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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

POST-HEARING BRIEF OF FIRSTENERGY SOLUTIONS CORP.

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I. INTRODUCTION

Subject to certain important modifications set forth below, FirstEnergy Solutions Corp. ("Solutions") supports the market rate offer ("MRO") proposed by Duke Energy Ohio ("Duke"). Duke's proposal to procure 100% of its standard service offer ("SSO") load through the MRO auction is consistent with R.C. 4928.142, is well within the Commission's statutory authority and is merited by current market conditions. Given the undisputed likelihood that market prices will be well below Duke's current generation rate, the Commission can—and should—improve upon Duke's MRO proposal by requiring Duke to procure all of its SSO non-shopping load in the ***second*** year of the MRO. *See* pp. 5-14, *infra.* Specifically, Duke should be required to procure 10% of its SSO non-shopping load in year one of the MRO and 100% of that load in year two. *See* Tr. Vol. V, pp. 1064:19-22 (Staff witness Strom agreeing that Commission "can alter the blending proportions in the second year of the MRO"); 1073:2-4.

There are compelling reasons why the Commission should alter Duke's proposal to require it to move fully to market in the second year of the MRO. First, doing so will allow non-shopping customers to access lower generation prices sooner than under the current ESP. In October 2010, the FirstEnergy Ohio operating companies conducted an SSO auction that resulted in a price of $54.55 per megawatt hour ("MWh") for the June 1, 2011 through May 31, 2012 delivery period. *See In re Procurement of Standard Serv. Offer Generation for Customers of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, No. 10-1284-EL-UNC, Finding and Order dated Oct. 22, 2010, ¶ 6. At hearing, several witnesses agreed that this price is a good proxy for the price Duke could obtain during the initial MRO auctions. *See* p. 7, *infra.* And this price is significantly lower than Duke's projected ESP price between 2012 and 2014, which is 7.34¢ / kilowatt hour ("kWh"). Rose Dir., p. 13:10-11 (Duke

Ex. 4).[1] By requiring Duke to transition fully to market in year two as opposed to year three, the Commission will ensure that Duke's non-shopping customers have the benefit of the lower market price.[2] Moreover, the results of the FirstEnergy Ohio auctions demonstrated the benefits of competitive wholesale procurement as the resulting retail rates were set through robust, competitive market forces and resulted in generation rate decreases for a large number of customers.[3]

Further, Duke's proposed MRO will facilitate retail competition in its service territory. By setting retail rates based on a competitive bidding process, the retail market in the FirstEnergy Ohio operating companies' service territory further developed, providing customers with more opportunities to choose, while nevertheless retaining competitively-priced SSO supply as an alternative option. *See* "Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales for Month Ending Sept. 30, 2010" (reflecting, as percentage of total sales, shopping percentages of 67.98% for Toledo Edison, 65.69% for CEI, and 59.32% for Ohio Edison) (available on website of Commission's Division of Planning & Market Analysis);

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[1] The FirstEnergy Ohio operating companies also obtained prices of $54.10/MWh for the June 1, 2011 to May 31, 2013 time period and $56.58/MWh for the June 1, 2011 to May 31, 2012 time period. *See In re Procurement of Standard Serv. Offer Generation for Customers of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, No. 10-1284-EL-UNC, Finding and Order dated Oct. 22, 2010, ¶ 6. Similar prices were obtained in the auction conducted on January 25, 2011, which resulted in prices of $56.13/MWh for the June 1, 2011 through May 31, 2012 time period, $54.92/MWh for the June 1, 2011 through May 31, 2013 time period, and $57.47/MWh for the June 1, 2011 through May 31, 2014 time period. *See In re Procurement of Standard Service Offer Generation for Customers of Ohio Edison Co., The Cleveland Electric Illuminating Co. and The Toledo Edison Co.*, No. 10-1284-EL-UNC, Finding and Order dated Jan. 27, 2011, ¶ 6.

[2] In the event the Commission does not require Duke to transition fully to market in year two of the MRO, at a minimum the Commission should approve Duke's proposal to make that transition in year three.

[3] The January 2011 auction featured ten registered bidders and seven winning bidders. *See In re Procurement of Standard Service Offer Generation for Customers of Ohio Edison Co., The Cleveland Electric Illuminating Co. and The Toledo Edison Co.*, No. 10-1284-EL-UNC, Finding and Order dated Jan. 27, 2011, ¶ 6. The October 2010 auction featured ten registered bidders and four winning bidders. *See In re Procurement of Standard Serv. Offer Generation for Customers of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, No. 10-1284-EL-UNC, Finding and Order dated Oct. 22, 2010, ¶ 6.

"Summary of Switch Rates from EDUs to CRES Providers in Terms of Customers for the Month Ending September 30, 2010" (reflecting, as percentage of customers, shopping percentages of 68.19% for CEI, 53.88% for Toledo Edison, and 46.17% for Ohio Edison). Duke's proposed MRO thus will benefit both wholesale and retail competition in its service territory.

