

THE PUBLIC UTILITIES COMMISSION OF OHIO

**IN THE MATTER OF THE COMPLAINT OF
DIRECT ENERGY BUSINESS, LLC,**

COMPLAINANTS,

CASE NO. 14-1277-EL-CSS

V.

DUKE ENERGY OHIO, INC.,

RESPONDENT.

ENTRY ON REHEARING

Entered in the Journal on June 5, 2019

I. SUMMARY

{¶ 1} The Commission finds that Duke Energy Ohio, Inc.'s application for rehearing should be denied.

II. PROCEDURAL HISTORY

{¶ 2} Duke Energy Ohio, Inc. (Duke) is a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 3} On June 22, 2014, Direct Energy Business, LLC (Direct) filed a complaint against Duke. Thereafter, on August 13, 2014, Duke filed its answer to the complaint.

{¶ 4} Duke filed a motion to dismiss the complaint on October 31, 2014. A memorandum contra was filed by Direct on November 14, 2014, and Duke filed its reply on November 21, 2014. On January 13, 2015, the attorney examiner denied the motion to dismiss and set the matter for hearing for April 14, 2015. Thereafter, the attorney examiner granted multiple motions to continue the hearing and ultimately approved a request to suspend the procedural schedule on May 18, 2015. On January 5, 2017, the attorney examiner instructed Direct to file a status update. In a February 9, 2017 response, Direct indicated the negotiations were ongoing but a resolution with Duke has not been reached.

Accordingly, the attorney examiner issued an Entry establishing a hearing for June 13, 2017.

{¶ 5} The hearing was held as scheduled on June 13, 2017. At the hearing, the parties stipulated to the submission of all exhibits, including prefiled testimony, and waived all cross examination. Initial briefs were filed on August 11, 2017, and reply briefs were filed on September 1, 2017.

{¶ 6} On April 10, 2019, the Commission issued an Opinion and Order finding that Direct sufficiently established Duke failed to provide accurate readings of generation usage, constituting inadequate service.

{¶ 7} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 8} On May 10, 2019, Duke filed an application for rehearing. Direct filed a memoranda contra the application for rehearing on May 20, 2019.

III. DISCUSSION

{¶ 9} In the Opinion and Order, the Commission determined that Duke, in its role as the Metered Data Management Agent (MDMA), violated the Certified Supplier Tariff (Supplier Tariff) and failed to provide adequate and necessary service in violation of R.C. 4905.22. The Supplier Tariff establishes the bounds of the relationship between Duke, the provider of distribution services, and Direct, a certified supplier of competitive retail electric services (CRES). Pursuant to the Supplier Tariff, Duke serves as the MDMA and is obligated to maintain all meters used for retail billing. Duke is also responsible for metering customer load, which allows Direct to bill its customer, SunCoke Energy, Inc. (SunCoke), and for PJM Interconnection, Inc. (PJM) to bill Direct. In its complaint, Direct asserted that, from January 2013, to July 2013, Duke provided PJM with erroneous

metering data, causing PJM to overcharge Direct. SunCoke is a customer that both produces and consumes generation. Because of this, Duke needed to do a manual calculation in order to determine the net generation usage. Before January 4, 2013, when Duke was SunCoke's generation provider, the Company properly did the manual calculation. Once Direct became the supplier of generation, Duke no longer did the calculation and provided PJM with inaccurate data. The Commission found this constituted inadequate service from Duke and a violation of the Supplier Tariff.

{¶ 10} In its application for rehearing, Duke argues that the Commission's decision was erroneous for multiple reasons. Initially, Duke reiterates arguments made previously that the Commission lacks jurisdiction to hear the complaint. Duke states that both Duke and Direct are members of PJM. According to Duke, within PJM, Duke is a transmission owner and Direct is both a load serving entity and a transmission customer. Duke asserts that the transmission of electricity is a federal issue governed by tariffs approved by the Federal Energy Regulatory Commission (FERC). Duke maintains that the relationship between the Company and Direct—and the billing process—is controlled by the Open Access Transmission Tariff (OATT). Duke states that, pursuant to the OATT, there are specific resettlement processes to ensure proper billing. Duke argues Direct's complaint is associated with these resettlement options, which is a FERC issue and outside of the Commission's jurisdiction.

