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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 Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service.	))))))	Case No. 10-2586-EL-SSO

OHIO PARTNERS FOR AFFORDABLE ENERGY'S POST-HEARING BRIEF

Introduction

Ohio Partners for Affordable Energy ("OPAE") hereby submits its post-hearing brief to the Public Utilities Commission of Ohio ("Commission") in this proceeding to consider the application of Duke Energy Ohio, Inc., ("Duke"), an Ohio electric distribution utility, for approval of a market rate offer ("MRO") and a competitive bidding process ("CBP") for standard service offer ("SSO") electric generation supply. The Commission should reject Duke's application for an MRO because it fails to comply with Revised Code Sections 4928.142(D) and (E), which mandate vital consumer protections, including a five-year minimum transition period and, in certain circumstances, extensions for up to an additional five years, in which periods market rates are blended with the utility's existing electric security plan ("ESP") SSO rate. The Commission should also reject Duke's proposal to transfer its generation assets to an affiliate to the extent that such a transfer would frustrate the consumer protections set forth at Revised Code Sections 4928.142(D) and (E) for transition periods up to ten years . The Commission should also reject Duke's proposed Riders BTR (base transmission rider) and RTO (regional transmission organization) because these riders propose to recover costs that have not yet been identified or incurred. The

Commission should adopt the recommendations of Staff witnesses Strom and Turkenton with respect to the CBP and the riders proposed by Duke. Finally, the Commission should address Duke's persistent failure to comply with the Commission's orders with respect to Rider SAW (Save a Watt) and requie Duke comply with the Commission's previous orders.

A. Duke's MRO application should be rejected because it denies Duke's customers the protections set forth in Revised Code Sections 4928.142(D) and (E).

Duke's application for an MRO requests a transition period that terminates in 29 months, from January 1, 2012 to May 31, 2014, moving to a 100% market rate beginning June 1, 2014. The application violates R.C. §4928.142(D) that requires a transition from the existing SSO price to full market based pricing over a minimum of 5 years for an electric distribution utility that owned generating resources as of July 31, 2008 that had been used and useful, which includes Duke. R.C. §4928.142(D) requires that a portion of the utility's SSO load for the first five years of the MRO be competitively bid under R.C. §4928.142(A) as follows: 10% in year one, not less than 20% in year two, 30% in year three, 40% in year four, and 50% in year five. Thus, there is a minimum five-year transition period before implementing 100% market rates. The Duke application does not comply with the statute.

Moreover, R.C. §4928.142(E) provides the Commission with the ability to alter prospectively the proportions specified in R.C. §4928.142(D) and to extend the time of the blending period so that it can last as long as ten years. Thus, the purpose of R.C. §4928.142(E) is to further protect consumers from the vagaries of the marketplace. Under R.C. §4928.142(E), the Commission may alter prospectively the proportions specified in R.C. §4928.142(D) to mitigate any

effect of an abrupt or significant change in the SSO price. Any such alteration shall be made not more often than annually. The Commission will evaluate the potential rate impact on customers annually beginning in the second year of the blending period. If market rates cause an abrupt or significant change in the MRO SSO price, the Commission may alter the blending period, including extending the blending period for an additional five years.

Under Duke's improbable interpretation of R.C. §§4928.142(D) and (E), the Commission could modify the blending requirements of Ohio law in its Opinion and Order in this proceeding. In other words, Duke contends that the Commission may alter the blending periods before the MRO *has even begun.* Duke's application calls for the Commission to determine, now, that the blend should be altered starting in year 3 to 100% competitively bid generation pricing. To support its proposal, Duke reads the words of the statute out of their context and plain intent. The statute clearly means that a determination to alter the *proportions is to be made based on the actual circumstances* that exist at some future time. There is no validity to Duke's interpretation of the statute; therefore, the Commission should reject the notion that the blending period can be altered in this proceeding.