At hearing, several parties offered purported "expert" testimony from non-lawyers regarding the meaning of R.C. 4928.142. *See* Tr. Vol. I, p. 79:17-19 (Janson Cross) ("We could exercise our debate here on statutory construction for, I'm sure, days."). Some of those witnesses testified to alleged limitations in the statute, arguing for example that R.C. 4928.142 requires the "blending period" of legacy SSO and MRO rates to last a minimum of five years. *See* pp. 10-12, *infra.* But statutory interpretation turns on the language of the statute, not the testimony of unqualified witnesses. And as demonstrated below, the alleged restrictions identified by those witnesses simply do not appear in the statute. The Commission should approve Duke's proposed full transition to market, but do so in the second year of the MRO.

The Commission also should approve certain other modifications to the proposed MRO. First, as set forth below, Rider RECON should be made bypassable. The charges intended to be collected through Rider RECON are related to generation, and customers who do not take generation service from Duke should not be forced to pay generation-related charges. *See* pp. 14-15, *infra.* Moreover, the evidence shows that the riders replaced by Rider RECON either are bypassable or bypassable with a waiver. *See id.* Rider RECON should be bypassable as well.

Second, the Commission should adopt Solutions' recommendation to smooth the volatility of the PTC-FPP component of Duke's proposed Rider GEN. As the evidence shows (and as Duke's own witness acknowledged at hearing), the PTC-FPP charges, which are a large portion of the generation price charged to non-shopping customers, have been quite volatile in recent quarters, varying as much as 1.656 ¢ per kilowatt hour in a single quarter. *See* p. 16, *infra*. Under Duke's proposal, the PTC-FPP charge will be frozen as of December 2011—even if it is at an unusually high or low level—and will remain at that level through May 2014. As shown at hearing, freezing such a volatile charge based on one quarter likely will have negative consequences for competition and Duke's customers. *See id.* Instead, the Commission should order Duke to use the average PTC-FPP charge over the eight quarters preceding December 2011, which will mitigate the extreme highs and lows of the PTC-FPP charge and result in more stable generation prices and a fairer competitive environment.

Third, the Commission should approve Solutions' recommendations related to credit provisions contained in the proposed Master Supply Agreement. Specifically, the Commission should order Duke to provide unsecured credit to suppliers with credit ratings of BB- (S&P and Fitch) and Ba3 (Moody's), which will encourage more aggressive participation by suppliers in the MRO auction (which in turn will result in a lower clearing price). *See* p. 17, *infra*. The Commission also should order Duke to accept first mortgage bonds as collateral from suppliers, which will allow suppliers to obtain credit at lower costs and pass those savings on to customers. *See id.* at 18-19. Further, the Commission should approve Duke's revised proposal to incorporate the credit ratings published by Fitch, Inc. ("Fitch").

Fourth, the Commission should adopt Solutions' recommendations regarding the partial payment priority for Duke customers. *See* p. 19-21, *infra*. As demonstrated at hearing, suppliers like Solutions currently must choose from two unworkable options: (i) accept Duke's current partial payment hierarchy, in which suppliers are paid last; or (ii) participate in Duke's purchase of accounts receivable program, which may be more expensive than the uncollectible expense arising from the payment hierarchy. *See id.* at 20. Forcing suppliers to choose between these options diminishes retail competition in Duke's service territory and results in higher prices for customers. *See id.* The Commission should either require Duke to abide by the partial payment hierarchy applicable to all other electric utilities in Ohio or require Duke to implement a purchase of accounts receivable program that is fair to suppliers.

II. ARGUMENT

A. The Commission Should Approve An Accelerated Version Of Duke's Proposed Blending Period.

1. Both the accelerated blending period proposed by Solutions and Duke's proposed blending period are consistent with R.C. 4928.142.

Revised Code Section 4928.142(D) establishes a default blending period for initial MROs by distribution utilities that owned generating facilities as of July 31, 2008. That default blending period is to last for five years, during which time the standard service offer price is derived from a blend of the then-existing standard service offer price and the competitive bid price under the MRO. *See* R.C. 4928.142(D). The statute prescribes specific blending percentages, or ranges of percentages, for each of the initial five years of the MRO. *Id.*

Revised Code Section 4928.142(E) provides:

> ***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.

R.C. 4928.142(E) (emphasis added). Thus, by providing "notwithstanding any other requirement of this section," Section 4928.142(E) expressly allows the Commission to modify the blending requirements set forth in Section 4928.142(D). *See* Tr. Vol. V, p. 882:25-883:6 (Higgins Cross) (agreeing that this interpretation is "logically conceivable"). Under Section 4928.142(E), the

Commission may decide now to "alter prospectively" the blending requirements in Division (D) "[b]eginning in the second year." *See* Tr. Vol. V, pp. 1064:19-22 (Staff witness Strom agreeing that Commission "can alter the blending proportions in the second year of the MRO"), 1073:2-4, 1065:2-6 (Strom agreeing that Commission can reduce the blending period to less than five years). The "alteration" may be made to "mitigate any abrupt or significant change" in the electric distribution utility's SSO price.

