IN THE SUPREME COURT OF OHIO

Duke Energy Ohio, Inc.,	)	Case No. _____
	)	
Appellant,	)	Appeal from the Public Utilities Commission of Ohio
	)	
v.	)	
	)	Public Utilities Commission of Ohio
The Public Utilities Commission, of Ohio,	)	Case No. 14-1277-EL-CSS
	)	
	)	
Appellee.	)	

NOTICE OF APPEAL
OF
DUKE ENERGY OHIO, INC.

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Notice of Appeal of Duke Energy Ohio, Inc.

Appellant, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) hereby gives notice of its appeal, pursuant to R.C. 4903.11 and 4903.13, to the Supreme Court of Ohio from the Public Utilities Commission of Ohio (Commission) Opinion and Order, entered in the journal on April 10, 2019 (Attachment A), and its Entry on Rehearing, entered in the journal on June 5, 2019 (Attachment B), in Case No. 14-1277-EL-CSS, both of which are attached hereto. The referenced matter involves a complaint by Direct Energy Business, LLC (Direct), a competitive retail electric services (CRES) supplier, regarding Duke Energy Ohio's performance of its role as a Meter Data Management Agent (MDMA).

The Commission's April 10, 2019, Opinion and Order unlawfully and unreasonably concluded that Duke Energy Ohio, in its role as an MDMA, provided inadequate service to Direct by inadvertently overestimating the net usage of one of Direct's customers, which led to Direct being overbilled by PJM Interconnection, L.L.C. (PJM).

On May 10, 2019, Duke Energy Ohio timely filed its Application for Rehearing (Attachment C), from the above-referenced Opinion and Order, pursuant to R.C. 4903.10. In the Entry on Rehearing entered on June 5, 2019, the Commission denied rehearing on the issues raised in Duke Energy Ohio's Application. Duke Energy Ohio has timely filed its Notice of Appeal with respect to Case No. 14-1277-EL-CSS, with the Clerk of the Supreme Court of Ohio and the Docketing Division of the Commission, and has served such Notice of Appeal upon the Chairman of the Commission and upon all parties who have entered an appearance in the proceeding before the Commission. *See* S.Ct.Prac.R. 3.11(B); S.Ct.Prac.R. 10.02; Ohio Admin. Code § 4901-1-36.

Duke Energy Ohio's Allegations of Error

Duke Energy Ohio hereby alleges that the Commission's April 10, 2019, Opinion and Order and its June 5, 2019, Entry on Rehearing in Case No. 14-1277-EL-CSS, are unlawful, unjust, and unreasonable for the following reasons, as set forth in the Company's May 10, 2019, Application for Rehearing:

1. The Commission erred in finding that it had jurisdiction over Direct's complaint against Duke Energy Ohio. Billing disputes involving payments to PJM and/or the PJM resettlement process fall under the exclusive jurisdiction of the Federal Energy Regulatory Commission. Reh'g App., Attachment C, pg. 3-5.

2. The Commission erred in refusing to give effect to the exculpatory clause in Duke Energy Ohio's tariff. Reh'g App., Attachment C, pg. 5-6.

3. The Commission erred in finding that Direct was a "customer" to whom Duke Energy Ohio was obligated to provide "adequate service" under R.C. 4905.22. Reh'g App., Attachment C, pg. 7-8.

4. Even if Direct had been a "customer" of Duke Energy Ohio's, the Commission erred in finding that Duke Energy Ohio's oversight regarding a billing adjustment constituted "inadequate service." Reh'g App., Attachment C, pg. 7-10.

WHEREFORE, Duke Energy Ohio, Inc., respectfully submits that the Commission's April 10, 2019, Opinion and Order and its June 5, 2019, Entry on Rehearing are unlawful, unjust, and unreasonable and thus should be reversed, vacated, or modified. Duke Energy Ohio respectfully requests that the Supreme Court of Ohio remand this case to the Commission with instructions to correct the errors complained of herein.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

/s Larisa M. Vaysman

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CERTIFICATE OF FILING

I certify that a copy of the foregoing was filed on this the 2nd day of August, 2019, with the docketing division of the Public Utilities Commission in accordance with Rules 4901-1-02(A) and 4901-1-36 of the Ohio Administrative Code.

/s Larisa M. Vaysman
Larisa M. Vaysman

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the chairman of the Commission, Sam Randazzo, by leaving a copy at the office of the Chairman and also on the following persons or entities, being all parties to the proceeding that is the subject of this appeal, via regular U.S. mail delivery, postage prepaid, overnight delivery and/or electronic mail delivery on this 2nd day of August, 2019.

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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.

OPINION AND ORDER

Entered in the Journal on April 10, 2019

I. SUMMARY

{¶ 1} The Commission finds that Direct Energy Business, LLC has established by a preponderance of the evidence that Duke Energy Ohio, Inc.'s failure to provide accurate readings of generation usage constitutes inadequate service.

