

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke
Energy Ohio, Inc. for a Waiver of Specific
Sections of the Ohio Administrative Code

Case No. 21-1100-EL-WVR

COMMENTS OF THE RETAIL ENERGY SUPPLY ASSOCIATION¹

Because of administrative rule changes that became effective November 1, 2021, Duke Energy Ohio is subject to a requirement to place non-jurisdictional charges of competitive suppliers on its consolidated electric bills. Although Duke currently provides this service to an affiliate, it seeks a one year waiver of Rule 4901:1-10-33(A) and two related rules² so that it can phase out this service to its affiliate and then continue to deny access to the bills by competitive suppliers. Application at 2-3 (Nov. 1, 2021). The Staff has issued its own view that the waiver should be granted but for only six months so that Duke could remove its affiliate charges from its consolidated bills. Staff Comments at 4 and 6 (Dec. 10, 2021) (“Staff Comments”).

The request for a waiver of requirements to place non-jurisdictional charges on consolidated bills is faulty in several ways. Initially, a waiver would permit unlawful discrimination in the short term and set up a permanent bar on the placement of charges in the

¹ The statements expressed in this filing represent the position of the Retail Energy Supply Association as an organization, but may not represent the view of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of retail energy suppliers dedicated to promoting efficient, sustainable, and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service to retail, residential, commercial, and industrial customers. More information on RESA can be found at www.resausa.org.

² Application at 1, citing Rule 4901:1-10-22(B)(16) and 4901:1-10-33(C)(9).

longer term. Moreover, the application does not demonstrate a reasonable justification for a waiver. Further, the application is an unlawful attempt at rehearing. Accordingly, the Commission should deny the request for the waiver of Rule 4901:1-10-33(A) and the related rules.

Background

In a review of the rules setting service standards for electric distribution utilities, competitive suppliers sought to address the denial of competitive suppliers' access to consolidated bills for the placement of non-jurisdictional product or service charges. In the Matter of the Commission's Review of its Rule for Electric Safety and Service Standards Contained in Chapter 4901:1-10 of the Ohio Administrative Code, Case No. 17-1842-EL-ORD, Finding and Order ¶¶ 134 and 213 (Feb. 26, 2020) ("Rule Proceeding"). While the Commission Staff and the Ohio Consumers' Counsel ("OCC") sought to ban all non-jurisdictional charges from placement on consolidated bills, the Commission rejected that approach and concluded that "[t]he [electric distribution utility] must allow the customer's CRES provider, on an open and nondiscriminatory basis, access to the consolidated bill to list non-jurisdictional service charges." Id., Finding and Order ¶ 213. The purpose of the rule is "to promote competition and fairness between all parties." Id. In a separate discussion, the Commission further explained, "While this provision does not force the [electric distribution utility] to place the customer's [competitive retail electric supply] provider's non-jurisdictional service on the consolidated bill, the Commission believes its amendment strikes a middle ground whereby fairness to the [competitive retail energy supply] provider is accounted for as is the [electric distribution utility's] freedom of contract is respected." Id., Finding and Order ¶242. Thus, the rule adopted by the Commission provides that "[a]n electric utility cannot discriminate *or* unduly restrict a

customer’s CRES provider from including non-jurisdictional charges on a consolidated electric bill.” Rule 4901:1-10-33(A) (emphasis added). In short, the electric utility (1) cannot discriminate in favor of itself or its affiliate and (2) must allow a competitive supplier access to the consolidated bill for non-jurisdictional charges unless it can demonstrate a reasonable justification for excluding access to the competitive supplier.

On rehearing, OCC again sought an outright ban on the placement of non-jurisdictional charges on consolidated bills. Rule Proceeding, Entry on Rehearing ¶¶ 47 and 54 (Jan. 27, 2021). In rejecting OCC’s request, the Commission noted that “a blanket prohibition of these non-jurisdictional services, for which OCC seems to advocate, was not contemplated by Staff or the Commission.” Id., Entry on Rehearing ¶ 54.

