's assertion that its return on equity would fall without such extension. They both rely, for this argument, on a portion of a sentence in the statute, reading that the Commission "shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing." Unfortunately, both OCC and OMAK ignore the remainder of the sentence, as well as its context:

> If the commission grants such rehearing, it shall specify in the notice of such granting the purpose for which it is granted. The commission shall also specify the scope of the additional evidence, if any, that will be taken, but it shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing.[18]

The Commission is not required to take any additional evidence. The limitation that OCC and OMAK point to only relates to a circumstance where the Commission determines that it will take additional evidence. It did not do so here. What OCC and OMAK are complaining about is arguments made by Duke Energy Ohio in its application for rehearing, not evidence taken by the Commission.

Nonetheless, the impact of the Commission not approving a new ESP prior to the expiration of ESP 3 was not something that could have reasonably been contemplated at the time of the original hearing, particularly when the Company filed its application for ESP 4 well in advance of the 275-day time limitation for prosecution of an ESP under R.C. 4928.143. Nor could the Company have presented evidence in 2014 of the financial implications that the Commission not approving a new ESP by May 31, 2018, would have on the Company beyond that date. The opposing parties would have likely argued that such evidence was not ripe and would result in an advisory opinion.

This argument by OCC and OMAK should be dismissed.

[18] R.C. 4903.10.

### F. Policy Issues Concerning Settlements Do Not Support Rehearing.

OMAK adds a discussion of policies that it feels are impacted by the Commission's decision. However, not only is OMAK's argument one-sided and wrong, it is also not a ground for rehearing.

OMAK asserts that the Commission's decision with regard to Rider DCI will negatively impact intervenors' willingness to settle Commission cases. What OMAK misunderstands is that the reverse decision by the Commission would similarly have impacted utilities' willingness to settle Commission cases. It cannot be forgotten that the reason why an extension of Rider DCI was necessary was the unforeseeably lengthy time that had to be devoted to settlement efforts, which OMAK seems to forget it agreed to. But for that, the case would have been completed prior to the expiration of ESP 3.

OMAK also suggests – groundlessly – that the Commission's willingness to extend Rider DCI and its caps will incentivize utilities "to artificially extend an ESP when doing so would be more advantageous than moving on to the next ESP."[19] OMAK suggests that utilities could thereby game the system. There is certainly no evidence that Duke Energy Ohio engaged in such gaming – and indeed all parties in the ESP 4 proceeding agreed to the numerous extensions. Furthermore, OMAK again fails to see the other side: Refusing to extend Rider DCI could be seen as giving intervenors a mechanism by which they can game the system, by refusing to negotiate reasonably until such time as the prior ESP expires.

This whole line of discussion should be ignored.

[19] OMAK AFR, pg. 11.

## III. CONCLUSION

Duke Energy Ohio respectfully submits that the Commission should deny the Applications for Rehearing filed by OCC and OMAK.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 4th day of September, 2018, to the parties listed below.

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