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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 MEMORANDUM CONTRA

Introduction

Ohio Partners for Affordable Energy ("OPAE") hereby submits to the Public Utilities Commission of Ohio ("Commission") this memorandum contra the applications for rehearing filed March 25, 2011 in this proceeding by Duke Energy Ohio, Inc., ("Duke"), an Ohio electric distribution utility, and FirstEnergy Solutions Corp. ("FES"). In its February 23, 2011 Opinion and Order, the Commission rejected Duke's application for approval of a market rate offer ("MRO") and a competitive bidding process ("CBP") for standard service offer ("SSO") electric generation supplies. Herein, OPAE replies to Duke's and FES's allegations of error in the Commission's Opinion and Order.

A. The Commission lawfully and reasonably rejected Duke's MRO application because the application denies Duke's customers the statutory protections set forth in Revised Code Sections 4928.142(D) and (E).

Duke claims that the Commission provided no rationale for its decision that R.C. §4928.142 requires a five-year blending period. Duke Application for Rehearing at 5. Duke is wrong; the Commission certainly provided ample rationale for its decision. As with Duke's entire position in this case, it is difficult to comprehend Duke's refusal to accept the clear meaning of the law.

R.C. §4928.142(D) requires the Commission to establish a transition from the existing SSO price of a utility's electric security plan ("ESP") to full market based pricing over a minimum of five 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. R.C. §4928.142(E) provides the Commission with the ability to alter prospectively the blending 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. Under R.C. §4928.142(E), beginning in the second year of a blended price, the Commission may prospectively alter the blending proportions to mitigate any effect of an abrupt or significant change in the SSO price. 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.

In complete accordance with the statutes as quoted above, the Commission found that R.C. §4928.142(D) requires it to determine the actual percentages for blending for years two, three, four and five. Opinion and Order at 15. The Commission also found that it must wait until year two of the MRO to consider whether the blended price percentages set forth in R.C. §4928.142(D) should be altered pursuant to R.C. §4928.142(E). Opinion and Order at 17. The Commission lawfully and reasonably found that its determination to alter the proportions of the blended SSO price must be based on actual evidence that exists at some future point beginning in year two of the MRO. As the Commission correctly noted, the evidence about market prices presented by Duke in this case was all speculative and based on future events that may not occur. To change the blending period at the outset of the MRO is premature and would require the Commission to prejudge circumstances that are not present nor reflected in the record. Opinion and Order at 25. In any event, the Commission found that the statute does not permit such speculation on the future. The statute requires that, in year two of an MRO, the Commission may consider altering the blending proportions; the Commission may not consider altering the blending proportions before year two. Opinion and Order at 18.

The Commission also reasonably and lawfully found that the primary reason for the blending requirement is the goal, during the migration from the ESP price to a 100 percent market price, to safeguard ratepayers from the risk of abrupt or significant increases in prices. Opinion and Order at 24. The Commission is correct that it was not given the authority to alter the blending proportions solely for the purpose of moving Duke to a fully competitive market. Opinion and Order at 24. The purpose of the blending period is to protect consumers from drastic rate changes. As the Commission found, the statute evidences consumer protection. Opinion and Order at 25.

Duke also alleges that it met all the requirements for an MRO application and that the Commission should therefore have approved the application as submitted. Duke claims that it demonstrated the sufficiency of its application. Duke Application for Rehearing at 8. Of course, Duke's claim is not true. The

Commission found that Duke's application was not in compliance with the statutory requirements. Under R.C. §§ 4928.142(D) and (E), as well as Chapter 4901:1-35, O.A.C., Duke was required to file a five-year blending plan for transition to market. The Commission found that Duke's failure to do so rendered Duke's MRO application in non-compliance with the statutory requirements. Opinion and Order at 23. Therefore the case could not proceed. Contrary to Duke's assertion, the Commission is not required to approve an MRO application that is not in compliance with the statutes. Duke did not comply with the requirements for the filing of an MRO because Duke did not provide information for years three through five. Opinion and Order at 26. This was the Commission's lawful decision with regard to the consumer protections of the blending period and with regard to the requirements for a competitive bidding process ("CBP"). Duke did not present sufficient information to satisfy the requirements for an open, fair, and transparent competitive solicitation. Opinion and Order at 36. Duke failure to provide information for a five-year blending period simply meant that its application did not conform to the statutory requirements for the CBP. Opinion and Order at 41-44.

In sum, Duke's MRO application did not provide for the level of consumer protection required in R.C. §§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 reasonably and lawfully rejected Duke's request to have the Commission determine now before the MRO even begins a blending period of only 29 months. The full five-year minimum blending period consistent with R.C. §4928.142(D) was lawfully and reasonably required. Thus, Duke's application failed to provide the information for a five-year blending period that would enable the Commission to consider its MRO application. Opinion and Order at 34.

FES makes the same arguments as Duke with regard to the Commission's refusal to alter the blending proportions at the outset of the MRO and the requirement of a five-year blending period. Because FES's arguments are the same as Duke's, FES's application for rehearing should be rejected for the same reasons as Duke's application for rehearing. In addition, while the Commission's decision not to modify the blending period in this case was essentially a legal decision, there was no evidence to support such a modification in any event. FES also argues that the Commission's concern about the absence of a load cap was unreasonable. FES Application for Rehearing at 11-12. FES is wrong. Clearly, the rationale for a load cap is to prevent any one bidder from securing too large a share of the load. Given the certainty that one bidder will be an affiliate of the distribution utility, it is reasonable for the Commission to require a load cap. A load cap also helps insure a vibrant, competitive electricity market, a policy of this State under Revised Code §4928.02.