Pursuant to Section 4928.142(E), Duke proposes a modified blending period in which the MRO bid price accounts for 10% of the SSO price in the first year of the MRO, 20% in the second year and 100% in the third and all subsequent years. *See* Wathen Dir., p. 10:10-11:2 (Duke Ex. 16). Although Solutions supports Duke's proposed MRO concept, the Commission should improve on it by requiring that the MRO bid price total 10% of the SSO price in the first year of the MRO and 100% in the second and all subsequent years.

Duke's proposed blending period is consistent with R.C. 4928.142(E). As Duke witness Judah Rose testified, by 2014 (the third year of Duke's proposed MRO), wholesale market prices will converge with the legacy ESP prices in the third year of the MRO, rendering further blending beyond that point unnecessary. *See* Rose Dir., pp. 18:9, 45:1-9 (Duke Ex. 4).

Solutions' proposed accelerated blending period is better and is supported by statutory authority and two undisputed facts. First, market prices will be well below Duke's ESP price for the first two years of the MRO. In pre-filed testimony, Mr. Rose testified regarding his analysis of future wholesale market prices and his comparison of those prices with Duke's legacy ESP prices.[4] *See* Rose Dir., p. 18:1-13. Based on this analysis, he testified (and other witnesses

[4] Notably, Mr. Rose was the only witness in this case to project future wholesale power prices, and no other witness was able to articulate a specific challenge to Mr. Rose's analysis. *See, e.g.*, Tr. Vol. V, p. 949:20-24 (witness Baron testifying that he had "no reason" to question Mr. Rose's analysis). In fact, Mr. Rose's analysis was

agreed) that market prices currently are below Duke's legacy ESP price of 7.34¢/kWh. *See id.* at 13:10-11. Specifically, in October 2010, the FirstEnergy Ohio operating companies conducted an SSO auction that resulted in a price of $54.55/MWh for the June 1, 2011 through May 31, 2012 delivery period. *See In re Procurement of Standard Serv. Offer Generation for Customers of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, No. 10-1284-EL-UNC, Finding and Order dated Oct. 22, 2010, ¶ 6. Witnesses for several parties agreed that this price was a good proxy for the price Duke could obtain during the initial MRO auctions. For example, on behalf of Kroger, Mr. Higgins agreed that those results were a "fair proxy," as did Staff witness Mr. Strom. Tr. Vol. V, pp. 917:24-918:7 (Higgins Cross); Tr. Vol. V, p. 1106:12-16 (Strom Cross). Duke witnesses Don Wathen, Jr. and Jeffrey Bailey agreed. Tr. Vol. III, p. 613:16-19 (Wathen Cross) (stating that for Duke auction, he would expect "probably somewhere in the range of 55 to 60, because that's what FE got"); Tr. Vol. III, p. 575:5-8 (Bailey Cross) (stating that October 2010 auction result was .055 cents per kilowatt hour, and that this "was recent enough in time to use as a reasonable total price" in calculating estimated Duke auction price); Bailey Dir., p. 9 n.3 (noting that Duke has estimated the annualized bid price to be $0.055 per kWh, with $0.0455 representing the energy-related portion of the price); Tr. Vol. III, p. 574:17-575:15 (Bailey Cross).

The recent FirstEnergy auction prices, in the range of $54.10 to $57.47, are significantly lower than what non-shopping customers would otherwise receive under Duke's ESP, which is 7.34¢/kWh. *See In re Procurement of Standard Serv. Offer Generation for Customers of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co.*, No. 10-1284-EL-

(continued...)

not based on mere projections. Rather, Mr. Rose's analysis is based on wholesale forward power prices—that is, ***actual prices*** that have been paid for future delivery of power. *See, e.g.*, Rose Dir., p. 20:1-6 (Duke Ex. 4).

UNC, Finding and Order dated Oct. 22, 2010, ¶ 6; *See In re Procurement of Standard Service Offer Generation for Customers of Ohio Edison Co., The Cleveland Electric Illuminating Co. and The Toledo Edison Co.,* No. 10-1284-EL-UNC, Finding and Order dated Jan. 27, 2011, ¶ 6. The Commission should accelerate Duke's proposed blending period to ensure that customers can access those lower prices.

The second undisputed fact is that because Duke proposes to procure its SSO non-shopping load requirements through staggered auctions of multiyear products, an accelerated version of Duke's proposed MRO will mitigate volatility and thus any likelihood of an abrupt or significant change in the SSO price. Tr. Vol. III, 623:4-17 (Wathen Cross) (stating that proposed staggered MRO auctions will "eliminate any unforeseen change" in prices and will "smooth out the prices"). Because the accelerated version of Duke's proposed blending period discussed here complies with the R.C. 4928.142(E), the Commission should order now a full transition to market prices in the second year of the MRO. To the extent the Commission declines to do so, it should at a minimum approve Duke's proposed full transition to market in the third year of the MRO.