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 Energy Ohio, Inc. (Duke). Direct states that it provides competitive retail electric services to SunCoke Energy, Inc. (SunCoke) and that Duke provides certified supplier services to Direct. Duke's services to Direct include metering customer load, which allows Direct to bill its customer, SunCoke, and for PJM Interconnection, Inc. (PJM) to bill Direct. Direct asserts that, from January 2013, to July 2013, Duke provided PJM with erroneous metering data, causing PJM to overcharge Direct. The incorrect data, per Direct, is a violation Ohio Adm.Code 4901:1-10-05(B) and (F). According to Direct, the charges from March 2013, to July 2013, were resettled, but the charges in January and February were not. Direct believes Duke is obligated to resettle with PJM on behalf of Direct and

Duke has failed to do so. Failing to do so, according to Direct, is unjust and unreasonable and a violation of R.C. 4905.32 and R.C. 4928.35(C).

{¶ 4} On August 13, 2014, Duke filed its answer to the complaint. Duke asserts that the Commission does not have jurisdiction over the issues in this case because the relevant issues deal with PJM's billing practices, which are regulated by the Federal Energy Regulatory Commission (FERC). Duke also avers that it did initiate resettlement with PJM, on behalf of Direct, even though it has no obligation to do so. According to Duke, it started the resettlement process but received no communication back from Direct, which hindered any progress. Duke also notes Direct failed to seek resettlement with PJM on its own behalf. Duke denies it violated Ohio Adm.Code 4901:1-10-05(B) and (F) or R.C. 4905.32 and 4928.32 and requests that the complaint be dismissed.

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} In conjunction with its September 1, 2017 reply brief, Duke filed a motion to strike portions of Direct's initial brief. Direct filed a memorandum contra on September 18, 2018, to which Duke replied on September 25, 2017.

III. DISCUSSION

{¶ 9} R.C. 4905.22 provides that every public utility shall furnish service and facilities that are adequate, just, and reasonable, and that all charges made or demanded for any service be just, reasonable, and not more than allowed by law or by order of the Commission.

{¶ 10} Pursuant to R.C. 4905.26, the Commission has authority to consider a written complaint filed against a public utility by any person or corporation regarding any rate, service, regulation, or practice relating to any service furnished by the public utility that is in any respect unjust, unreasonable, insufficient, or unjustly discriminatory.

{¶ 11} Duke is a public utility as defined in R.C. 4905.02, and, as such, Duke is subject to the jurisdiction of this Commission.

{¶ 12} In complaint proceedings, the burden of proof lies with the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189,214 N.E.2d 666 (1966). Therefore, in cases such as this, it is the responsibility of the complainant to present evidence in support of the allegations made in the complaint.

A. Motion to Strike

{¶ 13} As discussed, Duke filed a motion to strike in conjunction with its reply brief. In its memorandum contra, Direct avers that Duke's motion lacks specificity and the motion does not expressly convey what Duke contends should be stricken. According to Direct, there is no separation from the reply brief and the motion to strike, as the filing conflates both arguments. Further, Direct states that Duke fails to provide any legal support for what should be stricken and why. In reply, Duke asserts that Direct's initial brief discusses Duke's billing relationship with a customer that is not a party to this matter

and involves circumstances that occurred after the relevant events in this proceeding. Duke claims the related comments would serve to bias the Commission.

{¶ 14} Dukes' motion to strike is denied. We agree with Direct that Duke's request lacks specificity as to what should be stricken from Direct's brief. However, in deciding the issues in this case, the Commission will properly consider all arguments raised and provide sufficient weight to all relevant evidence.

B. Background

{¶ 15} According to Direct, the relationship between Duke, as the provider of distribution services, and Direct, a certified supplier of competitive retail electric services (CRES), is dictated by the Certified Supplier Tariff (Supplier Tariff), which is filed with the Commission (Direct Ex. 4). The Supplier Tariff establishes the "basic requirements and coordination" between the two entities in order for suppliers to provide CRES to end-use customers. Direct states that, pursuant to the Supplier Tariff, Duke is responsible for maintaining all meters and associated equipment used for retail billing in the Company's service area. Part of this responsibility, asserts Direct, is two main tasks. One is providing accurate meter readings to the supplier in order for the supplier to bill its end-use customer. The other task is providing PJM with aggregate load data. PJM then uses that data to bill the supplier.

{¶ 16} Duke asserts that all entities that participate in PJM are subject to various tariffs filed with FERC, including the Open Access Transmission Tariff (OATT). Through the PJM process, Duke is considered a transmission owner and Direct is considered both a transmission customer and a load serving entity (LSE) that provides generation to end-use customers. LSEs are typically invoiced for their aggregate load based on two components, called settlements. Under Settlement A, Duke provides PJM with a daily estimate using elements such as weather and prior usage, and PJM bills the LSE on a weekly basis. Settlement B uses actual meter data for the period 60 days prior, and reconciles that with the previous data estimates under Settlement A. Duke avers this is PJM's only

documented process for billings and reconciliations. Duke notes, however, outside of Settlements A and B, there is an informal and voluntary process, Settlement C, that requires express agreement from all affected LSEs to go forward. (Duke Ex. 8 at 7-11.)

{¶ 17} SunCoke is a coke plant and cogeneration facility in Middletown, Ohio, in Duke's service territory. Prior to January 4, 2013, SunCoke received generation from Duke, as a default standard service offer customer. On January 4, 2013, SunCoke enrolled as a customer of Direct and thereafter received generation services from Direct. SunCoke is a large industrial customer that both requires a significant amount of energy and also produces a significant amount of energy. Partly because of this, Duke needs to do a manual calculation in order to construct SunCoke's bill. Additionally, SunCoke has a dual-billing arrangement where it received a bill for distribution from Duke and bill for generation from Direct. (Duke Ex. 8 at 2-5; Direct Ex. 2 at 5-6.)

