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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

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

In its Initial Brief, the Industrial Energy Users-Ohio ("IEU-Ohio") anticipated and addressed many of the arguments made by Duke Energy Ohio, Inc. ("DEO") in its Merit Brief. Thus, this Reply Brief is short and focused on the fundamental defects in the theories and positions maintained by DEO.

DEO has maintained through its Application[1] for approval of a market rate offer ("MRO"), its testimony, and its Merit Brief that DEO merely needs to satisfy the statutory criteria of Section 4928.142, Revised Code. DEO has also maintained that the burden of proof is not on DEO, and that a lack of opposition to each material element of the Application obviates DEO's burden of proof with respect to that element. DEO is incorrect. The other parties to this proceeding are not required to disprove the merits of DEO's Application.

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[1] *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, Application (November 15, 2010) (citation omitted) (hereinafter "Application").

DEO's claims about statutory meaning are self-serving and unsupported by case law, conflict with the Public Utility Commission of Ohio's ("Commission") rules, and the plain *meaning* of Chapter 4928, Revised Code.[2] DEO's Application fails to satisfy the requirements of Sections 4928.141 and 4928.142, Revised Code, state policy requirements, and Chapter 4928, Revised Code.

As IEU-Ohio stated in its Initial Brief, the statutory criteria in Section 4928.142, Revised Code are only a starting place. The balance of Chapter 4928, Revised Code, and, more specifically, the policy of the State of Ohio play an integral part in the Commission's (and the Ohio Supreme Court's) analysis of an application for approval of an MRO. The Commission's position in this regard has been unwavering, before and after Senate Bill 221 ("S.B. 221"). Prior to the implementation of S.B. 221, the Commission held:

> **Standard service offers remain subject to Commission jurisdiction under Chapter 4928 of the Revised Code**. And, standard service offers must be consistent with state policy under Section 4928.02, Revised Code. *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Thus, while a standard service offer price need not reflect the sum of specific cost components, the result must produce reasonably priced retail electric service, avoid anticompetitive subsidies flowing from noncompetitive to competitive services, be consistent with protecting consumers from market deficiencies and market power, and meet other statutory requirements.[3]

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[2] IEU-Ohio filed a Motion to Dismiss the Application because the MRO proposes a blending period that is shorter than Section 4928.142, Revised Code, permits. IEU-Ohio incorporated that motion by reference into its Initial Brief. The Commission must require DEO to implement a blending period that complies with the five-year minimum statutory period

[3] *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Ration Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, *et al.*, Order on Remand at 37 (October 24, 2007) (hereinafter "Cinergy") (emphasis added).

Following S.B. 221, the Commission reinforced its commitment to fulfill the larger obligations contained in Chapter 4928, Revised Code, stating:

> **FirstEnergy believes that, once the Commission finds that the requirements of Section 4928.142, Revised Code, have been met, any further analysis is redundant** (Co. Reply Br. at 13-14).
>
> **The Commission does not agree with FirstEnergy.** As a preliminary matter, we do not find that there is a conflict between the policy provisions of Section 4928.02, Revised Code, and the requirements for a CBP contained in Section 4928.142, Revised Code, such that one statute must prevail over the other. On the contrary, as we stated previously, the policy provisions of Section 4928.02, Revised Code, will guide the Commission in its implementation of the statutory requirements of Section 4928.142(A), Revised Code.
>
> The Commission notes that Section 4928.06, Revised Code, makes the policy specified in Section 4928.02, Revised Code, more than a statement of general policy objectives. **Section 4928.06(A), Revised Code, imposes on the Commission a specific duty to "ensure the policy specified in section 4928.02 of the Revised Code is effectuated**." We have done so in rules governing MRO applications and will do so through our implementation of Section 4928.142, Revised Code, in this case.
>
> Moreover, we disagree with FirstEnergy's claim that Section 4928.02, Revised Code, does not impose any obligations or duties upon the Companies. **The Ohio Supreme Court recently held that the Commission may not approve a rate plan which violates the policy provisions of Section 4928.02, Revised Code**. *See Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Accordingly, an electric utility should be deemed to have met the statutory requirements of Section 4928.142(A), Revised Code, only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in Section 4928.02, Revised Code.[4]