In addition to its bizarre statutory interpretation to support its MRO application, Duke presents a projection of anticipated electricity market pricing to show "convergence" of market pricing with existing ESP SSO rates. Duke presented the testimony of Judah Rose who claimed that projected ESP SSO rates and projected market rates will be equal by 2014 when Duke's proposed transition period terminates. According to Duke, when Duke's 29-month transition period ends May 31, 2014, there will be no difference between the ESP

SSO rates and market rates so that the blending would result in the same rates as 100% market.

Of course, these projections from Mr. Rose are merely projections, nothing more. Presented by Duke, the projections serve Duke's case and have even less validity than a projection from a non-biased source. If Mr. Rose's projections are wrong, market rates could substantially exceed the blended ESP SSO/market rates. In that case, Duke's revenues would be higher as a result of the shortened blending period. Moreover, there is good reason to believe that Mr. Rose is wrong about the "convergence" of market prices and the ESP SSO rates. There would have to be substantial increases in market prices through 2014 to close the current gap between market prices and the Duke ESP SSO rates by May 2014. If market prices increase substantially up to 2014, there is reason to believe that market prices could further accelerate beyond the ESP SSO rates in 2015 and 2016. If market rates increase beyond the ESP SSO rates in 2015 and 2016, then customers will need the protections of the minimum five year blend set forth in R.C. §4928.142(D) at precisely the same time that Duke proposes to deny customers the protections provided under the law. Ohio Energy Group ("OEG") Exhibit ("Ex.") 1 at 8. Under the circumstances, it makes no sense for the Commission to approve the Duke application.

Obviously, the determination to alter the blending proportions is to be made based on the actual circumstances that exist in the future years of the MRO. As Staff witness Strom noted, any forecast is subject to error and using a forecast to make a current determination to alter the percentages to be used several years in the future is not in compliance with the statute. Staff Ex. 2 at 3-4. The Commission should not approve Duke's MRO as proposed.

Duke's proposal to have the Commission make a determination now that the blending period will terminate after only 29 months transfers substantial risk to retail customers. The blending provisions of R.C. §4928.142(D) allow for a sharing of risk between Duke and its customers. By shortening the blending period to a mere 29 months, market risk is shifted to customers who would no longer have the legacy ESP price options in years three through ten as the statutes contemplate. Again, it makes no sense for the Commission to approve Duke's MRO as filed.

It is the policy of the state of Ohio to ensure reasonably priced retail electric service. R.C. Section 4928.02(A). It is also the policy of the state of Ohio to protect at-risk populations. R.C. Section 4928.02(L). The purpose of R.C. Sections 4928.142(D) and (E) is to provide for market-based rates to be blended with existing ESP rates for a period of up to ten years in order to protect consumers from abrupt and significant market price increases. While there has been some shopping by residential customers in Duke's service territory, there has certainly not been enough shopping to place great confidence in residential customer interest in the competitive retail market. Only 29% of residential load has switched; in terms of accounts by customer class and only 26% of residential accounts have switched to competitive retail electric suppliers ("CRES") providers. Duke Ex. 2 at 8. This low level of shopping has persisted even when Duke's ESP price is higher than market. Under these circumstances, it is likely that most residential customers will still be served by Duke's SSO in 2014 and beyond. It makes no sense for the Commission to deny these customers the consumer protection of the blended SSO price as set forth in Revised Code Sections 4928.142(D) and (E) up to the maximum time period allowed by the statutes, i.e., ten years.

Thus, Duke's application does not provide for the level of consumer protection required in R.C. Sections 4928.142(D) and (E), which require at least five years of blending of competitively bid generation pricing with adjusted pre-existing SSO rates and the potential for an additional five years after the initial minimum five years. The Commission should reject Duke's request to have the Commission determine immediately a blending period of only 29 months. The full five-year minimum blending period consistent with R.C. §4928.142(D) should be required. Moreover, the Commission should establish annual reviews of current market rates and the impact on the blended MRO SSO rate. If the Commission determines that an abrupt or significant change in SSO rates may result, it should make appropriate changes in the blending proportions and evaluate whether an extension of the blending period up to ten years is appropriate.

