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February 3, 2011

Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 10-2586-EL-SSO

Dear Sir/Madam:

Please find enclosed an original and twenty (20) copies of REPLY BRIEF OF THE OHIO ENERGY GROUP fax-filed today in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

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MLKkew
Encl.
Cc: Certificate of Service

CERTIFICATE OF SERVICE

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BEFORE THE
PUBLIC UTILITY COMMISSION OF OHIO

In The Matter Of The Application Of Duke Energy Oho, 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**

REPLY BRIEF OF
THE OHIO ENERGY GROUP

I. INTRODUCTION

Comes now, the Ohio Energy Group ("OEG") and submits this Brief in reply to the Merit Brief of Duke Energy Ohio, Inc. OEG continues to recommend that the Public Utility Commission of Ohio ("Commission") reject Duke's Application For Approval of a Market Rate Offer ("MRO") or in the alternative, require a 5-10 year MRO "*blending*" period as required by R.C. 4928.142.

II. ARGUMENT

1. Duke's Interpretation Of The Word "*Alter*" Contained In 4928.142(E) Ignores The Context Of The Statute And Should Be Rejected.

Pages 21 through 30 of Duke's Merit Brief contains Duke's argument in support of its recommendation that the Commission terminate the MRO-blending period after only 2 years. Duke's argument hinges upon the question of whether the word "*alter*" contained in 4928.142(E) allows the Commission to terminate the blending period before the expiration of the 5-year schedule set out in 4928.142(D). At page 26 Duke argues that a key "*definitional question is what is meant by the term 'alter,'*" Duke launches into linguistic analysis of the meaning of the word "*alter*" eventually settling on the conclusion that "*[t]o construe the word 'alter' to mean something other than its ordinary meaning, such as to lengthen, extend, or enlarge... would run afoul of the legislature's obvious intent.*"

In State v. Johnson, (2008) 116 Ohio St.3d 541, 545 880 N.E.2d 896, 900; the Supreme Court of Ohio states that a court "*shall apply an unambiguous statute in a manner consistent with the plain meaning of the statutory language and may not add or delete words.*" (Emphasis added). Duke is attempting to "*delete words*" from 4928.142(E) in order to get to the result that it prefers. The meaning of the word "*alter*" must be examined within the context of the sentence it is used and within the context of the statute. It cannot be looked at in a vacuum. Duke's discussion of the word "*alter*" completely ignores the words that immediately follow "*alter*" in 4928.142(E). These words are crucial to understanding the intent of the statute. 4928.142(E) states that the Commission may "*alter prospectively the proportions specified in [4928.142(D)] to mitigate any effect of an abrupt or significant change in the electric distribution utility's [SSO] ...*" (Emphasis added). Within this context "*alter*" has a very specific, and limited meaning. The statute allows the Commission to "*alter*" the "*proportions specified in [4928.142(D)]*", i.e. the blending percentages that are set out in 4928.142(D). Within the context of the entire statute this means that the Commission can alter the relative proportion of SSO and market rates that make up the MRO-blend. It does not mean that the Commission can terminate the blending period prior to the 5-year minimum time period.

Duke concludes its argument concerning the meaning of the word "*alter*" by stating that in "*drafting these provisions, the legislature could have chosen to use the word that unambiguously granted the Commission the right only to lengthen the blending period. But it did not. Thus, the correct - and only - reading of the statutory language is that the Commission has the right to increase or decrease the blending percentages. Either would be an alteration.*" (Duke Brief p. 27)

Duke is searching for ambiguity where none exists. There was no need for the legislature to add additional "*unambiguous*" language to grant the Commission "*the right only to lengthen the blending* *period,*" because this restriction is plain in the statute as it is written. With respect to the duration of the blending period R.C. 4928.142(D) and (E), read together, only provide for the following:

- A specific, 5-year schedule for the blending of SSO and market rates. (4928.142(D)).
- A provision that beginning "*in year two*" the Commission may alter prospectively the proportions specified in [4928.142(D)] to mitigate any effect of an abrupt or significant change in the electric distribution utility's [SSO]. (4928.142(E)).
- A provision that states that the Commission cannot extend the duration of the blending period beyond ten years. (4928.142(E)).

The statutes grants the Commission the ability to "*alter*" the blending percentages contained in the 5-year blending schedule set out in 4928.142(D), and nothing more. This is plain and unambiguous. When a statute's plain language does not say what Duke wants it to say; that is not ambiguity. The statute simply does not state that the Commission can terminate the blending schedule beginning in year 2 and it cannot reasonably be read to allow for the termination of the blending schedule prior to 5 years as Duke proposes.