DEO's Application, its testimony, and its Merit Brief ignore this body of case law and endorse a "check-the-box" approach that is focused narrowly on Section 4928.142,

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[4] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO, Opinion and Order at 13-14 (November 25, 2008) (hereinafter "*FirstEnergy*") (emphasis added); *see* also *Elyria Foundry v. Public Utilities Commission*, 114 Ohio St. 3d. 305 (2007).

Revised Code. Thus, DEO has continually ignored the requirements for approval of an MRO that have been enumerated by the Commission and Ohio Supreme Court.

II. ARGUMENT

A. DEO Did Not Carry Its Burden of Proof.

The electric distribution utility ("EDU") bears the burden of proving that its Application for approval of an MRO complies with Ohio statutes, case law, and the Commission's rules. *See generally FirstEnergy*, Case No. 08-936-EL-SSO (November 25, 2008). To exemplify this principle, the Commission stated, "First Energy has not adequately explained how its application advances the policies of this state…." *Id.* at 15. The EDU cannot shift its burden by pointing to a lack of opposition with respect to an essential element. But that is exactly what DEO has attempted to do through its Application, its testimony, and its Merit Brief.[5]

B. DEO's Evidence and Application Fail to Align Costs with Benefits.

DEO's burden of proof extends to demonstrating that its Application complies with regulatory principles. Longstanding regulatory principles require that costs recovered through rates are aligned with benefits.[6] Thus, customers must receive the

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[5] DEO Merit Brief at 7-14.

[6] *See In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Energy Delivery of Ohio, Inc. and Related Matters*, Case Nos. 00-220-GA-GCR, *et al.*, Opinion and Order at 12 (September 25, 2001) (requiring gas cost recovery ("GCR") customers to receive all of the benefits of pipeline capacity release transactions because GCR customers purchased the pipeline capacity, unless otherwise approved by the Commission. The Commission further explained that only the Commission can make an apportionment of benefits decision and chided Dayton Power and Light Company ("DP&L") for taking benefits associated with transactions utilizing ratepayer-funded assets without Commission approval); *In the Matter of the Application of the Cleveland Electric Illuminating Company for an Increase in Rates*, Case No. 84-188-EL-AIR, Opinion and Order at 21 (March 7, 1985) (mandating that off-system sales revenue be shared with jurisdictional customers because the utility uses plant paid for by jurisdictional customers to make the off-system sales); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas*

benefits associated with the costs that customers bear. The Commission cannot approve an application that violates this regulatory principle.

DEO seeks to recover the costs incurred to change Regional Transmission Organization ("RTO") membership — Midwest Independent Transmission System Operator ("MISO") exit fees, duplicative transmission expansion costs (MISO transmission expansion planning ("MTEP") and regional transmission expansion planning process ("RTEPP")), and PJM Interconnection LLC ("PJM") integration costs — from DEO's distribution customers. Yet, the evidence shows that [redacted] RTO realignment. *See* IEU-Ohio Ex. 1-10 & 12. Thus, DEO's Application violates regulatory principles because it fails to align costs recovered through rates with the benefits associated with those costs. DEO's Merit Brief did not address this obvious problem. Instead, it simply repeated its position on the meaning and significance of Section 4928.142, Revised Code. Regardless of what DEO may say in its Reply Brief on this subject, its legal theory was and is wrong.

C. DEO's Application is Inconsistent with State Policy Requirements.

As previously explained, the Commission's analysis only starts with the statutory criteria in Section 4928.142, Revised Code. *Elyria Foundry v. Public Utilities Commission*, 114 Ohio St. 3d 305, 314-316 (2007) *FirstEnergy*, Case No. 08-936-EL-SSO, Opinion and Order at 13-14 (November 25, 2008); *Cinergy*, Case No. 03-93-EL-ATA, *et al.*, Order on Remand at 37 (October 24, 2007). The Commission's analysis

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Company d.b.a. Dominion East Ohio and Related Matters, Case Nos. 03-219-GA-GCR, *et al.*, Opinion and Order at 12 (March 2, 2005) (noting the Commission has "long required" local distribution companies ("LDCs") to credit GCR customers with revenue from the third-party use of GCR-financed assets).

must take a broader view, including state policy and Chapter 4928, Revised Code. *Id.* The Commission and the Supreme Court has held that a standard service offer ('SSO") cannot be approved by the Commission if it fails to advance the policies enumerated in Section 4928.02, Revised Code. *Elyria Foundry v. Public Utilities Commission*, 105 Ohio St. 3d 305, 314-316; *FirstEnergy*, Case No. 08-936-EL-SSO, Opinion and Order at 13-14 (November 25, 2008). Section 4928.02(H), Revised Code, prohibits an EDU from subsidizing the unregulated generation business.

The record evidence shows that DEO's Application fails to advance state policy requirements. DEO's Merit Brief relies on the conclusory statement that the Application satisfies state policy requirements. DEO alleges — without citing any evidentiary support — that "the MRO either had no impact or relationship with the policy or supported and advanced the policy" of the state of Ohio. DEO Merit Brief at 36. But mentioning state policy in passing does not satisfy DEO's burden of proof. DEO must affirmatively demonstrate that its Application advances state policy and address any facts in the record that demonstrate that DEO's Application fails to advance state policy.

DEO's Merit Brief fails also to address the record evidence that shows that the Application proposes to [redacted] of DEO's regulated distribution customers. DEO has not, in its Merit Brief, contested this claim or the evidence that supports the claim. More specifically, DEO has not addressed the evidence that shows that its Application, if approved, would permit DEO to use distribution functions, such as the SSO, to produce a [redacted], Revised Code, and the comparable non-discriminatory requirements of Section 4928.141, Revised Code. DEO fails to address this issue in its Application, its testimony, or its Merit Brief. Based on the record, it is IEU-Ohio's position that the Commission must find that DEO's Application does not advance state policy requirements and is part of a scheme that violates specific statutory requirements.

D. DEO Fails to Demonstrate that It Satisfies Corporate Separation Requirements.

DEO has the burden of affirmatively demonstrating that it complies with corporate separation requirements. The Commission stated that "FirstEnergy must demonstrate that it has a **<u>separation plan and policies</u>** in place that, within the context of its proposed MRO, would **<u>meet the requirements of Section 4928.17</u>**, Revised Code, and the Commission's newly adopted rules." *FirstEnergy*, 08-936-EL-SSO, Opinion and Order at 14 (November 25, 2008) (emphasis added). DEO ignores this requirement in its Merit Brief, stating:

> No party, including Commission Staff, submitted testimony to suggest that Duke Energy Ohio is not in compliance with terms of the corporate separation plan or that the corporate separation and aggregation requirements have been fully addressed. The requirements of these provisions have been met.[7]

The fact that no other party submitted direct testimony on the subject of corporate separation is irrelevant. DEO's claim that it is complying with corporate separation requirements was and is contested.

In any event, DEO has an affirmative obligation to demonstrate that its corporate separation plan and corporate activities are in compliance with Section 4928.17, Revised Code and Rule 4901:1-20-16, Ohio Administrative Code. DEO cannot carry this burden by alleging that no other party submitted testimony to disprove DEO's

[7] DEO Merit Brief at 41.

position. Moreover, there is evidence in the record — which DEO failed to address in its Merit Brief — that demonstrates that DEO is not complying with corporate separation requirements. IEU-Ohio Ex. 1-10 & 12; Tr. Vol. I at 57; Tr. Vol. II at 358.

It is apparent, based on cross-examination and information produced by DEO during discovery which is part of the record, that DEO has no respect for corporate separation requirements. The decision to withdraw from MISO was driven by the [redacted]. DEO's own analyses and public documents show this to be the case. *See* IEU-Ohio Ex. 1-10 & 12. DEO's actions demonstrate that its corporate separation plan is not working to properly do what a corporate separation plan must do.