2. Duke's proposed blend period should be modified to require Duke to procure all of its non-shopping load requirements through a competitive bidding process beginning in the second year.

Section 4928.142(E) allows the Commission to decide now to alter the blending specified in Section 4928.142(D) "beginning in the second year." It is undisputed that a market-based generation rate will provide Duke's non-shopping customers lower generation prices in the first two years of the MRO. Witnesses from several parties agreed that the $54.55 / MWh price the FirstEnergy Ohio operating companies obtained in their October 2010 SSO auction is a good proxy for the price Duke could obtain during the initial MRO auctions. *See* p. 7, *supra.* And again, this price is significantly lower than Duke's projected ESP price between 2012 and 2014, which is projected to be 7.34¢ / kWh. Rose Dir., 13:10-11 (Duke Ex. 4). By requiring Duke to transition fully to market in year two as opposed to year three, the Commission will ensure that Duke's non-shopping customers have the benefit of the lower market price.

Section 4928.02 sets forth the policies of the state of Ohio regarding retail electric service and Chapter 4928. The Commission has held that SSO proposals must be reviewed with regard to those policies. *In re Application of Ohio Edison Co., The Cleveland Elec. Illuminating Co., and The Toledo Edison Co. for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Elec. Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, No. 08-936-EL-SSO, Op. and Order dated Nov. 25, 2008, p. 6. Two of the policies articulated in Section 4928.02 are:

> Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;
>
> Protect at-risk populations....

R.C. 4928.02(A), (L).

Given the undisputed fact that non-shopping customers, which include all of Duke's "at-risk" customers, could save 30 percent on generation rates if their load requirements were purchased though a competitive process over the first two years of the proposed MRO, the Commission should require Duke to submit all of its non-shopping load for auction in the second year of the MRO. Tr. Vol. III, p. 612:7-19 (Wathen Cross). Should the Commission decline to do so, it should at a minimum approve Duke's proposal to complete a full transition to market in the third year of the MRO.

3. Other parties' objections to Duke's proposed blending period should be rejected.

In attempting to overcome the plain language of the statute and this uncontradicted evidence, witnesses Kevin Higgins, on behalf of The Kroger Co., and Stephen Baron, on behalf of the Ohio Energy Group, opined on the meaning of Section 4928.142; these witnesses opined that the blending period in Section 4928.142(D) could not be shortened. These witnesses' arguments fail for several reasons.

First, Mr. Higgins and Mr. Baron are utterly unqualified to render opinions regarding the meaning of R.C. 4928.142. Both Mr. Higgins and Mr. Baron acknowledge that interpretation of R.C. 4928.142 is a legal question, and at hearing (and notwithstanding their testimony), both witnesses disclaimed any intention of offering a legal opinion. *See* Tr. Vol V., pp. 895:19-23 (Higgins Cross); 930:2-10, 931:8-12 (Baron Cross). Nor would they be qualified to do so. Unlike other witnesses who testified regarding the statute, including Duke witness Julia Janson and Constellation Energy Group, Inc. witness David Fein, neither Mr. Higgins nor Mr. Baron is an attorney. Tr. Vol. V, pp. 880:12-13 (Higgins not a lawyer), 931:6-7 (Baron not a lawyer).

Notwithstanding that they were not lawyers offering "legal opinions," Messrs. Higgins and Baron nonetheless attempted to provide some type of opinion on the meaning of the language of the statute and purported to be qualified to do so based on their "experience." But the experience they purport to rely on in interpreting R.C. 4928.142 does not bear scrutiny. Mr. Higgins testified that the "experience" included his work with Utah State Energy Office. Higgins Dir., 2:3-5 (Kroger Ex. 1). On cross-examination at hearing, he admitted that this office deals only with conservation issues and does not regulate or set policy for public utilities in Utah. Tr. Vol. V, p. 882:10-13. Mr. Baron similarly relied on his "experience." Given that Mr. Baron admitted that the Ohio statute was "unique" (*id.* at 931:21-932:18 (Baron Cross)), he apparently was forced to rely principally on the fact that he had testified in previous Commission ESP and MRO proceedings involving the FirstEnergy Ohio operating companies. *See id.* at 930:11-21. But he admitted that he did not even mention Section 4928.142(D) or (E) in his testimony in those cases. *Id.* at 933:22-934:2. Mr. Higgins' and Mr. Baron's testimony regarding R.C. 4928.142 are entitled to no weight.