On rehearing, the Commission also addressed several narrow complaints of electric distribution utilities concerning the rule. First, Duke requested that the rule be qualified to account for the specific factual circumstances of the case; to that end, it sought the insertion of the word “unreasonably” before “discriminate.” Id., Entry on Rehearing ¶ 49. The Commission found that the change was not needed since the existing language provided the Commission adequate discretion to determine if a violation of the rule occurred. Id., Entry on Rehearing ¶ 55. Second, Ohio Power Company and the Dayton Power and Light Company sought confirmation that they would recover the costs to accommodate the addition of non-jurisdictional charges on a consolidated bill. Id., Entry on Rehearing ¶¶ 50-51. The Commission concluded that the rule proceeding was not the appropriate docket to address cost recovery for bill changes. Id., Entry on Rehearing ¶ 56. Third, the FirstEnergy utilities argued that the new rule was unnecessary. Id., ¶ Entry on Rehearing 52. In response, the Commission noted that FirstEnergy conceded that the Commission had the requisite authority to adopt the amended rule. Further, it concluded that

“[t]he rule does nothing more than prohibit undue or unreasonable prejudice or disadvantage, as already required in R.C. 4905.35(A), *in a specific context.*” Id., Entry on Rehearing ¶ 57 (emphasis added).

The rule change became effective on November 1, 2021. Id., Entry (Oct. 6, 2021).

That same day, Duke filed the application in this case seeking a twelve-month waiver of the rules providing competitive suppliers the opportunity to place non-jurisdictional charges on consolidated bills. Application at 1. In support of the waiver, Duke stated that it would eventually comply with the requirements of Rule 4901:1-10-33(A) by ending the existing placement of its affiliate’s non-jurisdictional charges on its consolidated bills and by doing so eliminate any prejudice or disadvantage. It reasoned that by denying its affiliate access to its consolidated bill, it need not address the specific context to which the rule applies. Application at 2-3. To implement the change (since it is currently placing affiliate charges on its bill), Duke sought a twelve month waiver because it is implementing a new billing system and addressing other unexplained technical requirements. Id. at 3.

The Commission should deny the application for a waiver since Duke fails to demonstrate good cause for its non-compliance with the Commission’s requirement to place a customer’s competitive supplier’s non-jurisdictional charges on consolidated bills

The new provision of Rule 4901:1-10-33(A) contains two prohibitions. First, an electric distribution utility may not discriminate in the placement of non-jurisdictional charges of a customer’s competitive supplier on a consolidated bill. Second, an electric distribution utility cannot unreasonably restrict access to that bill. The application, although not framed as such, seeks a waiver of both requirements of the rule. While the application expressly seeks a twelve-month waiver of the prohibition of discrimination on placement of non-jurisdictional charges, this waiver is only the first step to Duke’s intended outcome: a permanent bar on placement of

any non-jurisdictional charges on consolidated bills. If the initial waiver is given, Duke will then comply with Rule 4901:1-10-33(A) “by removing all non-jurisdictional charges from the bill.”

Application at 1.

The Commission staff comments accept the premise that Duke can comply with Rule 4901:1-10-33(A) if it removes all non-jurisdictional charges from consolidated bills. According to the Staff, it believes that the rules allow an electric distribution utility either to allow all competitive retail electric service providers to place charges on the consolidated bills of their customers or bar them from doing so. Staff Comments at 4. Staff’s only complaint is that the process should happen faster.³

The bar contemplated by Duke is not permitted by the Commission’s rule for several reasons.

First, Duke’s application would result in an outright ban on the placement of non-jurisdictional charges that is not permitted by the Commission rules. In its application, Duke asserts that it may prevent the addition of suppliers’ non-jurisdictional charges if its affiliates’ charges do not appear on the bill. The rule, however, prohibits both discrimination (which the application seeks to continue for an additional twelve months) and any “undue” restriction on access to consolidated bills. Under this second requirement, the rule expressly contemplates that a competitive retail electric supply provider may place non-jurisdictional charges on the bill even if the electric distribution utility chooses not to. The rule does not permit an electric utility to prevent placement unless it can show reasonable grounds for not doing so in a particular case.

³ Staff’s position in this case effectively advances the position it advocated in the Rule Proceeding and ignores the fact that the Commission rejected that position.

Accordingly, the blanket bar that Duke is seeking to set up by this waiver request is not permitted by the Commission's rule.