E. DEO's Claims Regarding the Meaning of Section 4928.05, Revised Code, are Wrong.

DEO argues that Section 4928.05, Revised Code, prohibits the Commission from denying recovery or exercising any authority over FERC-approved costs. DEO Merit Brief at 32. DEO's argument is without merit. In fact, Section 4928.05, Revised Code, is an enabling statute that gives <u>authority to the Commission</u>. It provides that:

> Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter <u>shall include the authority</u> to provide for the recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs, including ancillary and congestion costs, imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission.

Nothing in the statute takes authority away from the Commission to deny recovery of imprudently incurred costs or costs that are not attributable to service provided to jurisdictional customers.

Based on DEO's view of the meaning of Section 4928.05, Revised Code, it is essentially arguing that the Ohio General Assembly passed a statute to preempt the Commission from doing the very job the Commission must do to ensure reasonable rates. If DEO is correct that the Commission has no authority to do anything other than permit recovery of FERC-approved costs, then DEO would not need to obtain approval of the Base Transmission Rider ("Rider BTR") and Rider Regional Transmission Organization ("Rider RTO") in this proceeding.

But FERC has already suggested — and DEO has agreed — that the Commission still has a role to play in DEO's RTO realignment.[8] FERC stated in the Realignment Order "[w]e note, however, that nothing in this order should be interpreted as interfering with state regulatory authority or requirements." *Id.* at P 49. The Realignment Order also explains that DEO "did not address issues regarding potential preemption of state rates with respect to exit fee costs and transmission costs because it wishes to hold further discussions with the affected state commissions." *Id.* at P 134. DEO is speaking out of both sides of its mouth: DEO told FERC that it will discuss RTO switching costs with the Commission, but now DEO is telling the Commission it has no authority to do anything more than be a "rubber stamp" for FERC-approved rates.

[8] *See Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.*, 133 FERC ¶ 61,058 (2010) ("Realignment Order").

Even assuming that FERC-approved costs may be passed through under Section 4928.05, Revised Code, the Commission retains authority to ensure that those costs were prudently incurred. DEO is not entitled to a "rubber stamp" to recover any FERC-approved costs. For example, an extensive body of federal case law holds that the Commission has the authority to prohibit DEO from collecting costs that are not prudently incurred. *Pike County Light & Power Co. v. Pennsylvania Public Utility Commission*, 465 A.2d 735, 738 (1983).

III. CONCLUSION

IEU-Ohio's failure to address any issue in DEO's Application, its testimony, or its Merit Brief should not be taken as support or agreement. This Reply Brief is directed at the fundamental defects in the theories maintained by DEO.

DEO has failed to carry its burden of proof. DEO's Application, its testimony, and its Merit Brief are based on an incorrect "check-the-box" theory that works to preclude consideration of requirements enumerated by Commission precedent, the Supreme Court, and the balance of Chapter 4928, Revised Code.

DEO's Application, testimony, and Merit Brief fail to address evidence in the record that demonstrates that DEO's Application fails to properly align costs with benefits, it provides a [redacted], Revised Code and comparable non-discriminatory requirements of Section 4928.141, Revised Code, and it fails to affirmatively demonstrate that DEO complies with corporate separation requirements. Thus, DEO's Application must be rejected.

Even assuming that the Commission could or should grant DEO's request for an MRO, the Commission must reject those parts of DEO's Application which do not satisfy the requirements for approval of an MRO—at the least, the Commission must reject the Supplier Cost Reconciliation Rider, Rider RTO, and Rider BTR. The meaning that DEO attaches to Section 4928.05, Revised Code, is wrong: The Commission must not provide DEO with a "rubber stamp" to collect RTO switching costs at the expense of Ohioans.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Reply Brief of Industrial Energy Users-Ohio,* was served upon the following parties of record this 3rd day of February 2011, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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