C. Argument of Direct

{¶ 18} Direct contends that once SunCoke switched generation service from Duke to Direct, Duke ceased doing the manual calculation necessary to properly bill SunCoke. Direct avers that, after the January 2013 switch, SunCoke's usage appeared to be normal. However, states Direct, the invoice it received from PJM, based on reportage from Duke, indicated usage almost twice as high as expected. According to Direct, the discrepancy was discussed with Duke, but the Company initially failed to investigate the issue and continued to provide PJM with incorrect data. Direct explains it was not until May 2013 that Duke determined that SunCoke's meter data was being overstated because Duke was no longer doing the manual calculation that was necessary to calculate SunCoke's net usage. Further, states Direct, Duke did not ultimately correct the calculation until August 2013. Direct contends that, after the miscalculation was discovered, Duke went through PJM's Resettlement B process to correct the error. However, Direct notes that the Resettlement B process can only go back 60 days. Because Duke did not initiate resettlement until May 2013, Direct's invoices from January and February 2013 have not been corrected. Direct contends Duke attempted to correct the issue through Resettlement

C, but was unable get the necessary affirmative consents from the other LSEs. According to Direct, it paid PJM an excess of over $1.6 million that cannot be resettled due to Duke's actions. (Direct Ex. 2 at 7-10, 12-13.)

{¶ 19} Thereafter, Direct states that when SunCoke renewed its contract in January 2014, the customer requested to switch to consolidated billing, where both generation charges and distribution charges would appear on the same invoice. Direct contends that Duke failed to include the generation charges on the first three month's bills. Direct states that, when confronted with the issue, Duke asserted it could not do consolidated billing for a customer such as SunCoke, reverted SunCoke back to dual billing, and issued a single bill for three months of generation. (Direct Ex. 2 at 10-12.)

{¶ 20} Direct contends that Duke failed to comply with Supplier Tariff and thus violated R.C. 4905.22, by failing to provide necessary and adequate service. Pursuant to Section 14.1 of the Supplier Tariff, Duke serves as the Metered Data Management Agent (MDMA) and is required to provide hourly load to PJM on behalf of Direct. Direct contends that it is implied that such data be accurate. According to Direct, Duke violated the Supplier Tariff when it provided PJM with inaccurate data. Further, Direct asserts Duke failed to efficiently and timely correct the mistake after it was identified. Direct avers that SunCoke's unique metering needs, which require manual calculations, do not justify Duke's failure to provide accurate meter readings. Direct notes that the Supplier Tariff requires Duke to own, furnish, install, program, calibrate, test and maintain all meters, and, notably, Duke was able to provide proper readings to SunCoke when Duke was providing SSO generation to SunCoke. (Direct Ex. 2 at 12-13.)

{¶ 21} Direct asserts Duke also violated Section 10.1 of the Supplier Tariff, and thus failed to comply with R.C. 4905.22, by failing to allow SunCoke to choose consolidated billing. Direct maintains that Section 10.1 allows consolidated billing, as long as the customer is receiving standard rates. According to Direct, Duke accepted SunCoke's request for consolidated billing, but then did not include any charges for three months

before ultimately informing Direct that SunCoke's account is not eligible for consolidated billing. Direct argues that it offered SunCoke a fixed volumetric price plan, which qualifies as a standard rate, and thus Duke was obligated to provide consolidated billing. (Direct Ex. 2 at 10-12.)

{¶ 22} Accordingly, Direct asks the Commission find that Duke violated the Supplier Tariff and thus did not comply with R.C. 4905.22, 4905.26, 4905.30, and 4905.32. Direct also asks that Duke be directed to pay Direct restitution for the over $1.6 million it paid PJM that cannot be otherwise recovered, plus interest. Direct contends that while the Supplier Tariff says an MDMA, such as Duke, should be held harmless for any actions taken in the role of MDMA, Ohio Adm.Code 4901:1-10-02(G) prevents tariffs from having exculpatory language such as that.

D. Argument of Duke

{¶ 23} Duke submits that Direct's complaint is without merit for numerous reasons. Duke initially contends that its meters recorded accurate data and operated correctly. Duke avers that, while the manual calculation to compute the net usage was not completed, the meters functioned properly. Further, Duke maintains that Direct had the opportunity to review all data from Duke before it was submitted to PJM, but Direct voluntarily waived that right and thus assumed the risk (Duke Ex. 8 at 8). Duke additionally notes that, in the Company's role as MDMA, the Supplier Tariff expressly states that MDMAs should be held harmless for any actions performed as MDMA.

{¶ 24} Duke also states that it did not violate the Supplier Tariff. In serving as the MDMA, Duke asserts it receives no rates or charges. Further, Duke explains that it was not unjustly enriched in any amount, as it was not a part of the financial transaction between PJM and Direct. Regarding its meters, Duke maintains they functioned properly and complied with standards set forth in Ohio Adm.Code 4901:1-10-05(B) (Duke Ex. 8 at 5). Duke further asserts the complaints should be denied as Direct lacks standing. According to Duke, complaints brought under R.C. 4905.26 can only be brought by

customers against utilities. Duke maintains that Direct is not a retail customer of Duke and thus is without standing to bring a complaint. Duke continues, stating that, even if Direct has standing, the Commission cannot grant Direct its requested relief. Duke contends that the various resettlement options with PJM are a part of the OATT, which is approved by FERC and thus FERC's jurisdiction. Finally, Duke avers that the Commission is restricted from awarding monetary relief. Duke states that Direct's request for restitution is misplaced, as Duke was not unjustly enriched and Direct is not a retail customer of Duke. For these reasons, Duke asks that Direct's complaint be denied.

