

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Duke Energy Ohio, Inc. and : Docket No. ER10-1562-000  
Duke Energy Kentucky, Inc. :

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**COMMENTS  
SUBMITTED ON BEHALF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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July 26, 2010

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**INTRODUCTION**

On June 29, 2010, the Federal Energy Regulatory Commission (FERC or Commission) issued its Combined Notice of Filings establishing a comments due date of July 26, 2011 for the above-captioned proceeding. The Public Utilities Commission of Ohio (PUCO or Ohio Commission) hereby submits its remarks responding to the Duke Energy Ohio, Inc and Duke Energy Kentucky, Inc.'s ("Duke" or "the Company") June 25, 2010 filing. Pursuant to FERC's Rule 214, Part 38, Rules of Practice and Procedure, 18 C.F.R. § 385, the Ohio Commission filed a timely motion to intervene on July 1, 2010, and is a party to this docket.

**BACKGROUND**

On June 25, 2010, Duke filed an application at FERC in the instant proceeding seeking to withdraw its transmission assets from the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO"), and fully integrate with PJM Interconnection,

L.L.C. (“PJM”) effective January 1, 2012. Duke asserts it only has to satisfy a three-pronged test to obtain Commission approval of its PJM integration plan: (1) the withdrawal must satisfy the terms of the applicant's contractual obligations as they relate to RTO withdrawal; (2) the replacement arrangement must comply with Orders No. 888, 890 and the standard of review under those orders for proposed tariff provisions that differ from the pro forma Open Access Transmission Tariff (OATT); and (3) the replacement arrangement must be just, reasonable and not unduly discriminatory.

## **DISCUSSION**

### **1. The application does not satisfy FERC’s criteria for approval.**

The Ohio Commission maintains that Duke’s application falls short of establishing that it meets FERC’s three-prong test for approval in that it is sufficiently vague and lacks detail to allow for FERC’s approval. That is, the Ohio Commission questions how FERC can determine the application to be just, reasonable, and not unduly discriminatory when a company makes no attempt to quantify the additional costs and associated recovery involved with its proposed move to PJM. That is, the Company’s application makes no attempt to identify its obligation to the Midwest ISO for its Transmission Expansion Plan (MTEP), nor does the company attempt to quantify its ensuing obligation to PJM for Regional Transmission Expansion Plan (RTEP) payments. Duke also does not quantify its exit fee obligations to the Midwest ISO. As a result of these omissions, the Ohio

Commission believes that FERC's approval of this application in its current state would be premature.

The Ohio Commission also finds important that the Company's application is reticent concerning the recovery of additional costs associated with its proposed transfer to PJM. The Company's application states that there is no need for parties to introduce, in response to its filing, questions regarding potential preemption of states' rates with respect to exit fee costs and transmission costs, because it is not proposing in its filing any rate for exit fees or transmission. Rather, the company remarks that it is "expressly deferring such rate issues."<sup>1</sup> Therefore, according to Duke, no state commission can make an issue out of this omission until a filing seeking cost recovery is made with FERC. The Ohio Commission maintains that the issue of cost recovery is pertinent because of its potential significant negative impact on retail load. This issue must be addressed up front by FERC prior to making a determination that the application is just and reasonable.

Furthermore, as a result of the application's lack of specificity and detail regarding costs and cost recovery, the Ohio Commission questions whether the Company has performed its due diligence regarding its proposed change of RTOs. If the answer is "no," the Ohio Commission questions how Duke could arrive at a business decision to change

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<sup>1</sup> *In re Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.*, Docket No. ER10-1562-000 (Application at 4) (June 25, 2010).

RTO's with so many monetary matters that are unresolved. Additionally, FERC should require the company to determine and weigh the impact of its proposed move to PJM on all of its business units, most importantly its local distribution company and retail customers. Moreover, the Ohio Commission takes issue with how FERC can determine that Duke's application is "just and reasonable" if the matter of cost quantification and cost recovery are not defined and are deferred?<sup>2</sup> If no due diligence has been performed to identify the additional costs to execute the requested transfer, the Ohio Commission questions how the company (and FERC for that matter) can determine that its decision to change RTO's is in its retail customers' (*i.e.* load's) best interest.

If the appropriate due diligence has taken place, the Ohio Commission questions why has it not been produced by Duke to assist FERC in making its determination that this application is just and reasonable? The Company is asking the Commission to approve this application in a vacuum on the basis of blind faith. In addition, because the application is devoid of basic information regarding the extent of fees and costs involved with this proposed transfer, the application violates the reasonable notice requirement of the Federal Power Act (FPA)<sup>3</sup> and should be considered void due to vagueness.