Moreover, these witnesses' purported interpretations of R.C. 4928.142 also fail as a basic matter of statutory construction. To interpret a statute, courts "must first look to the plain language of the statute itself." *Summerville v. City of Forest Park*, 2010 Ohio 6280, ¶ 18. "It is axiomatic in statutory construction that words are not inserted into an action without some purpose," and therefore that the words chosen by the General Assembly in drafting a statute should be given effect. *See Cheap Escape Co. v. Haddox, LLC* (2008), 120 Ohio St. 3d 493, 497. Moreover, "the words and phrases used by the General Assembly will construed in their usual, ordinary meaning," unless a "contrary intention clearly appears." *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health* (2002), 96 Ohio St. 3d 250, 255.

For example, both Mr. Higgins and Mr. Baron testified that, notwithstanding R.C. 4928.142(E), the statutory MRO blending period must last a ***minimum*** of five years (and cannot be shortened to a two-year blend like Duke proposes). *See* Higgins Dir., p. 7:3-8 (Kroger Ex. 1); Baron Dir., p. 5:18-19 (OEG Ex. 1). But the statute contains no five-year "minimum" provision. In fact, the only limitation in the statute regarding the duration of the blending period is a ***maximum*** provision, prohibiting the blending period from lasting longer than ten years. *See* R.C. 4928.142(E). Indeed, Mr. Baron was forced to admit that the language of Section 4928.142(E) could provide the Commission with the authority to shorten the blend period in

Section 4928.142(D).[5] Tr. Vol. V, p. 946:6-8 ("[I]t's possible that the language would grant the Commission the legal authority to do that."). Mr. Higgins and Mr. Baron attempt to read into the statute a limitation that simply is not there.

Similarly, Mr. Higgins and Mr. Baron both suggest that R.C. 4928.142(E) authorizes only a decrease in the default blending proportions allocated to the MRO auction bid price. *See, e.g.*, Higgins Dir., p. 8:12 (Kroger Ex. 1). This limitation too does not appear in the statute. Ohio Revised Code Section 4928.142(E) does not say that the proportions allocated to the bid price may only be decreased or lessened. Rather, the statute says that those proportions may be "alter[ed]." *See* R.C. 4928.142(E) (also referring to "alteration" and "altering"). The word "alter," which means "to make different" or "to modify," plainly allows the Commission to "modify" the blending proportions in whatever way it chooses, subject to the restrictions of the statute—regardless whether that modification is an increase or decrease to the MRO bid price proportion. *See D.A.B.E., Inc.*, 96 Ohio St. 3d at 255 (holding that in construing statutes, the words and phrases used by the General Assembly typically will construed in their usual, ordinary meaning); *see also* Tr. Vol. V, p. 940:11-13 (Baron admitting that the statutory phrase "any effect of an abrupt or significant change" in an SSO price means "all" such effects). Nor does the statute contain any limitation preventing the Commission from deciding the blending proportions in Duke's proposed MRO ***now***. Even Mr. Higgins admitted on cross-examination

[5] Mr. Baron also admitted that a "large part" of his conclusion that the blend period could not be shortened was derived from the language in Section 4928142(E) that allowed for the blend period to be extended up to ten years. However, Mr. Baron admitted that the provision relating to the potential extension of the blend period up to ten years began with the word "including," and that this word meant that the ten-year extension was one of several things that the Commission could do. Tr. Vol. V, p. 938:10-20.

that reading the statute to allow the Commission to do so is "certainly a potential interpretation."[6] Tr. Vol. V, p. 883:9-10.

Although both Mr. Higgins and Mr. Baron noted that the intent of Section 4928.142(D) and (E) was to protect consumers, they both said that the blending period could not be shortened to allow non-shopping customers to take advantage of lower market prices. Tr. Vol V, pp. 906:15-21 (Higgins Cross), 961:6-15 (Baron Cross). Mr. Higgins insisted on this position even after he was forced to concede that certain customers would not be allowed to shop and thus would be forced to pay higher prices under his reading of the statute. Tr. Vol. V, p. 886:3-7.

Mr. Higgins and Raymond Strom, one of Staff's witnesses, also challenge Mr. Rose's use of projected future market prices to support the modified blending period. *See, e.g.*, Strom Dir., p. 3 (Staff Ex. 2) (alleging that "any forecast, no matter how well constructed, is subject to error"). But this ignores the every day practice at the Commission. In fact, the Commission routinely considers (and at times requires submission of) forecasts of data to consider in making regulatory decisions. For example, the Commission requires annual submission of long-term forecast reports, which must include among other things a forecast of loads and identification of the relationship between prices and energy consumption. Rule 4901:5-5-03. In filing a rate case, a utility is allowed to submit projected data regarding operating income and other financial information. *See* Rule 4901-7-01, Appx., Chapter II (A)(5)(d). And here, as Mr. Strom acknowledged, where the Commission is called on to alter the blend of legacy SSO and market prices in future years of an MRO, the Commission must review forecasts of future market prices