B. The Commission should reject Duke's proposal to transfer its generation assets to an affiliate to the extent that such a transfer will frustrate the consumer protections provided by R.C. Sections 4928.142(D) and (E).

Duke is proposing to transfer its legacy generation assets to an affiliate on or before May 31, 2014. According to Duke witness Wathen, the blended rate after the asset transfer would be comprised of a weighted average of the price of power under the purchased power agreement and a market rate. Since both would be priced at market, Duke argues that once the generation assets have been transferred, there would be no need for any blending of the ESP SSO and market rates. This is why Duke seeks to end the blending period in 29 months, or on May 31, 2014.

SB 221 mandates a different approach. In order to effectuate the consumer protections of the legislation, the generation assets must be retained

as long as necessary to accommodate the blending of the ESP SSO rates with market rates. These are the consumer protections set forth at Revised Code Sections 4928.142(D) and (E) as discussed above. Thus, it would be logical for the Commission to deny the generation asset transfer during the transition periods set forth in R.C. §§4928.142(D) and (E). Otherwise, Duke's customers would not have access to ESP SSO generation at legacy pricing as required by the blending periods set forth in the statute. The statute provides for a five to ten year transition period before full market pricing is in effect for those who do not shop. To allow the asset transfer to take place before the end of the transition period would deny customers the statutory protections. OEG Ex. 1 at 10. The Commission should make no orders that deny these consumer protections set forth in R.C. §4928.142(D) and (E).

C. In the event the Commission provides for a competitive bidding process ("CBP") for Duke's SSO load, the Commission should adopt Staff witness Strom's recommendations for a load cap and on-going Commission review of the CBP.

Staff witness Strom testified against the application's proposal not to use a load cap for the proposed auction. Staff Ex. 2 at 4. Duke's application will allow any supplier to win up to 100% of the competitively bid load. Staff supports the use of a load cap and notes that the Commission has required load caps in previous proceedings for the FirstEnergy companies. The use of a load cap encourages participation of bidders and assures diversity of supply in the auction. Staff Ex. 2 at 4.

Staff witness Strom also testified that the Commission's rules, at Rule 4901:1-35-11, O.A.C., provide for the MRO and CBP to be subject to ongoing reporting requirements and Commission review. It appears that Duke is not

prepared to comply with requirements for ongoing Commission review of the CBP. Staff Ex. 2 at 5. Staff recommended that the Commission not approve the MRO application without requiring compliance with the Commission's rules for ongoing review of the CBP.

The Commission should adopt these Staff recommendations. It is the policy of the state of Ohio to assure diversity of supply of electric generation. Revised Code Section 4928.02(C). It is also the policy of the state of Ohio to ensure consumer protection against market deficiency and market power. Ohio Revised Code Section 4928.02(I). Obviously a market cap would prevent the possibility that one supplier would win 100% of the load at the auction. On-going Commission review of the CBP would also assure compliance with the policy of the state of Ohio to promote diversity of supply and to ensure consumers protection against market deficiencies and market power by any one supplier. The recommendations of Staff witness Strom should be adopted.

D. The Commission should adopt Staff witness Turkenton's recommendations regarding Duke's various proposed riders.

1. Rider RECON should be subject to Commission review and be fully by-passable.

Staff witness Tamara S. Turkenton testified about the various riders proposed by Duke in its application. With regard to Rider RECON, she testified that Duke proposed Rider RECON to recover the over or under recovery balances remaining as of December 31, 2011 pertaining to Rider PTC-FPP and Rider SRA-SRT under the current ESP. Rider RECON would be updated quarterly during the MRO period and would terminate when the remaining over and under recovery balances are passed back to or collected from ratepayers. Duke proposed that Rider RECON be non-by-passable.