E. Replies

{¶ 25} In reply, Direct reiterates that Duke violated the Supplier Tariff and caused Direct to be overcharged by over $1.6 million. Direct first asserts that it is no longer asking the Commission to order resettlement; Direct is asking that the Commission find Duke in violation of the R.C. Chapter 49 and direct Duke to pay restitution. Direct also affirms that it has standing to bring the complaint. According to Direct, R.C. 4905.26 does not limit complaints to just end-use customers; complaints may be filed by any person against a utility. Further, Direct maintains that pursuant to Supplier Tariff, Direct is a customer of Duke as it pays Duke for the provision of regulated service. Direct restates that Duke's metering practices violated the Supplier Tariff and resulted in inadequate service that harmed Direct. Direct contends that it is irrelevant if the meters were working properly because Duke handled the data inappropriately. Direct states Duke was able to accurately bill the usage when Duke was providing the generation, but ceased doing so when Direct was the generation provider. According to Direct, Duke therefore violated the Supplier Tariff by failing to provide accurate data to PJM.

{¶ 26} Duke responds that the issues in this proceeding are based on Direct's ability to resettle. According to Duke, in Direct's original complaint and in its case-in-chief, Direct's main objective was to get an order from the Commission directing all affected CRES providers to consent to resettlement. Duke contends resettlement is controlled by PJM and by tariffs filed with FERC and should be treated as a federal issue, outside of the

Commission's jurisdiction. Duke further maintains that, pursuant to the Supplier Tariff, Duke merely serves as an agent for Direct and is to be held harmless for its action. Therefore, Duke maintains it did not violate the Supplier Tariff. Such exculpatory language is appropriate, according to Duke, as the rule prohibiting such language, found in Ohio Adm.Code 4901:1-10-02, is limited to customer losses. Duke further notes that the current Supplier Tariff was approved by the Commission after Ohio Adm.Code 4901:1-10-02 went into effect, and, further, Direct was involved in that proceeding and did not object to the language in the tariff. Duke also reiterates its arguments that Direct is not a customer of Duke and accordingly does not have standing to bring a complaint. Even if Direct did have standing, Duke avers the Commission cannot grant monetary restitution.

IV. COMMISSION CONCLUSION

{¶ 27} To begin, the Commission observes that the underlying facts of the case are uncontroverted. SunCoke is a customer that both produces and consumes generation. Because of this, in order to determine SunCoke's net generation, Duke needed to do a manual calculation. 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. At issue is whether Duke's actions constitute inadequate service. (Duke Ex. 8 at 12-13; Direct Ex. 2 at 12.)

{¶ 28} Initially, we will examine whether the exculpatory language of the Supplier Tariff limits Duke's liability. Section 14.1 of the Supplier Tariff reads, in part, "The Company will be held harmless for any actions taken while performing Meter Data Management Agent responsibilities." As discussed by the parties, Ohio Adm.Code 4901:1-10-02(G) states:

> No tariff of an electric utility shall incorporate exculpatory clauses that purport to limit or eliminate liability on the part of the electric utility to its customers or others as a result of its own negligence when providing a regulated service. No electric utility tariff shall incorporate provisions

> which purport to establish liability on the part of the electric utility's customers for acts or failures to act involving an electric utility's facilities, which are beyond the control of the customer. Any contrary provisions in an electric utility's tariff now on file with the commission shall be eliminated.

In enacting this rule, the Commission stated the rule "codifies the Commission's longstanding policy and previous Supreme Court decisions that have held that a public utility cannot, through the use of an exculpatory clause, limit its liability for damages resulting from its own negligence when providing a required service." We went on, explaining that the rule "furthers 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). Thus, the rule is explicit that such language in unenforceable, regardless of whether the Commission approved the tariff as a whole. Here, Duke is the designated MDMA and certified suppliers have no choice but to accept the accompanying services. Thus, it would be against public policy to hold Duke harmless for all actions taken while serving as the MDMA. Accordingly, we find the hold-harmless language in the Supplier Tariff does not exempt Duke from providing adequate service in its role as the MDMA.

{¶ 29} Next, we will address whether Duke complied with the terms of the Supplier Tariff. The Supplier Tariff, in Section 14.1, requires Duke, as the MDMA, to supply hourly load data to PJM in accordance with the OATT. It is not disputed that once SunCoke began receiving services from Direct, Duke ceased providing the necessary calculation in order to provide a true reading of usage to PJM (Duke Ex. 8 at 12-13; Direct Ex. 2 at 12). Once Direct identified that the usage calculations were likely incorrect, the parties appeared to work together to identify the cause of the miscalculation and to remedy the situation. PJM's Resettlement B process corrected the calculations from March 2013

onward. However, the initial miscalculations from January and February 2013 remain unresolved, despite Duke's attempt to initiate the Resettlement C process on Direct's behalf. (Duke Ex. 8 at 11-14; Direct Ex. 2 at 13.) While it appears Duke made a good faith effort to correct the issues, it is agreed that the meter readings Duke provided to PJM were inaccurate. As the Supplier Tariff explicitly says, Duke is to "supply hourly load data" to PJM, it is evident that Duke failed in this regard. Duke's argument that its meter readings were technically accurate and its meters were properly working is unpersuasive. While the outgoing meter readings may have been accurate, Duke was aware that additional steps were necessary in order to provide a true calculation of SunCoke's usage, as the Company was completing those calculations when it was the generation provider (Duke Ex. 8 at 5). Therefore, the Commission finds Duke did not fulfill its duties as the MDMA and violated the Supplier Tariff.

{¶ 30} We further find that Duke's violation of the Supplier Tariff, in this situation, constitutes noncompliance with R.C. 4905.22 and 4905.26. R.C. 4905.22, in sum, requires utilities to provide adequate service that is just and reasonable. R.C. 4905.26 similarly allows complaints for service that is in any way inadequate, unjust or unreasonable. Here, we determine that Duke's service was inadequate. As discussed, Duke's failure to provide accurate usage data violated the Supplier Tariff. A violation of the Supplier Tariff does not automatically demonstrate inadequate service, but it is indicative. In this situation, however, Duke was aware, prior to Direct's involvement, that in order to properly calculate SunCoke's usage, additional steps were necessary. While the calculation of SunCoke's usage is complex and perhaps atypical, Duke understood what was necessary and was capable of doing the calculation. Moreover, Duke was properly calculating SunCoke's usage up until Direct began providing generation. Duke Ex. 8 at 5. Although Duke was no longer the generation supplier, in its role as the MDMA for Direct, the Company maintained the obligation to properly ascertain SunCoke's usage and pass that data on to PJM. Accordingly, we determine that Duke's service was inadequate and in violation of R.C. 4905.22 and 4905.26.

{¶ 31} While the Commission finds Direct's complaint against Duke valid, we deny Direct's request for monetary damages. It is well established that the Commission lacks authority to award monetary damages to a complainant. Direct's request for damages pursuant to R.C. 4928.16 is misplaced. While R.C. 4928.16(B)(2) permits the Commission to award restitution in limited circumstances, they do not apply here. Under R.C. 4928.16, such a remedy is only applicable for violations of R.C. sections 4928.01 to 4928.15. Direct filed a complaint pursuant to R.C. 4905.26, and thereafter, specifically only alleged violations of R.C. 4905.22, 4905.30, and 4905.32 (Direct Br. at 8). Further, our findings are limited to R.C. 4905.22 and 4905.26. Accordingly, the Commission lacks jurisdiction to award monetary relief.

F. Motions for Protective Order

{¶ 32} As a final administrative matter, the Commission notes there are several motions for protective order still pending in this case. Specifically, Duke filed motions for protective order on April 14, 2014, June 12, 2017, and August 11, 2017 and Direct filed a motion on April 15, 2014, in which they allege certain information in their respective pre-filed testimony and post-hearing briefs constitute proprietary and trade secret information, including operational and financial data, business forecasts, electric demand and use and pricing information, and employment figures, the disclosure of which is prohibited by state law. R.C. 149.43; R.C. 1333.61(D). No memoranda contra were filed in response to any of the pending motions for protective order.

{¶ 33} The Commission initially notes that R.C. 4905.07 provides that all facts and information in the possession of the Commission shall be public, except as provided in R.C. 149.43, and as consistent with the purpose of Title 49 of the Revised Code. R.C. 149.43 specifies that the term "public records" excludes information which, under state or federal law, may not be released. The Supreme Court of Ohio has clarified that the "state or federal law" exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 2000-Ohio-207, 732 N.E.2d 373. Similarly, Ohio Adm.Code 4901-1-24 allows the Commission to protect the confidentiality of information contained in

a filed document "to the extent that state or federal law prohibits release of the information, including where the information is deemed * * * to constitute a trade secret under Ohio law, and where non-disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code." Moreover, Ohio law defines a trade secret as "information * * * that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." R.C. 1333.61(D).

{¶ 34} Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to R.C. 1333.61(D), as well as the six-factor test set forth by the Ohio Supreme Court in *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 1997-Ohio-75, 687 N.E.2d 661, we find that the operational information filed under seal in this docket contain trade secret information. Their release, therefore, is prohibited under state law. We also find that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Accordingly, we find that the six unopposed pending motions for protective order are reasonable and should be granted.

{¶ 35} Ohio Adm.Code 4901-1-24(F) provides that, unless otherwise ordered, protective orders issued pursuant to Ohio Adm.Code 4901-1-24(D) automatically expire after 24 months. The Commission finds that confidential treatment shall be afforded to the information filed under seal for 24 months from the date of this Opinion and Order. Until that time, the Docketing Division shall maintain, under seal, the information filed confidentially. Further, Ohio Adm.Code 4901-1-24(F) requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If a party wishes to extend its confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend the

confidential treatment is filed, the Commission may release the information without prior notice.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 36} On July 22, 2014, Direct filed a complaint against Duke alleging violations of the Supplier Tariff.

{¶ 37} Duke is a public utility as defined in R.C. 4905.02, and, as such, is subject to the jurisdiction of this Commission.

{¶ 38} On August 13, 2014, Duke filed its answer to complaint.

{¶ 39} An evidentiary hearing was held on June 13, 2017.

{¶ 40} The burden of proof in a complaint proceeding is on the complainant. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189,214 N.E.2d 666 (1966).

{¶ 41} The Commission finds that Direct has established, by a preponderance of the evidence, that Duke's failure to provide accurate readings of SunCoke's generation usage constitutes inadequate service.

VI. ORDER

{¶ 42} It is, therefore,

{¶ 43} ORDERED, That this matter be decided in favor of Direct, as Direct has established by a preponderance of the evidence that Duke's failure to provide accurate readings of SunCoke's generation usage constitutes inadequate service. It is, further,

{¶ 44} ORDERED, That the motions for protective order filed by Direct and Duke be granted. It is, further,

{¶ 45} ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

M. Beth Trombold, Chair

Thomas W. Johnson

Lawrence K. Friedeman

Daniel R. Conway

Dennis P. Deters

NJW/hac

Entered in the Journal

APR 10 2019

Tanowa M. Troupe
Secretary

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) "furthers 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

Daniel R. Conway

Dennis P. Deters

NJW/hac

Entered in the Journal
JUN - 5 2019

Tanowa M. Troupe
Secretary

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

Direct Energy Business, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	Case No. 14-1277-EL-CSS
	)	
Duke Energy Ohio, Inc.,	)	
	)	
Respondent.	)	

APPLICATION FOR REHEARING OF DUKE ENERGY OHIO, INC.

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) seeks rehearing of the Opinion and Order (Order) issued by the Public Utilities Commission of Ohio (Commission) on April 10, 2019, on the following grounds:

1. The Commission erred in finding that it had jurisdiction over the events and relationships relevant to this complaint.

2. The Commission erred in finding that the exculpatory clause was invalid.

3. The Commission erred in finding that Duke Energy Ohio failed to provide adequate service.

4. The Commission erred in reaching a conclusion that could ultimately require Duke Energy Ohio to pay amounts to Direct Energy, even though Duke Energy Ohio was not enriched by the events, particularly in light of Direct Energy's failure to monitor its own customers' billing.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING OF DUKE ENERGY OHIO, INC.

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, Duke Energy Ohio, Inc., (Duke Energy Ohio or Company) seeks rehearing of the Opinion and Order (Order) issued by the Public Utilities Commission of Ohio (Commission) on April 10, 2019.

I. The Commission Erred in Finding that it Had Jurisdiction over the Events and Relationships Relevant to this Complaint.

The Commission has gone astray of its statutory mandate and has come to a conclusion that has the potential to wreak havoc with what is exclusively a wholesale market process and procedure. The facts giving rise to the dispute in this case related to settlements between Direct Energy Business Services, LLC, (Direct Energy) and PJM Interconnection L.L.C. (PJM). That relationship is governed by tariffs and agreements approved by the Federal Energy Regulatory Commission (FERC), including the Open Access Transmission Tariff (OATT), the Operating Agreement (OA), and the Reliability Assurance Agreement (RAA).

All entities that are members of and participate in PJM are subject to the OATT, the OA, and the RAA. However, entities within PJM have different roles:

- Transmission owners are those PJM members that own or lease transmission facilities. Duke Energy Ohio is a transmission owner in PJM.
- Transmission customers receive transmission services within PJM.
- Load serving entities, or LSEs, serve end-use customers in a PJM Control Area and have authority to sell energy to end-users in a PJM Control Area. Direct Energy is both a transmission customer and an LSE in the Duke Energy Ohio load zone within PJM.

The OATT sets forth the rates, terms, and conditions that allow transmission customers to use the transmission facilities owned by a transmission owner and operated by PJM to deliver power to end-users.[1] PJM, through its tariffs and agreements, provides certain mechanisms for

[1] Duke Energy Ohio Exhibit 8, Direct Testimony of Timothy Abbott, pg. 6.

disputed settlements that fall within identified time parameters. PJM bills its transmission customers and LSEs consistent with provisions of its OATT and OA. As summarized by PJM, "[b]illing and payment are coordinated processes under the terms of the [OA] of PJM and the PJM [OATT]."[2] The fact that such mechanisms exist at all is dispositive of the fact that errors can occur in the process.

As the facts were discussed at length in initial and reply briefs, as well as in the Commission's Order in this case, Duke Energy Ohio will not restate them for purposes of seeking rehearing. Indeed, the facts, though important in understanding the issue, are not as important as the assigned roles that evolve from the facts, and the responsibilities that flow from those roles.

The resettlement process that provides fundamental rules for billing between transmission owners, transmission customers, and LSEs in PJM was described in detail in the Company's initial brief.[3] That process comprises two parts:

- The first part is known as Settlement A and is based on an estimate of usage. The estimate is prepared by the Company on a daily basis, using weather and load from a prior period. PJM then sends weekly invoices to LSEs, based on that estimate.[4]
- Settlement B, the second part of the process, reconciles the weekly invoices on the basis of final data, comprising actual metered usage.[5]

PJM also allows for an informal resettlement process, outside of the Settlement A and Settlement B. This informal process, known as Resettlement C, is entirely voluntary. Duke Energy Ohio, therefore, is not required to initiate a Resettlement C and cannot compel participation in such a resettlement by any LSE.