[6] Mr. Higgins's one-sided interpretation of the statute went to illogical conclusions. For example, he also testified that the statute would not permit a change in the blending period even if there was an abrupt or significant change in the SSO price based on an increase in the ESP portion of the SSO price during the blend period. *See* Tr. Vol. V, pp. 886:22-887:8 (Higgins Cross). Most tellingly, he provided no support—other than his "experienced" say so—for this absurd result.

to make that determination. *See* Tr. Vol. V, 1066:12-15 (Strom Cross); *see also* Tr. Vol. I, 150:12-15 (Rose Cross) ("[T]he Commission has to make a prospective decision and it has to – and I think it needs to use prospective information . . . ."). Although no forecast is perfectly accurate, forecasts nonetheless are routinely considered by the Commission, and the Commission should consider Mr. Rose's price forecasts here.

B. The Commission Should Approve Solutions' Recommendations Regarding Rider RECON and Rider GEN.

1. Rider RECON should be bypassable.

Rider RECON is designed to reconcile Riders PTC-FPP and SRA-SRT, both of which are generation-related riders. D'Alessandris Dir., p. 3:8-9 (FES Ex. 3); Tr. Vol. III, pp. 613:20-614:7 (Wathen Cross). The Commission should adopt Solutions' recommendation that Rider RECON be bypassable. There are four compelling reasons why.

First, generation-related costs should be borne by those who incur them, such as those customers who take generation service under Duke's SSO. Customers who do not take generation service from Duke should not be forced to pay for it through a nonbypassable charge. *See* D'Alessandris Dir., p. 3:9-11 (FES Ex. 3); Fein Dir., p. 44:9-14 (Constellation Ex. 1) ("[C]ustomers that are not taking SSO service from Duke Energy should not have to pay Duke Energy for costs associated with SSO service . . . .).

Second, the costs derived from the proposed reconciliation have been, for the most part, bypassable. The riders being reconciled through Rider RECON are either bypassable or bypassable with a waiver. D'Alessandris Dir., p. 3:11-12 (FES Ex. 3); *see* Tr. Vol. III, p. 611:14-18 (Wathen Cross). To the extent the component riders of Rider RECON are generation-related bypassable or conditionally bypassable riders, Rider RECON should be bypassable as well. D'Alessandris Dir., p. 3:15-17 (FES Ex. 3). Moreover, because the rates charged in Rider

PTC-FPP are significantly larger than those charged in Rider SRA-SRT, it is likely that any over or under-recovery will be attributable to Rider PTC-FPP, which is unconditionally bypassable. *Id.* at 3:17-4:1.

Third, under Duke's proposal, the costs for which reconciliation is sought in Rider RECON will be bypassable going forward. The costs that are currently being collected under Rider PTC-FPP and Rider SRA-SRT will be recovered under proposed Rider GEN. Rider GEN will be bypassable.

Fourth, the reconciliation component of Rider PTC-FPP has averaged approximately 3 mils for the non-residential customer class since the first quarter of 2009. D'Alessandris Dir., p. 4:3-5. If this trend continues, shopping customers eventually will be paying for the over-collection of Rider PTC-FPP (a bypassable rider) based solely on Duke's alleged convenience. Wathen Dir.,p. 27:19-22 (Duke Ex. 16). To avoid penalizing shopping customers, the Commission should order that Rider RECON be bypassable.

2. The Commission should order Duke to utilize an average of the prior eight quarters to set the PTC-FPP component of Rider GEN.

The Commission should adopt Solutions' recommendation to smooth the volatility of the PTC-FPP component of Duke's proposed Rider GEN. During the first two years of the proposed MRO, Rider GEN will be the main driver of Duke's generation price, comprising 90% of the price during the first year and 80% of the price during the second year. Wathen Dir., p. 11:2 (Duke Ex. 16). Rider GEN, in turn, will be comprised in large part of Rider PTC-FPP charges. In fact, Rider PTC-FPP charges are the largest portion of the price to compare, comprising 44% of the total. Rose Dir., p. 12:2 (Duke Ex. 4); D'Alessandris Dir., p. 5:8-10 (FES Ex. 3).

The record evidence also shows that Rider PTC-FPP charges have been volatile. Tr. Vol. III, p. 615:23-616:2 (Wathen Cross) (noting that rider has proven "quite variable"). In just the past few quarters, Rider PTC-FPP has fluctuated $65 million, between a $40 million over-recovery and $25 million under-recovery. Tr. Vol. III, p. 616:3-5 (Wathen Cross). Moreover, Rider PTC-FPP has varied as much as 1.656 ¢ per kilowatt hour in a single quarter. D'Alessandris Dir., p. 5:11-12. To date, this volatility has been mitigated because the charge has been updated quarterly. *See* FES Ex. LMD-1.