The Ohio Commission recommends that FERC instruct the Company to revise its application to include estimated additional costs associated with the Midwest ISO's exit

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<sup>2</sup> *In re Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.*, Docket No. ER10-1562-000 (Application at 4) (June 25, 2010).

<sup>3</sup> 16 U.S.C. § 824d (2010).

fees, MTEP, and RTEP. The revised application must also delineate how the Company proposes to recover such addition costs (including RTEP, Midwest ISO exit fees, and PJM integration fees) associated with its requested to move to PJM from the Midwest ISO.

If FERC elects to move forward without requiring the identification of all additional costs and corresponding proposals for cost recovery, then FERC must prevent the Company from charging its retail customers (load) from these additional costs, considering it was the Company's business decision to effectuate this move. As noted in FERC's decision concerning the American Transmission Systems, Inc. (ATSI), "transmission owners that seek to change RTOs should be prepared to assume the costs attributable to their decisions."<sup>4</sup> The Ohio Commission contends that the issue of cost identification and its corresponding recovery is real, tangible, and immediate and must be addressed by FERC upfront prior to authorizing the requested transfer. Therefore, if the Commission elects to move forward to approve Duke's application in its current form, the only means available to ensure that the "just and reasonable" standard is realized is to hold retail customers harmless from any additional costs and charges associated with the Company's business decision to change RTOs.

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<sup>4</sup>

129 FERC ¶ 61,249, *In re First Energy Company*, Docket No. ER09-1589, *et al.* (Order Addressing RTO Realignment Request and Complaint at ¶ 113) (December 17, 2009).

## 2. Federal and State Jurisdiction

The PUCO calls to FERC's attention that FERC does not possess sole authority over all aspects of the Company's business decision to change RTOs. The PUCO must determine whether the proposal is reasonable and consistent with the requirements of Ohio law. Consistent with *Duquesne*, 126 FERC ¶61,074, the PUCO does not anticipate that FERC will address the prudence of the Applicant's decision to change from Midwest ISO to PJM, and asks that this Commission specifically note that it does not make such a finding. Further, the PUCO requests that the Commission clarify that any decision to grant Duke's application is not a determination that costs resulting from the decisions at issue are recoverable from retail ratepayers.<sup>5</sup>

In addition to being a utility for the Commission's purposes, Duke Ohio is also a public utility subject to the regulation of the Public Utilities Commission of Ohio. Public utility status under Ohio law brings with it a wide array of legal obligations, including a requirement to obtain PUCO approval before entering into certain contracts, a requirement to transfer control of transmission facilities to a state-approved transmission entity and many others. Duke's application to FERC raises questions which must be addressed by the Ohio Commission. It is clear that the PUCO has authority over the Company. As the load serving entity (LSE) is the applicant in this case, the PUCO is concerned that

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<sup>5</sup>

*Pike County Light and Power Co. v. Pennsylvania Public Utility Commission*, 77 Pa. Cmwlth, 268, 465 A. 2d 735 (1983); *Palisades Generating Co.*, 48 F.E.R.C. ¶61,144 (1989); *Pacific Gas & Electric Co. v. Lynch*, F. Supp. 2d 1016 (N. Dist. CA 2002).



FERC may take an action that might compromise the PUCO's ability to regulate LSE retail rates.

### **3. Disparate Treatment of State Jurisdictions**

Duke's application reveals that it has committed to the Kentucky Public Service Commission "that it will not seek to pass through to Kentucky retail customers Midwest ISO exit fees or any overlapping charges of MTEP and RTEP costs."<sup>6</sup> In regards to Ohio, Duke's application reveals that FirstEnergy has offered a settlement that is similar to Duke's position in Kentucky.<sup>7</sup> The Ohio Commission calls into question whether the company's actions in this regard result in disparate (and potentially discriminatory) treatment between the involved state jurisdictions because the Company has made no such offer in Ohio. When referring to the State of Ohio, the Company simply mentions that a similar proposal is pending, which involves another company operating in the State of Ohio,<sup>8</sup> and that it plans to meet with the Ohio Commission at some date in the future. Therefore, the Ohio Commission believes that the Company's application falls short of

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<sup>6</sup> *In re Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.*, Docket No. ER10-1562-000 (Application at 4) (June 25, 2010).

<sup>7</sup> *Id.*

<sup>8</sup> The Ohio Commission informs FERC that, while a stipulation is pending concerning FirstEnergy Corporation's Electric Security Plan (PUCO Case No. 10-388-EL-SSO) which addresses, among other things, RTO transfer fees from the Midwest ISO to PJM, as of the date of this filing the PUCO has not moved forward to approve that filing.

making any tangible offer to hold Ohio's retail customers harmless from any additional charges associated with the Company's proposed move.