{¶ 11} Direct replies that Duke's argument is without merit. Direct avers that Duke has responsibilities as the MDMA, pursuant to the Supplier Tariff approved by the Commission. And, according to Direct, the Commission has jurisdiction over tariffs it approved. Further, Direct maintains it is no longer pursuing resettlement through this proceeding.

{¶ 12} Duke's application for rehearing on this issue is denied. It is well established that the Commission has jurisdiction over the tariffs that it approves. *Kazmaier Supermarket, Inc. v. Toledo Edison Co.*, 61 Ohio St.3d 147, 573 N.E.2d 655 (1991). Here, the

Supplier Tariff was filed pursuant to the Commission's November 22, 2011 Opinion and Order in Case No. 11-349-EL-SSO and approved by the Commission. Duke attempts to frame this case as a billing adjustment associated with resettlement at PJM. While resettlement may have prevented a complaint from being filed, at issue in this case was whether Duke complied with Section 14.1 of the Supplier Tariff, which states that Duke will serve as the MDMA and will supply load data in accordance with the OATT. Because the issue in this case pertains to a Commission-approved tariff, we have jurisdiction to hear this complaint.

{¶ 13} In its second assignment of error, Duke submits the Commission wrongfully invalidated the exculpatory clause in the Supplier Tariff. The Company notes that the Supplier Tariff contains a provision that expressly states that the MDMA is to be held harmless for actions taken while serving as the MDMA. As Ohio Adm.Code 4901:1-10-02(G) precludes exculpatory clauses, the Commission nullified that provision in the Supplier Tariff. Duke asserts this was inappropriate, as Ohio Adm.Code 4901:1-10-02(G) only limits exculpatory language addressing negligent actions. According to Duke, the provision in the Supplier Tariff does not pertain to negligent actions, nor did the Commission find Duke's actions were negligent. Further, Duke submits that Ohio Adm.Code 4901:1-10-02(G) only pertains to exculpatory clauses that limit the liability of utilities providing a regulated service. In acting as the MDMA, Duke argues that is not a service addressed by R.C. Title 49 and is thus not regulated by the Commission. Accordingly, Duke argues the Commission should find the language in the Supplier Tariff requiring Duke to be held harmless for its actions as the MDMA to be a valid provision.

{¶ 14} In reply, Direct avers that the Commission's Order did not invalidate the hold-harmless language in the Supplier Tariff. Instead, according to Direct, the Commission found that the Supplier Tariff language did not prevent a finding of inadequate service. Direct further argues that Duke wrongfully contends the Company's role as MDMA is a not a regulated service. Direct states the Supplier Tariff expressly

states that the tariff is subject to Commission oversight. Additionally, Direct submits that the Commission is not asserting jurisdiction over how Duke applies the load data, but rather acknowledging Duke's obligation to report load data in accordance with the OATT.

{¶ 15} The Commission is not persuaded by Duke's argument. As we cited in the Order, the Commission previously determined Ohio Adm.Code 4901:1-10-02(g) "furtheres the practice of the Commission in determining that exculpatory clauses included in tariffs for regulated services are neither binding nor relevant in Commission proceedings." *In re Commission's Review of Chapters 4901:1-9, 4901:1-10, 4901:1-21, 4901:1-22, 4901:1-23, 4901:1-24, and 4901:1-25 of the Ohio Administrative Code*, Case No. 06-653-EL-ORD, Finding and Order at 6 (Nov. 5, 2008). Duke's assertion that the services it provides as the MDMA is not an activity regulated by the Commission is without merit, as discussed above. As we determined in the Order, certified suppliers are captive customers and must accept Duke as the MDMA along with the associated services. Opinion and Order at ¶ 28. The Commission has a responsibility to ensure that service is reasonable and adequate. Accordingly, Duke's application for rehearing on this issue is denied.