But under Duke's MRO proposal, the volatility of the PTC-FPP charge would have a far more profound effect on generation prices. Rather than being updated quarterly, under Duke's proposal the PTC-FPP charge (as well as other charges) will be frozen as of December 2011 and will remain at that level through May 2014. Ziolkowski Dir., p. 6:7-10 (Duke Ex. 17). Thus, the timing will be critical: if that charge happens to be unusually high or low in December 2011, Duke's customers will feel the effects for years. Tr. Vol. IV, p. 812:6-8 (D'Alessandris Cross) ("Our concern is simply that Duke is holding the fuel rider that happens to be in place in the fourth quarter of 2011 constant for 29 months."). An unusually low PTC-FPP charge will result in a lower price-to-compare, which decreases the ability of suppliers to offer savings to customers who otherwise would shop. D'Alessandris Dir., p. 5:13-15. By contrast, an unusually high PTC-FPP charge will result in an elevated price-to-compare, leading to more shopping opportunities but higher prices for non-shopping customers. *Id.* at 5:15-17.

The Commission should modify Duke's proposal to smooth the volatility of the PTC-FPP charge and prevent the level of that charge in December 2011 from dictating generation prices for years. Specifically, the Commission should order Duke to incorporate into Rider GEN the average PTC-FPP charge over the eight quarters preceding December 2011. D'Alessandris Dir., p. 6:2-5. Using an average will mitigate extreme highs and lows of the PTC-FPP charge, resulting in more stable generation prices and a more competitive environment.

C. The Commission Should Approve Solutions' Credit-Related Recommendations.

1. The Commission should approve Solutions' recommendations regarding Duke's proposed credit rating requirements.

In the Revised Master Supply Agreement, Duke revised its proposal to provide unsecured credit to suppliers with credit ratings of BB (S&P and Fitch) and Ba2 (Moody's). *See* Duke Ex. 6, Attachment F.1, § 5.4(a)(i). Although this is a positive and beneficial change, the Commission should order Duke to adopt Solutions' recommendation that unsecured credit be granted to suppliers in one additional credit-rating range, to BB- (S&P and Fitch) and Ba3 (Moody's). *See* FES Ex. MJS-1; *see also* Fein Dir., p. 25:5-26:7 (Constellation Ex. 1).

Extending unsecured credit to suppliers in the additional range will be beneficial in two important ways. First, it will increase the number of suppliers who are able to cover all or a portion of Duke's credit requirements, and thus will increase the number of suppliers who are able to participate in the auction. Swartz Dir., p. 13:4-7 (FES Ex. 1). Second, it will lower the cost of credit for participating suppliers, allowing them to bid more aggressively in the auction. *Id.* at 13:7-9. As a result, the auction clearing price likely will be lower under this proposal than if the credit requirements are overly stringent. *Id.* at 13:9-10; *see* Fein Dir., p. 21:19-23 (Constellation Ex. 1). Moreover, extending unsecured credit to suppliers in the additional range is consistent with the master supply agreements utilized in the FirstEnergy SSO auctions, which were highly competitive and resulted in lower prices for customers. *See* Swartz Dir., p. 14:1-11 (FES Ex. 1). The Commission should adopt the credit rating requirements proposed by Solutions.

2. The Commission should approve the use of credit ratings published by Fitch.

In the Revised Master Supply Agreement discussed by Duke witness James Northrup, Duke adopts Solutions' recommendation that credit ratings published by Fitch be considered for purposes of assessing prospective suppliers' credit. *See* Duke Ex. 6, Attachment F.1, § 5.4(a)(i).

The Commission should approve the use of Fitch ratings. Like Standard & Poor's and Moody's, Fitch is a respected credit rating agency whose ratings are widely viewed within the energy credit industry as being authoritative indicators of the general financial health of a business. Swartz Dir., pp. 6:20-7:1 (FES Ex. 1). By utilizing ratings from all three agencies, Duke will gain the most comprehensive, accurate view of the creditworthiness of a potential supplier. *Id.* at 8:14-20. Moreover, doing so will encourage broad-based, aggressive participation in the MRO auctions. *See id.* at 8:21-9:9. The Commission should approve this change to the Master Supply Agreement.

3. The Commission should approve Solutions' recommendation of the use of first mortgage bonds.

The Commission should require Duke to accept first mortgage bonds as collateral from suppliers. Under Duke's proposal, suppliers can use only cash or a letter of credit as collateral. *See* Duke Ex. 6, Attachment F.1, § 5.4(d). Obtaining these types of collateral, however, can be very expensive for suppliers—often prohibitively so. Swartz Dir., p. 14:18-19 (FES Ex. 1). This is especially true now, in the wake of the recent credit crisis. Tr. Vol. IV, p. 803:18-25 (Swartz Cross) ("[A]nd [in] the market currently, credit still is tight.").