#### **4. Capacity Auction**

Duke requests authority to join PJM effective January 1, 2012, midway through PJM's 2011-2012 Delivery Year. As a result of the "unique" three-year nature of PJM's capacity auction, Duke's application seeks authorization for all load and generation in the Ohio and Kentucky footprints to participate in the May 2011 Base Residual Auction for the 2014-15 Deliverability Year. The Company also proposes an out-of-time Fixed Resource Requirement (FRR) Integration Plan for capacity arrangements during the period from January 1, 2012 through May 31, 2014.

In the State of Ohio, Duke is a vertically integrated company. Consequently, similar to the Ohio Commission's treatment of DP&L, to avoid double recovery of generation assets from both the state and federal jurisdictions, the PUCO informs FERC that it is up to the state to arrive at how these capacity revenues are accounted for in retail rates. For example, the PUCO notes that DP&L bids all of its generation in the RPM auction. During a delivery year, DP&L generation collects Reliability Pricing Model (RPM) auction revenues from PJM, while DP&L load is billed a locational reliability charge by PJM. DP&L then nets all revenues and charges and passes through only the difference to retail customers in the form of credits or charges. A positive difference would result in a

credit to retail customers while a negative difference results in a charge to retail customers via a PUCO-imposed rider.

## 5. RTO Shopping

In its protest to FERC regarding ATSI's proposed integration with PJM from the Midwest ISO, the Ohio Commission brought to the forefront the issue of RTO shopping.<sup>9</sup> In the absence of a limit on how frequently a transmission provider can change RTOs and a requirement that sufficient notice be provided to permit market participants to adjust their investment plans and long-term contracts. Therefore, FERC must address the potential long-term consequences that come with frequent changing of RTOs and how those changes affect the planning process and reliability.

FERC must consider the effect that a transmission provider's migration to a different RTO will have on load serving entities ("LSE") not affiliated with Duke (*e.g.*, companies serving load located in various municipalities throughout Ohio, such as AMP-Ohio). These companies plan the construction of generation facilities based on their RTO membership and the deliverability of generation to their load. For these companies, it is uncertain what the proposed change in RTO membership will have on the deliverability of generation to load. The ambiguity associated with the timing of when transmission providers will choose to change RTOs creates further uncertainty. Uncertainty translates

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<sup>9</sup>

*In re First Energy Company*, Docket No. ER09-1589, *et al.* (Comments of the Public Utilities Commission of Ohio) (September 25, 2009).

into increased risk and increased risk translates into higher costs of capital, which is a significant determinant in the construction of generation facilities. Generation construction has a direct bearing on reliability, and is a significant aspect of this application.

FERC must also take into account the deleterious effect that RTO shopping will have on retail customers. Energy users would also need to consider the uncertainty created by frequent and unpredictable moves when making investments needed to create jobs and help the growth of the economy. It is not in the customers' best interests to allow casual RTO migration based on a determination that a different RTO may be more advantageous and/or more lucrative than another. The Ohio Commission maintains that Duke's application in this proceeding personifies and confirms these concerns. Therefore, FERC must act soon to develop rules that prevent RTO's from entering into bidding wars to attract and maintain customers. These types of bidding wars will only result in higher rates to customers with no corresponding benefit. This cannot be the type of competition envisioned by FERC when it issue Order 2000<sup>10</sup> instituting RTOs. That is, competition for RTO membership that perversely results only in higher rates to load with no commensurate benefits.

FERC must take immediate measures to enhance stability and predictability to mitigate RTO shopping. In the long term, FERC should initiate a comprehensive rule-

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<sup>10</sup> 89 FERC ¶ 61,285, Docket No. RM99-2-000 Regional Transmission Organizations, issued December 20, 1999.

making to develop standards for RTO migration and establish rules limiting companies' ability to change RTOs.

## CONCLUSION

As a result of the ambiguity of Duke's application, FERC cannot determine that Dukes proposal to change RTO meets the 'just and reasonable' standard of review. However, if FERC elects to move forward with the approval of Duke's application, FERC must ensure that retail customers are held harmless from any additional fees and costs associated with the company's "business decision" to change RTOs. Finally, to further protect retail load, FERC must adopt measures to ensure that RTOs do not enter into bidding wars to retain or attract new customers.

Respectfully submitted,

/s/ Thomas W. McNamee

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**PROOF OF SERVICE**

I hereby certify that the foregoing have been served in accordance with 18 C.F.R. Sec. 385.2010 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Thomas W. McNamee

Thomas W. McNamee

Dated at Columbus, Ohio this 26<sup>th</sup> day of July 2010.

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Summary: Comments submitted to the FERC to be filed in Docket No. ER10-1562-000 on behalf of the Public Utilities Commission of Ohio on July 26, 2010 by Thomas McNamee. electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio