

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke)
Energy Ohio, Inc. for Approval of a)
Market Rate Offer to Conduct a)
Competitive Bidding Process for Standard) Case No. 10-2586-EL-SSO
Service Offer Electric Generation Supply,)
Accounting Modifications, and Tariffs for)
Generation Service)

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**INITIAL POST-HEARING BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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January 27, 2011

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INTRODUCTION

On November 15, 2010, Duke Energy Ohio, Inc. (Duke) filed an application seeking approval of a market rate offer (MRO) to conduct a competitive bidding process (CBP) for a standard service offer (SSO) electric generation supply and related relief pursuant to R.C. 4928.141 and 4928.142. Duke is currently operating under an ESP that expires on December 31, 2011. As a result, Duke is proposing to have its MRO begin on January 1, 2012.¹

Because Duke owned generating facilities as of July 31, 2008, its first application for an MRO must propose a five-year transition plan from its current ESP structure to a full market rate offer pursuant to R.C. 4928.142(D). Although the law provides an exception to this provision, beginning in year two of a five-year MRO plan already

¹ Duke Ex. 3 at 12.

approved by the Commission, the plan may only be altered prospectively by the Commission if it decides that the standard in R.C. 4928.142(E) is satisfied.

But this exception has no application to Duke, at this time, because Duke is not currently in, at least, the second year of a five-year blend of an MRO. In fact, Duke is not in any Commission approved MRO, at this moment, where the Commission could alter the blending duration based on a showing of an abrupt or significant change in price.

Duke's first MRO application and CBP plan bypasses the requirements of R.C. 4928.142(D) and (E) by proposing that the five-year blending requirement in R.C. 4928.142(D) be altered now (emphasis added) by the Commission, as opposed to the future if circumstances require a different blending period to mitigate an abrupt or significant change in the Company's SSO price. Duke's plan calls for the Commission to decide now to discontinue the blending at the beginning of year three. Duke's MRO plan is contrary to the statutory scheme of R.C. 4928.142(D) and (E) because it prematurely calls for a pre-determined three-year transition to market when a five-year blending plan and transition to market is first required.

The centerpiece of Duke's proposed MRO plan is its three-year transition to market. Duke structured all the other parts of its plan around this requirement. Some of those other parts are requirements under the MRO statute, which also have deficiencies. The problem for Duke is that its proposed blending to market duration is the big picture of its MRO application. This is the core of Duke's plan and it is deficient because it does not provide for blending over five years as required by R.C. 4928.142(D). Fixing this aspect of the plan would require a new application, because the remaining parts of the

plan cannot be reconfigured to a planned five-year blending period, which is statutorily required.

Accordingly, the Commission should deny Duke's MRO application for being deficient in its entirety.

ARGUMENT

I. Duke's MRO Blending Period is Contrary to Law.

In its application, Duke states that the percentages to be bid through an auction and CBP, as provided in R.C. 4928.142(D), are not absolute.² Duke states that the Commission has "limited discretion in determining some of the actual percentages and, thus, the period over which the complete transition to market will occur."³ According to Duke, the legislature contemplated a circumstance under which the Commission could accelerate altering the blending period, but not affect any period before the third year of the MRO, more quickly to realize a fully competitive market.⁴ Accordingly, Duke requests that the blending period under its MRO expire at the end of year two because it expects Duke's unadjusted electric security plan (ESP) price and the retail market price to converge in year three or 2014.⁵

² Duke Ex. 3 at 10.

³ *Id.* at 10.

⁴ *Id.* at 11.

⁵ *Id.*

Contrary to Duke's misreading and misunderstanding of the law, the Commission does not have the discretion, pursuant to R.C. 4928.142(E), to revise the blending percentages of the Company's MRO *now* (emphasis added), such that 10% of the SSO load is auctioned in year one, 20% in year two, and 100% is auctioned beginning in year three and every year thereafter. Duke's confusion regarding R.C. 4928.142(E) is made clear by its assertion that its three-year plan will not result in abrupt or significant rate changes for customers because Duke is willing to forgo any adjustments to its most recent SSO price during this period.⁶ This standard is meant to mitigate any effect of an abrupt or significant change in Duke's SSO price as a result of unforeseen economic circumstances impacting market prices. In contrast, Duke applies this standard to mitigate against significant changes in customer rates, based on Duke volunteering to waive the recovery of potential costs associated with R.C. 4928.142(D)(1-4).

Moreover, Duke's confusion of R.C. 4928.142(E) is further demonstrated from the cross examination of its President, Julia S. Janson, who offered testimony to outline Duke's MRO request. Ms. Janson testified that the Commission can alter the blending duration in R.C. 4928.142(D) right out of the gate from the date of the Commission's first order approving Duke's maiden MRO plan.⁷ And Ms. Janson testified that Duke is requesting the Commission to alter the five-years today.⁸

⁶ Duke Ex. 3 at 12.

⁷ Tr. Vol. I at 76.

⁸ *Id.* at 78.

After a long exchange and change of opinion on whether the Commission can alter the blending duration and proportions annually in the future beginning in year two of a utility's MRO going forward, under R.C. 4928.142(E), Ms. Janson finally agreed that the Commission does have that discretion.⁹ Ms. Janson agreed that the Commission can alter once annually, including in year three, as opposed to now, the duration and proportions in the MRO blending period.¹⁰ And by this admission of Duke's President, Ms. Janson, Duke has conceded that the legislature intended for the Commission to have limited discretion to alter the duration and proportions, beginning in year two and continuing in to year three, and further, of a blended price already approved under R.C. 4928.142(D), not more than once annually in the future, under R.C. 4928.142(E).

R.C. 4928.142(D) reads, in significant part, that:

The first application . . . shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten percent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five.

But the legislature also gave the Commission the authority to alter the duration and proportions in *future* years if things significantly changed a few years down the road.

R.C. 4928.142(E) provides such authority:

⁹ Tr. Vol. I at 79-84.

¹⁰ *Id.*

Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the Commission shall not . . . cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer.

Duke is expected to argue that the words "notwithstanding any other requirement of this section" negate the words that precede it in the first sentence of R.C. 4928.142(E). In other words, Duke will likely argue that the introductory phrase in division (E), "[b]eginning in the second year of a blended price under division (D) of this section", has no meaning because of the words "and notwithstanding any other requirement of this section," that immediately follows in the same sentence.

But why would the legislature carve out two exceptions to division (D) in R.C. 4928.142(E)? But to defend its proposal Duke must argue otherwise. Duke must argue that the first exception allows the Commission to alter in the future the duration and percentages beginning in year two of a blended price already approved under division (D) of that section. Duke will then likely argue that the first exception is connected to a second or broader exception in division (E) that wipes out the "[b]eginning in the second year" exception. Duke identifies the broader exception as the "notwithstanding any other requirement of this section" language in division (E), which it must argue gives

the Commission discretion now to alter the duration and blended percentages required in a utility's first MRO application under R.C. 4928.142(D).

But Duke cannot explain, if we accept its interpretation, how division (E) relates to division (D) in the present tense, meaning an MRO plan that has not yet been approved for a utility company. It cannot, because division (E) only relates to division (D) in the past tense, meaning an MRO that has already been approved, which the company is operating under for at least a year.

Duke's expected argument fails the plain meaning test and the test of reasonableness. Duke is also selective as to what the "notwithstanding" language would trump. For instance, Duke is expected to argue that the "notwithstanding" language of division (E) wipes out the five-year duration and proportion requirements of years three through five in division (D), but then Duke is expected to argue that the Commission cannot change the duration and proportion requirements of years one and two. Duke's argument is neither reasonable nor logical. If "notwithstanding" is so sweeping and trumps everything else in R.C. 4928.142, which Duke must argue that it does, then the Commission could grant Duke a 100% market price in year one. Clearly, the legislature did not intend such an absurd result.

II. Because Duke's Blending Period is Deficient its Other Contingent Parts are Likewise Deficient.

Duke requests its transition to market should be permitted to occur over a three-year period, with 100% of its SSO load subject to, and thus 100% of its load determined

by, a competitively bid auction beginning in the third year of the MRO.¹¹ Duke's CBP plan is deficient, pursuant to O.A.C. 4901:1-35-03(B)(2)(j), because it fails to include a description of the Company's proposed blending of CBP rates for the first five years of its MRO as required by R.C. 4928.142(D).

Duke must also provide financial projections of the "effect of the CBP plan's implementation...upon generation...for the duration of the CBP plan."¹² These financial projections shall also address the blending requirement set forth in R.C. 4928.142(D).¹³ Duke witness Savoy sponsored the pro forma financial projections in respect to the implementation of Duke's proposed CBP plan upon its generation rates for the first three years under the MRO.¹⁴ Duke's application failed to project its statements of income, balance sheets, and sources and uses of funds, for blending years four and five of R.C. 4928.142 (D). Because Duke only provided a three-year CBP plan, this application is deficient.

Duke also expressed its intention of transferring its legacy generation assets, subject to the appropriate approvals, no later than year three of the MRO.¹⁵ Contrary to Duke's contention that continued ownership of its legacy assets is immaterial to the SSO

¹¹ Duke Ex. 3 at 36.

¹² Ohio Admin. Code § 4901:1-35-03(B)(2)(b) (West 2011)

¹³ Duke Ex. 3 at 36.

¹⁴ Duke Ex. 14 at 3-6.

¹⁵ *Id.* at 6.

charges derived from the competitive auction process,¹⁶ blending years four and five of R.C. 4928.142(D) are unaccounted for in Duke's application, testimony, and exhibits.

This is yet another deficiency impacting Duke's pro forma projections, because they are based on the assumptions that Duke's legacy generation assets would be transferred in year three of the MRO, and that all of the load in Duke's service territory would be served via Duke's MRO.¹⁷ For these reasons, Duke's ownership of its legacy assets, at least for the duration of a five-year blending period, is material to SSO charges derived from the competitive auction process for Duke's blending years four and five that it failed to include in its plan. This is yet another deficiency for Duke.

Duke witnesses Wathen and Rose provide the support for Duke's deficient three-year CBP plan.¹⁸ The testimony of these witnesses must be discounted for this reason. Mr. Wathen presented testimony on the blending requirement that fails to satisfy the requirements of R.C. 4928.142(D).¹⁹ Mr. Rose testified that Duke's current ESP price and market price are expected to converge in year three of Duke's proposed MRO, so longer blending would have no different effect.²⁰ Mr. Rose apparently relied on Duke's misunderstanding of R.C. 4928.142(D) and (E).

¹⁶ Duke Ex. 14 at 6.

¹⁷ *Id.* at 8-9.

¹⁸ Duke Ex. 3 at 6-7; Duke Ex. 14 at 6.

¹⁹ Duke Ex. 16 at 7-14.

²⁰ Duke Ex. 4 at 17-18.

Mr. Rose testified that market prices will continue to rise and converge with Duke's ESP price in year 2014, but he did not forecast market prices in years 2015 and 2016 (blending years four and five that Duke dropped from its plan) to show if projected market prices would continue to rise above Duke's current ESP price.²¹ The fact that Mr. Rose did not forecast wholesale and retail forward looking prices beyond year three of Duke's MRO is consistent with his misunderstanding that the Commission can alter the five-year blending period now and allow Duke to transition to a 100% market price beginning in year three of its MRO.²² Mr. Rose further testified that once an auction market share is reached, it cannot be decreased.²³ The problem is the Commission has no discretion to alter R.C. 4928.142(D) now and approve Duke's proposed plan to reach an auction market share in year three. Duke's request for a three-year blending period is premature.

Mr. Rose testified that in year three (2014) of Duke's MRO the transition ends and the SSO offer price reflects auction market conditions regardless of market conditions relative to the existing ESP prices.²⁴ Mr. Rose's understanding of the law in his testimony is inconsistent with the statutory scheme of R.C. 4928.142(D) and (E). Staff witness Ray Strom testified that, from his perspective, a determination to alter the proportions is supposed to be made based on actual circumstances that exist at some future

²¹ Duke Ex. 4 at 6, 9, 17-18.

²² *Id.* at 16.

²³ *Id.*

²⁴ *Id.* at 17.

time.²⁵ Current forecasts may show an expectation for future market and ESP pricing relationships, but no matter how well constructed, forecasts are still subject to error.²⁶ In Mr. Strom's view, using a forecast to make a current determination now to alter the percentages several years in the future, regardless of what actual circumstances may arise in the future, would not be in compliance with R.C. 4928.142(D) and (E).²⁷ For these reasons, Duke's forecast is, likewise, deficient.

All of these components are deficiencies for Duke that cannot be remedied without a major overhaul of its Application to comply with the MRO statute and applicable Commission rules. Duke's rush to market prices is not supported by the governing law.

The motivation for Duke's rush to market prices, albeit unlawfully, and to transfer its legacy assets, all by year three of its proposed MRO, is provided by the testimony of Duke witness Whitlock. He testified that Duke is unable to realize the value of its legacy generation assets in the market under its existing ESP going forward for two reasons. First, because Duke's assets are "dedicated" to customers, the utility is not completely free to try to obtain value for the assets beyond the current ESP period.²⁸ Second, as long as Duke owns generation, it is subject to the application of the Significantly Excessive Earnings Test.²⁹

²⁵ Staff Ex. 2 at 3.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Duke Ex. 11 at 15.

²⁹ Duke Ex. 11 at 15, 17.

Duke claims it is burdened with the costs of having these assets available to switching customers who return and, because of this standby service, is compelled to forgo other market opportunities that may be more lucrative.³⁰ But these reasons do not give Duke the right to earn more than a fair rate of return on its assets, which Duke failed to show that it was below this standard, and to butcher the interpretation of the law to fit its ends.

For the foregoing reasons, Duke's application is substantially deficient as a whole and should be denied.

III. Ongoing Commission Oversight of the Competitive Bidding Process.

If an MRO is approved, the Commission has ongoing oversight of Duke's CBP.

R.C. 4928.142(C) states:

Upon the completion of the competitive bidding process authorized by divisions (A) and (B) of this section, including for the purpose of division (D) of this section, the commission shall select the least-cost bid winner or winners of that process, and such selected bid or bids, as prescribed as retail rates by the commission, shall be the electric distribution utility's standard service offer unless the commission, by order issued before the third calendar day following the conclusion of the competitive bidding process for the market rate offer, determines that one or more of the following criteria were not met:

- (1) Each portion of the bidding process was oversubscribed, such that the amount of supply bid upon was greater than the amount of the load bid out.
- (2) There were four or more bidders.

³⁰

Id.

(3) At least twenty-five per cent of the load is bid upon by one or more persons other than the electric distribution utility. All costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process, shall be timely recovered through the standard service offer price, and, for that purpose, the commission shall approve a reconciliation mechanism, other recovery mechanism, or a combination of such mechanisms for the utility.

Furthermore, O.A.C. 4901:1-35-11 provides for Duke's MRO and CBP to be subject to ongoing Commission review including quarterly and annual reporting requirements.

Staff has concerns with Duke's position regarding the Commission's ongoing review of the CBP. It is unclear from the Application whether Duke intends for its CBP to be subject to ongoing Commission regulatory oversight. The MRO Application is scant in its discussion of continued Commission oversight. Attachment E of the Application (Communications Protocols for Duke Energy Ohio's Competitive Bid Process Auctions) discusses only limited communications between the auction manager, the Commission, the Commission consultant, and Duke. And the last sentence on page 1 of Attachment C (Bidding Rules), after a listing of potential reasons for making modifications to the Bidding rules, states:

Such modifications will be carried out in consultation with Duke Energy Ohio but without prior consent from the Public Utilities Commission of Ohio ("PUCO") or any past, current, or potential bidder and will be posted to the Information Website.³¹

This statement implies that the Company does not believe that it would be subject to the requirements of O.A.C. 4901:1-35-11. The language quoted above in Duke's Application concerns the Staff.

The record in the case may provide more clarity as to Duke's understanding of Commission CBP oversight. Duke Witness Lee in his direct testimony states:

[w]hile a proposed CBP contains necessary elements that result in a competitive process and meets applicable statutory and regulatory requirements, changes *may* (emphasis added) be considered as such changes further promote successful CBP solicitations in accordance with such regulatory requirements.³²

Duke Witness Lee further testifies on cross examination that the Commission does have oversight of the CBP:

Q. Would it be your testimony, your understanding that the Commission had ongoing oversight of the process itself after the blending period?

A. I believe the Commission does have oversight over the process, yes.³³

From the above testimony of its witnesses, it appears Duke witness Lee agrees that, if an MRO is approved, the Commission has some amount of ongoing oversight of Duke's

³¹ Staff Ex. 2 at 5.

³² Duke Ex. 7 at 20-21.

³³ Tr. Vol. I at 190.

CBP. But, because Duke's Application and testimony are unclear, Staff remains concerned with Duke's understanding of the Commission's ongoing review of the CBP. The Commission should not approve Duke's MRO application without requiring compliance with the Commission rules regarding ongoing oversight of Duke's CBP.

Staff is also concerned that, if the MRO is approved, the selection and function of the auction manager is non-competitive. Duke has proposed, in its Application, to use Charles River Associates (CRA) solely as its auction manager. In Duke's proposed MRO construct, it is possible that a single auction manager, CRA in this case, could have control over the CBP forever. Staff Witness Strom pointed this out on the record:

- Q. So I'm just trying to understand, is it the fact that this auction process is structured within an MRO that causes you some concern?
- A. No, it doesn't cause any concern as far as the auction itself. There are aspects to it that may be different under an ESP as opposed to a market rate offer such as the company's proposal is to -- it's to CRA as an auction manager, in an ESP kind of a setting where it's a short-term and you have a single auction manager that would manage the auction for several consecutive auctions, that may not be a concern, but if it's under an MRO where you would give a single auction manager control over this process in perpetuity, that aspect may not be appropriate after an MRO. (Emphasis added). It's subtle distinctions like that that I think may be important differences, but in general the concept of conducting this kind of an auction to solicit generation supply, I don't have any concern about that.

The proposed MRO lacks the option to change or choose a different auction manager.

Unlike a short-term ESP, this is a concern for an MRO. A short-term ESP would provide

the option to choose a different auction manager once the clearly defined ESP time-period expires.

IV. Lack of Dynamic Pricing.

The Staff is concerned with Duke's ability to demonstrate that its MRO Application provides an open, fair, and transparent competitive solicitation. Duke's Application describes concerns the Commission had with FirstEnergy's (FE) MRO Application (Case No. 08-936-EL-SSO) regarding an open, fair, and transparent competitive solicitation.³⁴ One of the Commission's concerns was "the failure of FE to provide time-differentiated and dynamic-retail-pricing options, thereby not giving customers the information they would need to control bills and make appropriate decisions regarding the purchase of power and failing to provide a potential check on the abuse of market power."³⁵ To remedy this Commission concern, Duke stated that its MRO Application does include time-differentiated and dynamic-retail-pricing options.³⁶ On the contrary, Duke's time-differentiated and dynamic-retail-pricing options are illusory.

Participation in Duke's time-differentiated and dynamic-retail-pricing options is very low, almost non-existent.³⁷ Duke Witness Baily estimated that the participation in the time-differentiated and dynamic-retail-pricing programs remains in the two-digits i.e.

³⁴ Duke Ex. 3 at 15-16.

³⁵ *Id.*

³⁶ *Id.* at 6.

³⁷ Tr. Vol. III at 579.

less than 100 customers.³⁸ A program with little or no participation does not address the Commission's overall concern to provide customers the information they would need to control bills and make appropriate decisions regarding the purchase of power. As a result, there is still concern regarding Duke's ability to demonstrate that its MRO Application provides an open, fair, and transparent competitive solicitation.

V. Proposed Riders.

A. Rider RECON

The bypassability of proposed Rider RECON remains an issue. If an MRO is approved by the Commission, Rider RECON should be fully bypassable until collected from customers, rather than non-bypassable as requested in Duke's MRO application.³⁹ Proposed Rider RECON essentially combines Riders PTC-FPP and SRA-SRT from Duke's current ESP, which are both generation-related riders.⁴⁰ Duke's generation-related costs should not be attributed to customers not taking generation service from Duke.⁴¹

In the current ESP, Rider PTC-FPP is completely bypassable and Rider SRA-SRT is conditionally bypassable.⁴² The rates in Rider PTC-FPP are several magnitudes higher

³⁸ Tr. Vol. III at 579.

³⁹ Staff Ex. 1 at 4.

⁴⁰ FES Ex. 3at 3.

⁴¹ *Id.*

⁴² Wal-Mart Ex. 1 at 9.

than those in Rider SRA-SRT.⁴³ Also, Staff believes that any under- or over-recovery balances should be attributed to Rider PTC-FPP as it tends to fluctuate more than Rider SRA-SRT from quarter to quarter.⁴⁴ As a result, proposed Rider RECON should be fully bypassable to mirror Rider PTC-FPP's bypassability in the current ESP.

If the MRO is approved, Duke should be permitted to create proposed Rider RECON and initially set the Rider at \$0 starting January 1, 2012.⁴⁵ However, proposed Rider RECON should be subject to Staff review and Commission approval regarding the reasonableness of the costs for inclusion in proposed Rider RECON.⁴⁶ Duke committed to make an application no later than April 1, 2012 to delineate any under- or over-balance.⁴⁷ The proposed April 1, 2012 application will be the vehicle for Staff to review December 31, 2011 balances of Rider PTC-FPP and SRA-SRT and their appropriateness for inclusion into proposed Rider RECON.⁴⁸

B. Rider UE-GEN

R.C. 4928.142(D) sets forth the adjustments Duke can request for recovery under a MRO construct. An uncollectible rider for generation is not one of the adjustments specifically listed or contemplated in 4928.142(D). Therefore, if the Commission were to

⁴³ FES Ex. 3 at 4, footnote 6.

⁴⁴ Staff Ex. 1 at 5.

⁴⁵ *Id.* at 4.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

approve the MRO construct as proposed by Duke, the Commission should not approve proposed Rider UE-GEN in this MRO proceeding.

C. Rider SCR

Staff has some concerns regarding proposed Rider SCR as proposed by Duke in this MRO Application. First, Staff is not in favor of the circuit-breaker concept and Rider SCR should be fully bypassable under the MRO to all shopping customers.⁴⁹ Duke proposes, through the circuit-breaker concept, if the deferral balance for the rider exceeds five percent of the SSO cost, the rider becomes non-bypassable until the deferral balance drops below five percent.⁵⁰ Duke states that the condition is required to “mitigate the potential for having the proverbial last non-switched customer have to pay for all of the cost avoided by customers who have already switched.”⁵¹ Overall, the Staff is concerned that this circuit-breaker concept, in this MRO application, shifts risks from Duke to customers who choose another supplier.

Second, Duke has proposed to include in proposed Rider SCR “any other costs” directly attributable to the MRO auction or any interaction with suppliers related to the

⁴⁹ Staff Ex. 1 at 8.

⁵⁰ Duke Ex. 17 at 10.

⁵¹ Duke Ex. 16 at 19. Staff recognizes the remote situation where the last non-switched customer would have to pay for the all of the costs remaining in Rider SCR. However, Staff would expect that Duke could foresee this type of spiral situation and would be able to assess the risks ahead of time. If this spiral situation occurs or Duke procures 100% of its SSO by auction, Duke could make a separate application to the Commission to address this unlikely scenario, as well as the continued bypassability of Rider SCR.

MRO auction.⁵² Since many of these costs are unknown at this time, Staff does not support undefined costs or any authorization that could amount to a blank check.⁵³ The Commission should direct Duke to consult with Staff regarding the appropriateness of costs that Duke intends to collect from customers in proposed Rider SCR.⁵⁴

Third, Duke should not be authorized to accrue carrying charges on proposed Rider SCR. Duke proposes that Rider SCR be adjusted quarterly with carrying charges.⁵⁵ Staff's expectation is that credits and/or charges flowing through proposed Rider SCR will be relatively small. Therefore, carrying charges are not warranted in proposed Rider SCR. The Commission should deny carrying charges in proposed Rider SCR.

Fourth, since it is likely that minimal credits and/or charges will flow through proposed Rider SCR, Staff believes an annual prudence review of the costs is not necessary.⁵⁶ However, Staff should be able to review proposed Rider SCR costs (as the rates adjust quarterly) and open a proceeding if warranted.⁵⁷

If it approves Duke's MRO construct, the Commission should approve proposed Rider SCR with the above-mentioned modifications.

⁵² Duke Ex. 16 at 19.

⁵³ Staff Ex. 1 at 9.

⁵⁴ *Id.*

⁵⁵ Duke Ex. 16 at 19.

⁵⁶ Staff Ex. 1 at 9.

⁵⁷ *Id.* at 9-10.

D. Riders FPP and EIR

Proposed Rider FPP should not be continued during any blending period and the placeholder for proposed Rider EIR should not be created at this time. From Duke's Application, the earliest these riders would be used is June 1, 2014.⁵⁸ Because these riders are not effective until a future date, Duke should make a separate application to the Commission, if necessary, to continue proposed Rider FPP and create proposed Rider EIR based on any final order from this Commission regarding the MRO blending period. However, if the Commission approves the continuation of proposed Rider FPP and the newly created bypassable proposed Rider EIR, either Staff or an outside auditor needs the ability to audit all costs to ensure those costs are warranted and prudent.

In Duke's MRO Application, proposed Rider FPP and proposed Rider EIR are proposed as a quarterly filing, with true-ups.⁵⁹ The Application does not include annual prudence reviews as required by R.C. 4928.142(D)(1), (D)(2), and (D)(3).⁶⁰ S.B. 221 requires that costs shall be prudently incurred in order to obtain recovery.⁶¹ Any riders (including the type of costs and associated dollar amounts) should be subject to review and audit.⁶² If the Commission were to approve the continuation of proposed Rider FPP and the newly created proposed Rider EIR, the prudence of all incurred and recovered

⁵⁸ Duke Ex. 16 at 4-8.

⁵⁹ Staff Ex. 1 at 12.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

costs in those riders through any automatic quarterly adjustments should be reviewed in separate annual proceedings.⁶³ The process and timeframes for these separate proceedings should be set by order of the Commission.⁶⁴

E. Rider AERR

Duke proposes Rider AERR to be bypassable and Duke plans to adjust it quarterly with true-up provisions.⁶⁵ R.C. 4928.142(D)(4) provides that costs shall be prudently incurred in order to obtain recovery. Any costs, including the type of costs and the associated dollar amounts, should be subject to Staff review.⁶⁶ Costs incurred through any automatic quarterly adjustment, such as proposed Rider AERR, should be reviewed in separate annual proceedings outside of the automatic recovery provision of Duke's MRO.⁶⁷ The process and timeframes for these separate proceedings should be set by order of the Commission.⁶⁸

F. Rider BTR

Proposed Rider BTR is a base transmission rider that covers Network Integrated Transmission Service (NITS) and other costs billed to Duke under tariffs approved by the

⁶³ Staff Ex. 1 at 12.

⁶⁴ *Id.*

⁶⁵ Duke Ex. 17 at 12.

⁶⁶ Staff Ex. 1 at 13.

⁶⁷ *Id.*

⁶⁸ *Id.*

Federal Energy regulatory Commission (FERC).⁶⁹ The proposed rider will be updated each year consistent with O.A.C. 4901:1-36 and will be non-bypassable.⁷⁰ If an MRO is approved, Staff is amenable to Rider BTR being created on non-bypassable basis to recover the NITS revenue requirements for Duke as calculated pursuant to the FERC-approved tariffs. Staff also recommends that similar to the current Rider TCR, proposed Rider BTR be updated each year consistent with O.A.C. 4901:1-36 and subject to Staff review and audit.

Proposed Rider BTR also includes “all costs billed from either PJM and/or MISO under FERC-approved tariffs.”⁷¹ However, FERC has not yet approved in tariffs any charges relating to MISO exit fees, PJM entrance fees, and RTEP expansion planning costs for Duke. The concern is that proposed Rider BTR would automatically permit Duke to fully recover all MISO exit fees, PJM entrance fees, and RTEP expansion planning costs and other similar type costs without any Commission review of their appropriateness.⁷² Deciding the appropriateness, at this time, of future MISO exit fees, PJM entrance fees, and RTEP expansion planning fees is premature. Those decisions should be the subject of future Commission proceeding and not part of this MRO proceeding.

In its October 21, 2010 Order Addressing RTO Realignment Request (FERC Docket Nos. ER10-1562 and ER10-2254), FERC approved the withdrawal of Duke from

⁶⁹ Duke Ex. 17 at 11.

⁷⁰ *Id.* at 20-22

⁷¹ Duke Ex. 16 at 23.

⁷² OEG Ex. 1 at 20.

MISO and its realignment into PJM, including Duke's proposed Fixed Resource Requirement Integration Plan (FRR Integration Plan).⁷³ However, FERC specifically did not address the recovery of any MISO exit fees or MTEP costs that may be imposed by MISO on Duke. FERC declined to make "a general statement regarding a withdrawing transmission-owning utility's transmission planning and cost obligation to its former RTO and new RTO," and whether Ohio retail customers should be charged the costs associated with any exit fees or MTEP costs imposed by MISO on Duke.⁷⁴ Duke should not prematurely receive explicit approval (recoverability) of these non-qualified expenses in this MRO proceeding. Once Duke obtains specific approval from FERC on the costs associated with any exit fees or MTEP costs imposed by MISO on Duke, Duke should, at that time, seek Commission approval for a mechanism in which to recover those costs.

In comparison, FE's MISO exit fees, PJM entrance fees, and RTEP expansion planning costs and other similar type costs are the subject of open proceedings at FERC and the Commission and are still being litigated. Since these same costs have not yet been approved by FERC for Duke, they should not be part of this MRO proceeding. S.B. 221 does not require the Commission to determine transmission cost recovery mechanisms within an MRO case. The MRO has an accelerated statutory time frame for a Commission decision. The issues surrounding proposed Rider BTR's transmission cost

⁷³ OEG Ex. 1 at 22.

⁷⁴ *Id.* at 22 citing FERC Order of October 21, 2010 at paragraphs 73, 74, and 75.

recovery are complex and require a full evaluation by the Commission in a separate future proceeding.

G. Rider RTO

Proposed Rider RTO includes only those costs charged to or imposed upon Duke by FERC-approved tariffs.⁷⁵ Costs recoverable under proposed Rider RTO include ancillary services but exclude any NITS charges to be recovered in proposed Rider BTR.⁷⁶ Eligible ancillary services are day-ahead scheduling reserves, regulation, synchronized reserves, black start service, reactive service, and balancing and operating reserve charges.⁷⁷ These charges are the same types of charges currently being recovered under Rider TCR. Similar to the current Rider TCR, if the MRO is approved by the Commission, proposed Rider RTO should be updated each year consistent with O.A.C. 4901:1-36 and subject to Staff review and audit.⁷⁸

H. Riders GEN and MRO

Both proposed riders are largely a function of an auction that will occur at some interval during the course of the MRO.⁷⁹ If the Commission approves Duke's MRO,

⁷⁵ Staff Ex. 1 at 16.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 17.

Staff should be able review those rider rates prior to the rates going into effect.⁸⁰ Duke should be required to submit to Staff, at least twenty business days before adjusting and/or docketing the tariffs of proposed Riders GEN and MRO, its calculations and assumptions on how wholesale auction rates were translated into retail rates.⁸¹

VI. Load Caps

Staff has suggested that the Commission should consider requiring the use of a load cap for the proposed auction. A load cap is simply a limit on the number of tranches that could be won by a single bidder in the auction.⁸² Duke's proposal would prohibit the use of a load cap, and allow any supplier to win up to 100% of the competitively bid load.⁸³ A load cap is recommended by Staff as a means to encourage participation of bidders and assure diversity of supply in the auction.⁸⁴

Staff is not, at this time, recommending a specific percentage to be used for the load cap. Indeed, Staff believes that the percentage should be subject to change, depending on the circumstances of the CBP at any given time. Determination of the level of the load cap, along with all aspects of the CBP plan, should be subject to the ongoing review of the CBP plan by the Commission.

⁸⁰ Staff Ex. 1 at 17.

⁸¹ *Id.*

⁸² Staff Ex. 2 at 4.

⁸³ Duke Ex. 7 at 24.

⁸⁴ Staff Ex. 2 at 4.

CONCLUSION

Duke's proposed MRO Application and CBP plan shortcut R.C. 4928.142(D) and (E) by proposing that the five-year blending requirement in division (D) be altered now by the Commission. Duke's plan calls for a 100% blending to occur at the beginning of year three instead of year six. Duke's MRO plan is contrary to the statutory scheme of R.C. 4928.142(D) and (E) because it prematurely calls for a three-year transition to market when a plan for a five-year blending period and transition to market is first required.

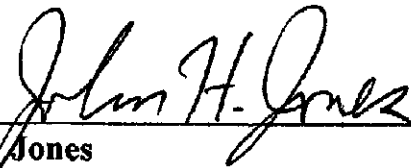
Duke's MRO application also contains many other deficiencies, including: lack of a clear provision for ongoing Commission oversight of the CBP, lack of dynamic pricing, and proposed rider deficiencies. But most importantly, the centerpiece of Duke's plan, its three-year transition to market blending proposal, is statutorily deficient. Because Duke structured its entire MRO plan around this three-year transition many other contingent parts to it are likewise deficient. Fixing the plan would require a substantial overhaul or new Application, since the remaining parts of the plan cannot be reconfigured to the statutorily required five-year blending period.

Accordingly, the Commission should deny Duke's MRO application and plan for being deficient in its entirety.

Respectfully submitted,

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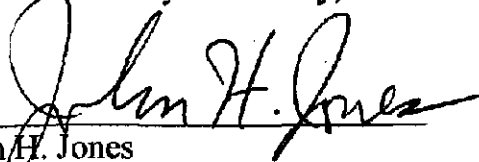
A handwritten signature in black ink, reading "John H. Jones", is written over a horizontal line.

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PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Initial Post-Hearing Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by electronic mail, upon the following parties of record, this 27th day of January, 2011.


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