Allowing the use of first mortgage bonds will give suppliers "flexibility and optionality" in the collateral they must provide. Tr. Vol. IV, p. 803:20 (Swartz Cross). A first mortgage bond is a form of collateral that is backed by unencumbered assets of a company, such as an interest in a power plant or other physical asset. Swartz Dir., p. 15:1-2 (FES Ex. 1). First mortgage bonds are typically less expensive than letters of credit or cash because the supplier does not have to incur borrowing costs by obtaining credit on the open market. *Id.* at 15:7-9. Rather, first mortgage bonds allow suppliers to use the value of their own assets as security. *Id.* at 15:9-10. This, in turn, likely will allow more suppliers to participate in the auction, and to bid more aggressively in it, than under Duke's proposal. *Id.* at 15:10-13. Moreover, because the first mortgage bonds are backed by assets of a company, companies that post first mortgage bonds typically have an even greater incentive not to default than under other types of collateral. Tr. Vol. IV, pp. 806:23-807:2 (Swartz Re-Dir.). The Commission should order Duke to allow suppliers to post first mortgage bonds as collateral.

D. The Commission Should Approve Solutions' Recommendations Regarding Duke's Partial Payment Priority.

The Commission should adopt Solutions' recommendations regarding the partial payment priority for Duke customers. Under Rule 4901:1-21-18(H)(1)(a-d), a customer's partial payment is credited in the following order: (i) supplier arrears; (ii) utility arrears; (iii) current balance for utility; and (iv) current balance for supplier. In Case No. 02-0564-EL-ORD, however, Duke's predecessor obtained a waiver from compliance with this rule. Specifically, the Commission found that since the predecessor company (and now Duke) purchased the receivables of competitive retail electric service suppliers, Duke could follow the partial payment priority applicable to natural gas companies. *See* Entry dated July 1, 2003, Case No. 02-0564-EL-ORD, ¶ 5. That payment priority is: (i) utility arrears; (ii) current balance for utility; (iii) supplier arrears; and (iv) current balance for suppliers. *See* Rule 4901:1-29-12. In the entry granting the waiver, however, the Commission warned that "violation of the terms and conditions of this waiver may result in the rescission of the waiver or other measures, as the

Commission deems appropriate." *See* Entry dated July 1, 2003, Case No. 02-0564-EL-ORD, ¶ 5.

Duke's Purchase of Accounts Receivable ("PAR") program is an unreasonable option for suppliers like Solutions. There are two reasons why. First, all customers on consolidated billing with arrears of 30 days or more totaling $50 or more at the time a supplier joins the PAR program must revert to dual billing, or Duke will return the customer to its SSO service. D'Alessandris Dir., p. 8:7-10 (FES Ex. 3). By joining the PAR program, a supplier like Solutions thus risks losing those customers. Second, Duke applies a discount rate of 1.87% to receivables from all rate schedules rather than applying a separate discount for receivables from each schedule. *Id.* at 8:11-14. But this rate, which apparently is designed to account for residential customers, is too high for commercial and industrial ("C&I") customers. *Id.* at 9:2-5. In fact, many utilities in other jurisdictions charge either separate discounts for residential and C&I customers or no discount at all. *See* FES Ex. LMD-2. Solutions described these problems in comments filed in Duke's PAR case, Case No. 09-1026-EL-ATA, but that case has been continued multiple times, and there is no timetable for resolution of these issues in that proceeding. *See, e.g.*, Letter from A. Spiller dated Dec. 9, 2010, No. 09-1026-EL-ATA (requesting additional extension of time, which expired over one month ago). As long as Duke's PAR program would require Solutions to risk losing customers or to accept an unreasonably high discount rate, that program is unworkable for Solutions and other suppliers.

Suppliers like Solutions thus must choose from two unreasonable options: either accept a partial payment hierarchy in which suppliers are paid last or participate in a PAR program that may actually be more expensive than the uncollectible expense that would otherwise occur. D'Alessandris Dir., p. 10:7-10. Forcing suppliers to choose between these options hinders retail competition in Duke's service territory. *Id.* at 10:5-7; Tr. Vol. IV, p. 815:7-15 (D'Alessandris Cross). Thus, the Commission should either: (i) revoke the waiver granted to Duke and require it to implement the same payment hierarchy followed by the other Ohio electric utilities; or (ii) require Duke to implement a PAR program that does not result in excessive cost to suppliers. For example, during the hearing, Duke witness James Ziolkowski testified that Duke purchases accounts receivable from natural gas suppliers at no discount and pays them on the 20th day of the following month. Tr. Vol. III, p. 711:20-24 (Ziolkowski Re-Cross). Applying those terms to Duke's PAR program for electricity suppliers would be acceptable to Solutions. *See* Tr. Vol. IV, p. 816:11-18 (D'Alessandris Cross) (agreeing that scenario in which Duke pays suppliers on the 20th day of the following month at no discount would be "workable" for Solutions).

III. CONCLUSION

For the foregoing reasons, the Commission should approve Duke's proposed MRO, subject to the modifications discussed herein.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Brief of FirstEnergy Solutions Corp. was sent to the following by e-mail this 27th day of January, 2011.

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