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[2] Duke Energy Ohio Exhibit 5, PJM Manual 29, Billing, pg. 4 (January 1, 2012).
[3] *See* Merit Brief of Duke Energy Ohio, pp. 2-4.
[4] Duke Energy Ohio Exhibit 4, PJM Operating Agreement, OA Schedule 1, Section 3.5.
[5] Duke Energy Ohio Exhibit 4, PJM Operating Agreement, OA Schedule 1, Section 3.6.

There is no question that the Commission's jurisdiction goes no farther than is specifically granted to it by Ohio law.[6] And, as the Company stated on brief, it is also undeniable that Direct Energy's complaint is based solely on the PJM settlement process and its efforts to recover overbillings thereunder.[7] Unfortunately for Direct Energy, nothing in Ohio law gives the Commission the power to order resettlement under PJM's controlling documents. Furthermore, federal law clearly states that the Federal Energy Regulatory Commission has exclusive jurisdiction over matters related to the transmission of electricity in interstate commerce.[8]

The Commission should not have taken jurisdiction over Direct Energy's complaint in this case. The subject matter thereof is clearly outside of the Commission's well-defined authority. The Order should therefore be reconsidered and the complaint should be dismissed.

II. The Commission Erred in Finding that the Exculpatory Clause in the Supplier Tariff Was Contrary to Public Policy and Invalid.

As the Commission correctly noted, the Company's Supplier Tariff includes a provision requiring Direct Energy to hold the Company harmless for actions taken while it serves as a Meter Data Management Agent.[9] The Commission invalidated that provision on the basis of a rule prohibiting the use of exculpatory clauses, where those clauses would limit a utility's liability resulting from **negligence** in the course of providing a **regulated** service.[10]

The Commission's invalidation of the tariff provision is in error for two reasons. First, nothing in the exculpatory clause addresses negligent actions. The tariff provision merely requires the Company to be held harmless in its provision of meter data management services to a competitive provider, regardless of what those actions might be. It is important to recognize that

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[6] *Penn Central Transportation Co. v. Pub. Util. Comm.*, 35 Ohio St.2d 97, 99 (1973).
[7] Complaint, Request for Relief ¶A (asking for an order directing the Company to again initiate Resettlement C and directing all impacted CRES providers to consent to that resettlement).
[8] 16 U.S.C. 824.
[9] Duke Energy Ohio Supplier Tariff. P.U.C.O. Electric No. 20, Section 14.1.
[10] O.A.C. 4901:1-10-02(G).

the tariff also specifically states that the use of estimates might be necessary and that it is the supplier's responsibility to understand the process.

Nor did the Commission attempt to determine, in its Order, whether Duke Energy Ohio was "negligent" in the performance of its meter data management services. What the Commission did conclude was that the Company provided "inadequate" service. This is not equivalent to negligence. And, even though the Commission used the term "negligence" in its rule, there is absolutely nothing in Title 49 of the Revised Code that would give the Commission the jurisdiction or authority to determine the presence of negligence in any set of facts. Therefore, the tariff provision cannot be invalidated as eliminating liability for negligence.

The second vital criterion in the rule is that the invalidation must relate to elimination of liability relating to the provision of a regulated service. Performing meter data management services for purposes of PJM billings is not a service that is regulated by the state of Ohio. This is not even a service that is recognized or addressed by Title 49. Indeed, the Company's Supplier Tariff defines a "Meter Data Management Agent" as "the party designated by the [Transmission Scheduling Agent] to provide hourly metered load data to [PJM]."[11] The services provided by the Company to Direct Energy for the management of meter data to be sent to PJM is not a service that is cognizable under Ohio law or regulated under the jurisdiction of the Commission. Therefore, the tariff provision cannot be invalidated as eliminating liability related to the performance of regulated services.

The Commission's conclusion that the exculpatory clause must be or can be invalidated should be reversed.

III. The Commission Erred in Finding that Duke Energy Ohio Failed To Provide Adequate Service.

[11] Duke Energy Ohio Supplier Tariff. P.U.C.O. Electric No. 20, Sheet No. 20.3.

Although the Commission did not specifically address the basic jurisdictional issue discussed above, it did purport to take jurisdiction. And, although the Commission was incorrect in its application of its rule to invalidate the exculpatory clause, it nevertheless did do so. As such, the Company will address the Commission's ultimate conclusion that Duke Energy Ohio failed to provide adequate service, even though the Commission should never have reached this issue.

The Commission itself has created rules that govern relationships between the Company and its distribution customers with respect to electric distribution service billing disputes.[12] When the Company engages with customers to adjust their bills, this is not regarded as inadequate service. Although Ohio law requires that all public utilities provide "adequate service," that term is never defined, either by statute or by administrative rule. "'Inadequate service' is not defined in R.C. Title 49, that determination being left to the commission and dependent upon the facts of each case."[13] If the Commission chooses to define a billing adjustment in this proceeding, particularly one that involves coordination with PJM and that is limited under terms set forth in PJM's tariffs, as inadequate service, the precedent established will result in monumental changes in established utility law in Ohio.

Furthermore, it is critical to focus on the who the parties actually are in this proceeding. Duke Energy Ohio is a regulated public utility because it falls within the definition of an "electric light company." That is, it is a public utility when it is "engaged in the business of supplying electricity . . . to consumers within this state."[14] When Duke Energy Ohio is providing meter data management services, it is not supplying electricity. Rather, the Company is acting as the billing agent of Direct Energy to provide information to PJM. And Direct Energy can in no way be

[12] *See* 4901:1-10-22, O.A.C.
[13] *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 14 Ohio St.3d 49, 50, 471 N.E.2d 475, 477 (1984).
[14] R.C. 4905.03(A)(4).

deemed a consumer of electricity in this transaction. Therefore, R.C. 4905.22 and .26 neither mandate the provision of reasonable and adequate service to Direct Energy in this regard, nor do they allow Direct Energy to complain, as if it were a customer.[15]

IV. The Commission erred in reaching a conclusion that could ultimately require Duke Energy Ohio to pay monetary damages to Direct Energy, even though Duke Energy Ohio was not enriched by the events, particularly in light of Direct Energy's failure to monitor its own customers' billing.

After erroneously concluding that Duke Energy Ohio failed to comply with R.C.4905.22 and 4905.26, the Commission denied Direct Energy's request for monetary damages stating that it did not have authority to award monetary relief. It is important to recognize that Duke Energy Ohio did not benefit in any way with regard to the inability to resettle under PJM's resettlement processes. Duke Energy Ohio merely provided data to PJM. Data, which Direct Energy had the ability and opportunity to review and verify and neglected to do so. PJM issued the bills to the LSEs, not Duke Energy Ohio. To the extent Direct Energy was over billed by PJM during the period at issue, that means that the other LSEs are underbilled. Duke Energy Ohio as the transmission owner does not bill or process payments between the LSEs and PJM and did not benefit. All other LSEs, however, did. But the Commission's decision seems to overlook this fact, as well as the inequitable result of a finding of inadequate service as it relates to R.C. 4905.61. To the extent that Direct Energy pursues enforcement of this section in civil court, the outcome would result in significant injustice to the Company. As the Company pointed out in its initial brief, when Direct Energy established its subaccount with PJM, it voluntarily elected a "buyer unilateral" confirmation, meaning that it waived the right to review data before it was submitted to PJM and

[15] *Accord, In the Matter of the Complaint of S.G. Foods, Inc., et al. v. FirstEnergy Corp., et al.*, Case No. 04-28-EL-CSS, *et al.*, Entry, Finding 48, *et seq.* (March 7, 2006).

assumed the risk associated with its election.[16] There was nothing that prevented Direct Energy from comparing load dated posted by PJM on its electronic tools to the historical customer usage data in Direct Energy's possession.[17] Thus Direct Energy comes to this case with "unclean hands." The equitable doctrine of unclean hands prescribes that when a party takes the initiative to set in motion the judicial machinery to obtain some remedy, but has violated good faith by some prior related conduct, the court will deny the remedy.[18] The maxim that one seeking equity must come to the court with clean hands denies all relieve to one, no matter how well-founded the claim may otherwise be, if, in granting the relief that the plaintiff seeks, the court would be required, by implication even, to affirm the validity of an unlawful agreement or give approval to inequitable conduct.[19] Here, Direct Energy knowingly waived its rights to oversee its own customers' billing, and now seeks to hold Duke Energy Ohio responsible. In addition to all the other reasons why the Commission should not have found Duke Energy Ohio to have violated its tariff, the outcome in this instance works an extreme inequity.

Moreover, allowing Direct Energy to have the potential to collect treble damages from Duke Energy Ohio, when the Company was merely acting as the meter data management agent for Direct Energy and following the processes prescribed by PJM, is particularly unfair. The monetary damages that Direct Energy seeks are in the hands of other energy suppliers that were participating in the PJM settlement process during the same settlement period. None of those dollars are in Duke Energy Ohio's pockets. The result of the Commission's decision is to levy an

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[16] Merit Brief, pg. 5.
[17] *Id.*
[18] *See, e.g., Wooster v. Entertainment One, Inc.*, 158 Ohio App.3d 161, 182-183, 814 N.E.2d 521 (9th Dist., Wayne County, 2004); *Trott v. Trott*, 2002-Ohio-1077 (10th Dist., Franklin County); *Oliver v. Natl. Collegiate Athletic Assn.*, 155 Ohio Misc.2d 8, 2008-Ohio-7143, 920 N.E.2d 196 (Erie County C.P., 2008).
[19] *Bradford v. Reid*, 126 Ohio App.3d 448, 710 N.E.2d 761 (1st Dist., Hamilton County, 1998).

extreme penalty on the Company for a claimed infraction that relates to a process that doesn't even fall within the Commission's jurisdiction.

Respectfully submitted,

DUKE ENERGY OHIO, INC.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing of Duke Energy Ohio, Inc., was served on the following parties this 10th day of May, 2019, by hand-delivery or electronic delivery.

/s/ Jeanne W. Kingery
Jeanne W. Kingery

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Case No(s). 14-1277-EL-CSS

Summary: Application for Rehearing for Duke Energy Ohio, Inc. electronically filed by Carys Cochern on behalf of Duke Energy

Summary: Supreme Court Appeal Notice of Appeal electronically filed by Ms. Emily Olive on behalf of Duke Energy Ohio and D'Ascenzo, Rocco O. Mr. and Kingery, Jeanne W. Ms. and Vaysman, Larisa M. Ms.