Ms. Turkenton recommended that Duke be allowed to create Rider RECON and initially set it at zero starting January 1, 2012. She also recommended that Rider RECON be subject to Staff review and Commission approval regarding the reasonableness of the costs for inclusion in Rider RECON. She also recommended that Rider RECON be fully by-passable because it should mirror Rider PTC-FPP's by-passability in the current ESP. Staff Ex. 1 at 5. The Commission should adopt the Staff's recommendation with regard to Rider RECON. It should be subject to on-going Commission review until the costs are fully recovered or until any over-recovery is fully passed back to customers. Rider RECON should be fully by-passable.

2. Rider UE-GEN should be rejected.

With regard to Rider UE-GEN, Staff witness Turkenton recommended that the Commission not approve this rider in this MRO proceeding. This rider proposes to recover the cost of bad debt associated with Duke's SSO service. She testified that an uncollectible rider for generation is not one of the adjustments specifically listed in R.C. §4928.142(D). Staff recommended that Duke make a separate application to the Commission to address Percentage of Income Payment Plan ("PIPP") uncollectibles and let the Commission decide the merits in the separate proceeding. Staff Ex. 1 at 6. The Commission should adopt this Staff recommendation and not approve Rider UE-GEN. Generation costs should not be passed through to customers in distribution rates or riders. It is the policy of the state of Ohio that competitive services not be subsidized through non-competitive services. Revised Code Section 4928.02(H).

3. Rider SCR should be modified as the Staff recommends.

With regard to Rider SCR, Staff recommended that the Commission modify the rider. As proposed by Duke, Rider SCR seeks to make Duke whole due to any differences in the auction price billed to customers compared to the amount paid by Duke to winning bidders in the MRO auction. Duke also plans to recover the cost of the CBP plan consultant in Rider SCR, net costs incurred by Duke to provide SSO service in the case of default by a CRES supplier, and "any other costs" directly attributable to the MRO auction or interaction with suppliers in the auction. Duke also proposed any balance should accrue a carrying charge.

Staff recommended that Rider SCR be fully by-passable during the MRO period to all shopping customers. Staff also recommended that the Commission not approve the collection of "any other costs" attributable to the MRO auction in Rider SCR. Since many of the costs associated with the auction are unknown at this time, Staff was concerned that a "blank check" not be authorized. Staff Ex. 1 at 9. Duke should be required to make a separate filing before the Commission if Duke intends to collect any other undefined costs from customers. These costs should be subject to Staff audit and review. Staff also recommended that Duke not be authorized to accrue carrying charges on Rider SCR. The rider will be adjusted quarterly and any amounts will be small; therefore, carrying charges are not warranted. The Commission should adopt these Staff recommendations.

4. Riders FPP and EIR should not be approved.

Staff also recommended that Rider FPP (fuel and purchased power costs) not be continued during the blending period and that the placeholder for Rider EIR (environmental costs) not be created at this time. Under Duke's MRO

application, these riders would not be used until June 1, 2014. Staff's concern about the legality of Duke's proposed shortened blending period also supports its recommendation that Rider FPP not be continued and Rider EIR not be created. Staff recommended that Duke make a separate application to the Commission, if necessary, to continue Rider FPP and create Rider EIR based on the final order from the Commission regarding the MRO blending period. Staff Ex. 1 at 11. The Commission should adopt this Staff recommendation.

5. Rider AERR should be subject to on-going Commission review and audit.

Duke also proposed to create Rider AERR to recover costs for compliance with SB 221's renewable energy requirements. Staff recommended that any costs should be subject to Staff review and audit. Staff Ex. 1 at 13. The prudence and nature of the costs incurred and recovered through any automatic quarterly adjustments such as the proposed Rider AERR should be reviewed in a separate annual proceeding outside of the automatic recovery provision of Duke's MRO. The Commission should also set the process and timeframes for the separate proceeding to review these costs. The Commission should adopt the Staff's recommendations.

6. The Commission should adopt the recommendations of OEG witness Baron and Staff witness Turkenton and reject the creation of Duke's proposed transmission rider Rider BTR.