2. Duke's Brief Ignores The Provision Of R.C. 4928.142(E) That Permits The Commission To Alter The Blending Percentages "*Beginning In The Second Year Of A Blended Price.*"

R.C. 4928.142(E) states: "*<u>Beginning in the second year of a blended price</u> under [4928.142(D)]..., the commission may alter the proportions specified in [4928.142(D)] to mitigate any effect of an abrupt or significant change in the electric distribution utility's [SSO] ...*". (Emphasis added). The Commission's ability to alter the blending percentages specified in 4928.142(D) is not activated until the "*beginning*" of the "*second year*" of the blended rate. The first MRO-year would be 2012. The second MRO-year would be 2013. Accordingly, the Commission cannot alter the blending percentages until the "*beginning*" of 2013. Duke proposes that the Commission alter the blending percentages prospectively, right now. Duke's Brief makes no attempt to reconcile this deficiency.

Additionally, the phrase *"beginning in the second year of a blended price"* contemplates an ongoing process in which the Commission has the discretion to alter the blending percentages throughout the term of the MRO-blending period. This language means that the Commission may alter the blending periods each year of the 5-year minimum term in order to mitigate the effect of any significant or abrupt change in the SSO. The Commission can mitigate the effect by changing the blending percentages and/or extend the 5-year blending period additional years to a maximum 10-year blending period.[1]

Duke's proposal would completely nullify the consumer protections contained in 4928.142 by terminating the blending period after the second year. The Commission should not voluntarily relinquish its authority to make modifications to the blending period for the duration of the 5 to 10 year MRO period. As recommended in OEG's Initial Brief,[2] the Commission should establish annual reviews by the Commission Staff and other parties of the current market rates and the impact on the blended MRO SSO rate charged to customers. To the extent that such annual reviews find that the five year blending period may result in an abrupt or significant change in general SSO rates or the SSO rates of a specific rate class or rate schedule, the Commission should make appropriate changes in the blending proportions and evaluate whether an extension of the blending period up to ten years, as allowed by R.C. 4928.142(E), is appropriate.[3]

3. If The Commission Finds That R.C. 4928.142 Permits The Termination Of The MRO Blending Period After 2 Years, Duke's Proposal Should Nevertheless Be Rejected.

If the Commission determines that the language of 4928.142 permits the MRO blending period to be terminated after only 2 years, Duke's proposal should still fail because its projection that SSO and

[1] 4928.142(E) states that the Commission "*shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the rate offer, <u>cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer</u>.*" (Emphasis added).
[2] OEG Brief pp. 11-12.
[3] Id. at 15.

market rates will converge in 2014 does not constitute an "*abrupt or significant*" change within the meaning of the statute. On page 29 of its Merit Brief Duke argues that:

> *"In conformity with the requirements, and legislative intent, of R.C. 4928.142, the MRO proposed by Duke Energy Ohio starts with 10- and 20-percent blends in the first two years (with the first year being 11 months), After that, the Company asks the Commission to alter the blending percentages on the basis that, by year three of the Company's proposal, there should be no further blending, as the ESP price for generation and the market price for generation will have converged."*

As noted in OEG's initial Brief, Duke's argument that a projection of market and SSO prices can meet the statutory requirement that a "*significant*" change occur is unfounded. The statute contemplates that an actual change of circumstances occur. It does not encompass mere speculation that a change may occur in the future.

Further, Duke has still not addressed the requirement in 4928.142(E) specifying that any alteration of the blending period must be done in order to mitigate the effect of a change in the SSO to the various customer classes. The statute provides that "*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...*" ((Emphasis added) 4928.142(E)). Duke's Application, testimony and Merit Brief have made no attempt to line up projections of future SSO and market rates for the various customer groups. How can the Commission find that the "*effect of an abrupt or significant change*" in SSO rates needs to be mitigated "*with respect to any rate group or rate schedule*" when there is no evidence that attempts to show the various SSO and market prices for the separate customer classes in 2014?

OEG believes that the plain language of 4928.142 forbids the Commission from terminating the blending period prior to 5 years. However, if the Commission finds otherwise, Duke's projected 2014 SSO and market rates do not meet the statutory standard that an "*abrupt or significant*" change has occurred.

III. CONCLUSION

For the reasons set forth herein and in OEG's Initial Brief, Duke's MRO proposal should be rejected.

Respectfully submitted,

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