B. Riders RECON, SCR, GEN, FPP, EIR, BTR and RTO were all reasonably and lawfully rejected.

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. The Commission found that the costs to be included in Duke's proposed Rider RECON should not be borne by customers who do not take generation service from Duke. Opinion and Order at 57. The Commission also found that the preponderance of costs contemplated for inclusion in Rider RECON would be incurred under the existing Rider PTC-FPP and that therefore Rider RECON could not be approved as proposed. Opinion and Order at 57. Thus, the Commission reasonably rejected Rider RECON.

The Commission also found that Rider SCR would not be approved as proposed. As proposed by Duke, Rider SCR sought to make Duke whole due to any differences in the CBP auction price billed to customers compared to the rate paid by Duke to winning bidders in the auction. Duke also planned to recover "any other costs" directly attributable to the MRO auction or interaction with suppliers in the auction through Rider SCR. Duke further proposed that Rider SCR be unavoidable by shopping customers and that any balance should accrue a carrying charge. In its application for rehearing, Duke claims that carrying charges could benefit customers. Duke also claims that it would have an incentive to keep costs down. Duke Application for Rehearing at 18-19.

The Commission correctly found that Duke's proposed Rider SCR would violate R.C. §4928.02(H) that states that it is the policy of the state of Ohio to avoid anti-competitive subsidies flowing from a non-competitive retail electric service to a competitive retail electric service. If Duke were permitted to recover costs proposed to be included in Rider SCR from shopping customers, it would create an anti-competitive subsidy. Opinion and Order at 63. Thus, the Commission reasonably and lawfully rejected Rider SCR as an unavoidable charge.

Duke also proposed Riders GEN, FPP and EIR. Duke proposed that its legacy generation rate would be billed through Rider GEN, which would be the mechanism through which the ESP prices are blended into customers' bills to achieve the blend required during the transition from the SSO to market. Rider FPP would recover the incremental fuel and purchased power costs above those costs that are recovered in Rider GEN. Rider EIR would recover the incremental environmental costs above those environmental costs that are recovered in Rider GEN. The Commission rejected Duke's proposal to create these three riders, just as it rejected the proposal to create Riders RECON and SCR. Opinion and Order at 66. The Commission found Duke's proposal unclear as to whether Rider GEN would be frozen or whether it would fluctuate through the blending period. The Commission also stated that, if Duke files another application for an MRO, it should demonstrate why it needs four riders (RECON, EIR, FPP and GEN) to incorporate, true-up, and reconcile the ESP price that will be blended. The Commission believed there should be a simpler way to achieve this goal. Duke must also show why any proposed adjustments or freezing of rates to recover known and measurable costs is reasonable. Opinion and Order at 66. The Commission's order rejecting Riders RECON, EIR, FPP and GEN is reasonable.

Duke also proposed Rider BTR (base transmission rider) that would recover Network Integrated Transmission Service ("NITS") and certain other costs billed to Duke by PJM under tariffs approved by the Federal Energy Regulatory Commission ("FERC"). As proposed by Duke, 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 Duke's 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 be non-by-passable. Duke also proposed Rider RTO to recover ancillary services costs imposed on Duke under FERC-approved tariffs. This is proposed as a by-passable charge that would recover costs related to serving SSO load. For shopping customers, these costs are recovered through competitive retail electric service ("CRES") charges. These charges are the same types of charges currently recovered under Duke's Rider TCR.

The Ohio Energy Group's ("OEG") witness Baron testified that the proposed 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 Exhibit 1 at 14-15. Since these costs have not yet been approved by FERC or the Commission, Staff recommended 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 reasonably and lawfully rejected the creation of Riders BTR and RTO. The Commission found that a proper application to recover transmission costs should be made pursuant to Section 4928.05, Revised Code and that Riders BTR and RTO should not be approved as part of an MRO application. Opinion and Order at 75. The Commission also found that the General Assembly intended the FERC-approved tariff pass-through contained in Section 4928.05, Revised Code, to include ordinary costs, not extraordinary costs. Therefore, when Duke makes a proper application to the Commission under Section 4928.05, Revised Code, to recover the costs associated with its move from the Midwest ISO to PJM, it will be required to demonstrate that its incurred costs were not extraordinary and that its decision to move to PJM was reasonable and prudent before Duke can recovery any of the costs of its move from ratepayers. Opinion and Order at 75.

In its Application for Rehearing, Duke claims that R.C. §4928.05 states that all transmission and transmission related costs imposed on the utility by FERC or an RTO are recovered and that the Commission's rules also do not restrict recovery of transmission costs. Duke Application for Rehearing at 19-20. This is an argument that Duke will be free to make when it files an application to recover the costs associated with its move to PJM. The issue is not properly before the Commission in this proceeding.

Conclusion

Duke's MRO application did not provide for the consumer protection required by R.C. §§4928.142(D) and (E), which mandate 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 lawfully and reasonably rejected Duke's request to have the Commission determine even before the MRO has begun a blending period of only 29 months. The full five-year minimum blending period required by R.C.

§4928.142(D) with the possibility of an extension of the blending period for up to ten years was lawfully and reasonably required. Moreover, any alterations in the blending proportions may only be made after year two. The Commission also reasonably and lawfully rejected the various riders proposed by Duke. Therefore, Duke and FES have raised nothing in their applications for rehearing that would cause the Commission to change any of its orders given in the February 23, 2011 Opinion and Order. FES's application for rehearing and Duke's application for rehearing, just as Duke's application for an MRO, should be rejected in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra was served electronically upon the following parties identified below in this case on this 4th day of April 2011.

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