Duke also proposed Rider BTR (base transmission rider) that recovers Network Integrated Transmission Service ("NITS") and certain other costs billed to Duke by PJM under tariffs approved by the Federal Energy Regulatory Commission ("FERC"). The rider would include all costs billed from either PJM and/or MISO under FERC approved tariffs. Thus, the rider would also recover

costs incurred as a result of the withdrawal from MISO and on-going MISO transmission expansion costs for which Duke has a continuing liability. This includes MISO Transmission Expansion Plan ("MTEP") costs for projects approved by MISO while Duke was a member. Duke proposed that Rider BTR be paid by all customers, i.e., that it is non-by-passable.

OEG witness Baron testified that the proposed transmission cost recovery rider Rider BTR would permit Duke to recover fully all MISO exit fees and MTEP charges from ratepayers. With regard to the MTEP costs, Ohio ratepayers will receive little or no benefit because Duke will no longer be a member of MISO. OEG Ex. 1 at 20. Moreover, Duke will incur PJM regional transmission expansion plan ("RTEP") costs that Duke will also ask Ohio ratepayers to pay. OEG witness Baron recommended that the Commission reject Riders BTR and RTO and require Duke to re-file its request for riders in a separate proceeding. The issues raised by transmission cost recovery are complex and require full evaluation by the Commission through a prudence review, particularly with regard to the costs caused by Duke's own voluntary decision to exit MISO and join PJM. Because Duke will not be joining PJM until January 2012, there is sufficient time for a full consideration of the issues outside this MRO proceeding.

Staff witness Turkenton testified that FERC has not yet approved tariff charges relating to MISO exit fees, PJM entrance fees, and RTEP and MTEP costs for Duke. Staff believes that Duke is not seeking approval of these costs in this proceeding and that Duke will seek approval after FERC approves the costs; Duke is only proposing that Rider BTR be created and eventually used to recover the costs. Since these costs have not yet been approved by FERC or the Commission, Staff recommends that the Commission find the creation of Rider BTR to be premature. These decisions should be made in another proceeding

and not part of this MRO proceeding. The Commission should reject the creation of Rider BTR.

7. The Commission should adopt the Staff recommendations on *Rider RTO.*

With regard to Rider RTO, Staff testified that Duke proposed Rider RTO to recover ancillary services costs imposed on Duke under FERC-approved tariffs. This is a bypassable charge that would recover costs related to serving SSO load. For shopping customers, these costs are recovered through CRES charges. Eligible ancillary services listed by Duke are day-ahead scheduling reserves, regulation, synchronized reserves, black start service, reactive service, and balancing and operating reserve charges. These charges are the same types of charges currently recovered under Duke's Rider TCR. The Staff recommended that, similar to Rider TCR, Rider RTO be updated each year and subject to Staff review and audit. Staff Ex. 1 at 16.The Commission should adopt this Staff recommendation with respect to Rider RTO.

8. The Commission should adopt the Staff recommendations for Riders GEN and MRO.

Staff also recommended that Duke's proposed Riders GEN and MRO, which are largely a function of the auctions, should be reviewed by the Staff. Staff recommended that the Commission give Staff the ability to review these rider rates prior to them going into effect. Duke should submit to Staff at least 20 business days prior to adjusting and docketing the tariffs of Rider GEN and Rider MRO all calculations and assumptions on how wholesale auction rates were translated into retail rates. Staff Ex. 1 at 17. The Commission should adopt this Staff recommendation.

E. Duke has consistently failed to comply with the Commission's orders to modify Rider DR-SAW.

Duke witness Stevie testified that Duke, in compliance with the Commission's rules, filed its energy efficiency and peak demand reduction plan in Case No. 09-1999-EL-POR. Duke Ex. 19 at 5. It is clear that Duke has not followed the Commission's rules or orders with respect to its Rider DR-SAW. Rider DR-SAW was approved in Case No. 08-920-EL-SSO. In the stipulation in Case No. 08-920-EL-SSO, Duke agreed that the terms of the stipulation would be modified as necessary to comply with the Commission's rules set forth in the Commission's rulemaking proceeding, Case No. 08-888-EL-ORD. Stipulation at 37.