Moreover, the Commission previously rejected the outcome that Duke is seeking in the Rule Proceeding. When presented with explicit proposals the Commission staff and OCC to ban placement of supplier charges for non-jurisdictional services on customers' bills, the Commission refused to adopt them and concluded that "[t]he [electric distribution utility] must allow the customer's CRES provider, on an open and nondiscriminatory basis, access to the consolidated bill to list non-jurisdictional service charges." Rule Proceeding, Finding and Order, ¶ 213. Further, the Commission intended to advance competition, not restrict it. *Id.* To strike the right balance, the Commission thus directed the electric distribution utilities to accommodate the charges on bills unless there was a good reason to exclude them in a particular case. Having already addressed proposals that would lead to a blanket ban, the Commission should not reverse course by granting the waivers requested in this Application.

Second, to the extent that an electric distribution utility seeks a waiver, as Duke does here, the Commission has not relieved Duke from providing some justification to show that the waiver is reasonable under the particular circumstances of a request. Rule 4901:1-10-02(C) and 4901:1-10-33(A). As explained below, however, Duke has not provided a reasonable justification for the temporary waiver it seeks or the permanent waiver that will result from its application.

On the request for a delay in enforcement on the bar on discrimination, Duke's only excuse is that it needs time to remove its affiliate charges from bills because it is converting its customer information system and other unspecified technical reasons. Application at 5. This explanation does not justify a waiver to continue discriminating, particularly when Duke

apparently has had the ability to include such billing information for at least 20 years. Further, Duke has been on notice for two years that its current practice would be unlawful, but has incurred no costs to accommodate non-jurisdictional charges despite the change in rule. Duke Response to IGS Interrogatory 01-001, part d, and Duke Response to IGS Interrogatory 01-002 (Attachment). In its application, moreover, Duke has not offered any economic justification for the waiver request, and it provides no explanation as to why the conversion to a new customer information system or unspecified technical difficulties prevent it from accommodating suppliers' non-jurisdictional charges.

On the implied request to permanently bar access of placement on non-jurisdictional charges on consolidated bills, Duke offers nothing other than a misreading of the Commission's rule that it claims allows it to bar access to competitors if it denies access to its affiliate. As noted above, that supposed justification is not supported by either the letter or the intent of the rules.

Thus, Duke has failed to provide any reasonable justification for the waivers it is seeking.⁴

Third, the attempt by Duke to prevent access to the bill is effectively an application for rehearing long after the period for such an application has lapsed. Duke had thirty days after the Commission issued its order in the Rule Proceeding to seek rehearing of the rule changes including any request to reverse the decision to adopt the rules at issue here. R.C. 4903.10. In its application for rehearing, however, Duke did not seek to remove the new language in Rule 4901:1-10-33(A); instead, it sought only a modification of the rule to include the word

⁴ The burden to demonstrate good cause for a waiver rests on the applicant. Because Duke has failed to make even a minimal showing of good cause, this portion of the application can be denied by the Commission. See *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, et al., Entry ¶ 5 (Mar. 23, 2011).

“unreasonably” to modify “cannot discriminate” in the text of the rule. Rule Proceeding, Entry on Rehearing ¶ 49. In fact, it opposed OCC’s request for a bar of the placement of such charges. Id., Entry on Rehearing ¶ 48. Although it now seeks to bar the placement of non-jurisdictional charges on the bills of customers of competitive suppliers, Duke is prevented from seeking what it failed to ask for in the rule proceeding. In the Matter of the Application of Duke Energy Ohio, Inc. for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code, Case No. 12-2400-EL-UNC, et al., Opinion and Order at 32 (Feb. 13, 2014).

Conclusion

Duke’s attempt to discriminate and then bar without justification the placement of non-jurisdictional product or service charges on consolidated bills should be denied because it seeks to continue unlawful discrimination and a permanent bar that undermine the intent of the Commission. Additionally, the request for a waiver is not supported by good cause and is an unlawful attempt at rehearing.

Respectfully submitted,

/s/ Frank P. Darr

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the interested parties, this 6th day of January 2022. The following parties were provided by electronic mail a copy of this document.

/s/ Frank P. Darr

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Attachment

REQUEST:

In footnote 4 of Duke's Application, Duke identifies Duke Energy One as the only entity currently with the ability to add non-jurisdictional charges to the utility bill. Regarding the statements made in footnote 4, please:

- a. Identify all entities that currently or historically have been able to add non-jurisdictional charges to Duke's utility bill.
- b. Identify all non-jurisdictional products or services that have been offered, and by what entity, on Duke's utility bill.
- c. Please identify the date, product name, and entity of the first non-jurisdictional charge placed on Duke's utility bill.
- d. Please identify the first month and year that Duke Energy One gained the ability to add any non-jurisdictional charge, such as but not limited to Strike Stop, to Duke's utility bills.

RESPONSE:

- a. Objection. This Interrogatory is overly broad and unduly burdensome, given that it seeks information that is unlimited as to time and that is neither relevant to this proceeding nor likely to lead to the discovery of admissible evidence in this proceeding. In this proceeding, with regard to non-jurisdictional charges, the Company is seeking waiver of newly added language in Rule 4901:1-10-33(A). Charges present on the Duke Energy Ohio utility bill prior to the effective date of the rule change, November 1, 2021, are therefore irrelevant to the outcome of this proceeding. Without waiving said objections, to the extent discoverable, and in the spirit of discovery, Duke Energy One is the only entity which has placed non-jurisdictional charges on Duke's utility bill for at least the past four years.
- b. Objection. This Interrogatory is overly broad and unduly burdensome, given that it seeks information that is unlimited as to time and that is neither relevant to this proceeding nor likely to lead to the discovery of admissible evidence in this proceeding. In this proceeding, with regard to non-jurisdictional charges, the Company is seeking waiver of newly added language in Rule 4901:1-10-33(A). Charges present on the Duke Energy Ohio utility bill prior to the effective date of the rule change, November 1, 2021, are therefore irrelevant to the outcome of this proceeding. Without waiving said objections, to the extent discoverable, and in the spirit of discovery, for at least the past four years, the only non-jurisdictional product placed on Duke's utility bill has been Strike Stop from Duke Energy One.

- c. Objection. This Interrogatory is overly broad and unduly burdensome, given that it seeks information that is unlimited as to time and that is neither relevant to this proceeding nor likely to lead to the discovery of admissible evidence in this proceeding. In this proceeding, with regard to non-jurisdictional charges, the Company is seeking waiver of newly added language in Rule 4901:1-10-33(A). Charges present on the Duke Energy Ohio utility bill prior to the effective date of the rule change, November 1, 2021, are therefore irrelevant to the outcome of this proceeding. Without waiving said objections, to the extent discoverable, and in the spirit of discovery, see the Company's response to parts a and d.
- d. This Interrogatory is overly broad and unduly burdensome, given that it seeks information that is unlimited as to time and that is neither relevant to this proceeding nor likely to lead to the discovery of admissible evidence in this proceeding. In this proceeding, with regard to non-jurisdictional charges, the Company is seeking waiver of newly added language in Rule 4901:1-10-33(A). Charges present on the Duke Energy Ohio utility bill prior to the effective date of the rule change, November 1, 2021, are therefore irrelevant to the outcome of this proceeding. Without waiving said objections, to the extent discoverable, and in the spirit of discovery, Cinergy Services, an unregulated affiliate of Cinergy, had the ability to add non-jurisdictional charges to the bill at least 20 years ago.

PERSON RESPONSIBLE: Lesley Quick as to responses. Legal as to objections.

Duke Energy Ohio
Case No. 21-1100-EL-WVR
IGS First Set of Interrogatories
Date Received: November 10, 2021

IGS-INT-01-002

REQUEST:

What billing system upgrades were made to accommodate the products and services referenced in the answers to INT 1-1? Identify when all changes were made.

RESPONSE: Objection. This Interrogatory is overly broad and unduly burdensome, given that it seeks information that is unlimited as to time and that is neither relevant to this proceeding nor likely to lead to the discovery of admissible evidence in this proceeding. In this proceeding, with regard to non-jurisdictional charges, the Company is seeking temporary waiver of newly added language in Rule 4901:1-10-33(A) and intends ultimately to remove all non-jurisdictional charges from the bill. Billing upgrades made prior to the effective date of the rule change, November 1, 2021, are therefore irrelevant to the outcome of this proceeding. Objecting further, the phrase “billing system upgrades” is vague and susceptible to different interpretations and Duke Energy Ohio would have to engage in speculation or conjecture to ascertain the intended meaning of this request. Without waiving said objections, to the extent discoverable, and in the spirit of discovery, no structural software upgrades have been made to the billing system specifically to accommodate non-jurisdictional charges in at least ten years.

PERSON RESPONSIBLE: Lesley Quick as to response. Legal as to objections.