{¶ 16} Finally, Duke claims the Commission erred in finding that the Company provided inadequate service and, in doing so, has wrongfully placed Duke in the position where it might be required to compensate Direct. Duke submits that what is at issue in this case is a billing adjustment. As "inadequate service" is not defined in R.C. Title 49, Duke argues that if the Commission establishes a billing adjustment as inadequate service, it will set a precedent resulting in significant changes to utility policy in Ohio. Duke additionally insists that, in its role as MDMA, the Company was not a provider of electricity and nor was Direct a consumer of electricity. Thus, Duke maintains that Direct is not able to complain as if it were a customer and Duke is not required to provide Direct reasonable and adequate service as if Direct were a customer. Duke contends that it in no way benefited from the improper billing. According to Duke, to the extent that Direct was over-billed, the other load serving entities were correspondingly under-billed; Duke did

not receive any compensation. However, if Direct pursues remedy in civil court, Duke could be found financially responsible based on the Commission's ruling. Additionally, Duke argues Direct had the opportunity to review the data before it was submitted to PJM, but declined to do so. The Company contends it should not be held fully responsible when Direct could have and should have identified any billing issues. For these reasons, Duke asks the Commission to reverse its decision.

{¶ 17} Direct counters that Duke does not deny its service was inadequate. According to Direct, the Company only argues that the decision would set bad precedent and that Duke is not obligated to provide Direct with adequate service. Direct notes that, while Direct is customer of Duke's meter data management services, R.C. 4905.26 does not limit complaints to only customers. In addition, Direct states it is irrelevant whether Duke benefited by providing inadequate service. Direct states there is no requirement to prove whether a utility wrongfully benefited from inadequate service or did so intentionally.

{¶ 18} Duke's application for rehearing on this issue is denied. We first note that at issue in this case was whether or not the service Duke provided was reasonable and adequate. Duke is incorrect to frame this case as a billing dispute. In serving as the MDMA, Duke had specific obligations pursuant to the Supplier Tariff to provide data to PJM in accordance with the OATT. In our Opinion and Order, we determined Duke's attempt to fulfill those obligations was inadequate. Opinion and Order at ¶ 30. Further, in making our determination about Duke's service, it is wholly irrelevant whether the Company benefited from the service it provided. We additionally find that Duke's contention that the Company is not even obligated to provide adequate service is without merit. R.C. 4905.26 allows any "person, firm, or corporation" to bring a complaint against a public utility as to any service and R.C. 4905.22 provides that such services shall be adequate. As discussed, the Supplier Tariff directs Duke to provide services as the MDMA, including submitting usage data to PJM. Accordingly, Duke's application for rehearing is denied.

IV. ORDER

{¶ 19} It is, therefore,

{¶ 20} ORDERED, That Duke's application for rehearing be denied. It is, further,

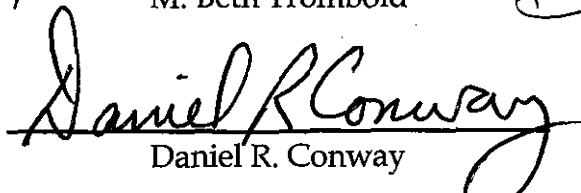
{¶ 21} ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

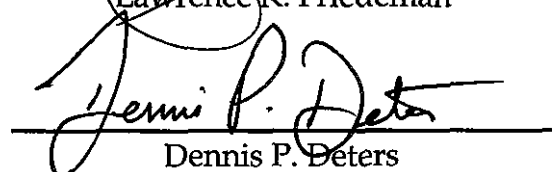
THE PUBLIC UTILITIES COMMISSION OF OHIO


Sam Randazzo, Chairman


M. Beth Trombold


Lawrence K. Friedeman

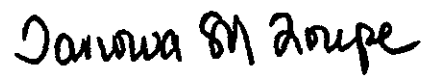

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Tanowa M. Troupe
Secretary