The Commission's rules conflict with the stipulation in Case No. 08-920-EL-SSO because the rules prohibit the recovery by a distribution utility of generation revenues lost due to energy efficiency programs. The rules also require that recovery of costs related to the energy efficiency portfolio is subject to an annual review and reconciliation. Rules 4901:1-39-04(A) and 4901:1-39-07(A). Rider DR-SAW as filed by Duke included recovery of lost generation revenues and the stipulation in Case No. 08-920-EL-SSO called for reconciliation of the rider only in 2012. Therefore, the rules conflict with the stipulation and Duke was required, under the stipulation, to conform to the rules.

Duke was first ordered to modify its Rider DR-SAW in the Commission's Opinion and Order in Case No. 09-283-EL-RDR (June 9, 2010). Even then, the Commission noted that Duke had agreed in the prior stipulation to conform to the Commission's rules and had not made the filings necessary to do so. Case No. 09-283-EL-RDR, Opinion and Order (June 9, 2010) at 5. However, Duke still did not modify its rider; nor did Duke file an application for rehearing from the

Commission's Opinion and Order in Case No. 09-283-EL-RDR. In its Opinion and Order in Case No. 09-1999-EL-POR, the Commission expressed its frustration with Duke's failure to comply with the Commission orders, the stipulation in Case No.08-920-EL-SSO, and the Commission's rules by modifying Rider DR-SAW. Case No. 09-1999-EL-POR, Opinion and Order (December 15, 2010), at 15. Duke filed for rehearing from the Opinion and Order but is unlikely to prevail on the merits.

Moreover, Duke's corporate separation plan requires that no generation-related costs be recovered through distribution rates. Duke Ex. 2 at 24. It is also the policy of the state of Ohio to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail service to a competitive retail service, including prohibiting the recovery of any generation-related costs through distribution rates. R.C. §4928.02(H). The Commission has now twice ordered Duke to comply with the stipulation and follow the rules. The inclusion of lost generation revenues in Rider DR-SAW violates the law and the Commission rules. Revised tariffs which eliminate the recovery of generation costs going forward and refund to customers those dollars that should not have been included in the rider previously should be filed immediately. There is no reason for further delay.

Conclusion

Duke's application does not provide for the consumer protection required in R.C. Sections 4928.142(D) and (E), which require at least five years of blending of competitively bid generation pricing with adjusted pre-existing SSO rates and the potential for an additional five years after the initial minimum five years. The Commission should reject Duke's request to have the Commission

determine immediately a blending period of only 29 months. The full five-year minimum blending period consistent with R.C. §4928.142(D) should be required. Moreover, the Commission should establish annual reviews of current market rates and the impact on the blended MRO SSO rate. If the Commission determines that an abrupt or significant change in SSO rates may result, it should make appropriate changes in the blending proportions and evaluate whether an extension of the blending period for up to ten years is appropriate. The Commission should also deny the generation asset transfer during the transition periods set forth in R.C. §§4928.142(D) and (E). The Commission should adopt the recommendations of Staff witness Strom with respect to the CBP. The Commission should adopt the recommendations of Staff witness Turkenton with respect to the various riders proposed by Duke. Finally, the Commission should, once again, and for a third time, order Duke to comply with the stipulation in Case No. 08-920-EL-SSO, the Commission's rules, and the Commission's orders and re-file its tariffs for Rider DR-SAW.

Respectfully submitted,

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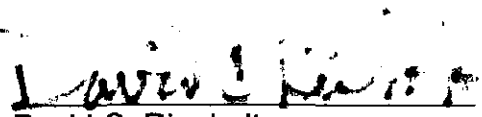
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Brief was served electronically upon the following parties identified below in this case on this 27th day of January 2011.



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