FILE

2011 APR -4 PM 3:44

RECEIVED-DOCKETING DIV

PUCO

21

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

MEMORANDUM OF THE GREATER CINCINNATI HEALTH COUNCIL IN OPPOSITION TO APPLICATIONS FOR REHEARING

Douglas E. Hart (0005600)
441 Vine Street, Suite 4192
Cincinnati, OH 45202
(513) 621-6709
(513) 621-6981 fax
dhart@douglasehart.com

Attorney for The Greater
Cincinnati Health Council

April 4, 2011

TABLE OF CONTENTS

I. INTRODUCTION

On March 25, 2011, Duke Energy Ohio, Inc. ("Duke") and FirstEnergy Solutions, Inc. ("FES") filed applications for rehearing of the Commission's February 23, 2011 Opinion and Order in this matter. Both Duke and FES challenge the Commission's determination that Duke's MRO application failed to conform to the statutory blending period mandated by Revised Code 4928.142(D). Duke also challenged a number of other aspects of the Commission's Order. Neither party has presented a valid basis for the Commission to grant rehearing. The applications should be denied and this case should be closed.

Duke has asserted eight grounds for rehearing: 1) that the words "not more than" do not apply to years two, three, four, and five of the price blending period, under R.C. 4928.142(D); 2) that the blending period need not extend at least five years; 3) whether the Commission may alter the blending percentages prior to year two; 4) whether the Commission is effectively forcing Duke to file an application conforming to an improper statutory interpretation; 5) whether the Commission's determination that the Company did not satisfy the open, fair, and transparent competitive solicitation, clear product definition, and independent oversight requirements improperly imposes requirements on a competitive bidding process in an MRO as compared to an ESP; 6) whether Duke's proposed rate design advances state policies enumerated in R.C. § 4928.02; 7) the Commission's alleged preference for an ESP over an MRO; and 8) the Commission's determination that various riders could not be approved as proposed.

FES similarly asserts that the Commission's interpretation of R.C. § 4928.142 is unlawful in three respects: whether the Commission may alter the statutory blending schedule at the outset of an MRO plan; whether an application must use a five-year blending schedule; and whether the Commission should have modified the blending rates. These issues overlap with

Duke's claims of error and will be discussed together. For the following reasons, the GCHC urges the Commission to deny rehearing.

II. STANDARD OF REVIEW

A Commission order can only be reversed on appeal if it is found to be unlawful or unreasonable. R.C. § 4903.13. As discussed below, the Commission's rejection of Duke's MRO application was in accordance with the governing statute, hence it was lawful. Further, the Commission thoroughly examined the application, the evidence and the arguments of all parties and reached reasoned conclusions on the contested issues. There is no basis for rehearing.

Duke and FES both contend that the Commission violated R.C. § 4903.09 by not explaining the basis for its interpretation of the blending requirements under R.C. § 4928.142(D). This claim is specious. Revised Code § 4903.09 does not require an Order to contain a detailed statutory analysis. The Commission must only provide "findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." Revised Code § 4903.09. The reason for this statutory requirement is to enable the Ohio Supreme Court on review to determine if there was record evidence to support the Commission's findings and to understand the logic of the Commission's decisions based on those facts. There is no requirement for the Commission to explain statutory interpretation, which is always a question of law. There was universal agreement in this case that the interpretation of R.C. § 4928.142(D) and (E) presented pure questions of law – much time and effort was devoted at the hearing attempting to *prevent* witnesses from offering opinions on what the statute means, so statutory interpretation is not an issue of fact that the Commission is required to explain.

The Commission thoroughly described the evidence presented and each of the legal arguments made by each of the parties. The Commission then announced the conclusions it drew from that evidence and those arguments. When the Commission ruled, unless it expressly stated otherwise, it obviously adopted the analysis provided by the party or parties who prevailed on that issue. Every aspect of R.C. § 4928.142 has been thoroughly analyzed from all sides. There is no issue upon which Duke or FES can legitimately claim it does not know the basis for the Commission's decision.

III. ARGUMENT

A. Assignments of Error 1 and 2:

The Commission's finding that the words "not more than" apply to years two, three, four, and five of the price blending period, under R.C. 4928.142(D), was immaterial to Duke's Application and not a reason to grant rehearing.

The Commission's determination that the initial price blending period must extend at least five years correctly interprets paragraphs (D) and (E) of R.C. 4928.142.

Duke's first two assignments of error relate to the Commission's determination that R.C. § 4928.142 demands an initial five-year blending period and that the initial limits of the market-based portion of rates are explicitly set forth in R.C. § 4928.142(D). Section 4928.142(D) provides that the first MRO application by an EDU owning generation assets as of July 31, 2008 "shall require that a portion of that utility's standard service offer load for the first five years of the market rate offer be competitively bid under division (A) of this section as follows: ten per cent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty per cent in year five." This provision could not be clearer that the initial application must conform to those percentages, nor could it be clearer that Duke's proposal did not so comply. Duke proposed a plan that would involve one hundred percent competitive bidding starting in year three. The Commission had no choice but to find that Duke's plan violated the statute and could not be approved.

Duke's first assignment of error challenges the Commission's finding that the words "not more than" in R.C. § 4928.142(D) apply to years three, four and five, as well as to year two. While the GCHC would agree with Duke that the Commission's interpretation of the term "not more than" in R.C. § 4928.142(D) was technically incorrect,[1] it disagrees with Duke that the Commission did not explain the reasoning it used to reach its conclusion. The Commission adopted Kroger's position on this issue, so it must have Commission followed Kroger's reasoning. In any event, interpretation of the phrase "not more than" is immaterial to the outcome of this case and not a basis upon which to grant rehearing. Whether R.C. § 4928.142(D) requires that the blending percentages in years three through five be *exactly* thirty, forty and fifty percent, or whether it allows for any percentages that are *no more than* thirty, forty or fifty percent, Duke's application did not comply with *either* interpretation. Duke proposed blending percentages of one hundred percent for each of those years, which is neither *exactly* thirty, forty or fifty percent nor *less than* thirty, forty or fifty percent. Rehearing on this issue would do nothing to advance Duke's application and is moot given Duke's clear intent to exceed the maximize permissible blending percentages.

Duke's second assignment of error challenges the Commission's determination that the blending period must be at least five years. To be fair, the Commission has not ruled out the possibility that the blending period might be shortened in the future through an alteration

[1] As pointed out in the GCHC's post-hearing briefing, beginning at page 8, the General Assembly considered three different versions of the language: one that would have explicitly applied the words "not more than" to each of the five years, one that would have applied the opposite words "not less than," and the language that was ultimately adopted. The General Assembly's decision to expressly include the words "not more than" in tandem with twenty percent, but not to express them in conjunction with thirty, forty, or fifty percent, was purposeful. This signifies that the General Assembly chose to fix the blending percentages in years three, four and five. This exact point was explained in the Legislative Service Commission report accompanying the Am Sub. H.B. 562.

pursuant to R.C. § 4928.142(E). But Duke contends that it could seek such a modification of the statutorily mandated percentages at the outset. It could not be clearer that the statute does not permit any such modification of the mandated blending percentages until "[b]eginning in the second year of a blended price." Duke continues to ignore the plain language of the statute and advance untenable interpretations of it.

While the statute might permit a blending period shorter than five years if there is justification for making an alteration beginning in year two or later, such a determination is premature upon initial consideration of an MRO application. Even when the statute does permit alteration of the mandated blending percentages, it strictly limits the circumstances under which an alteration may be approved. A prospective alteration of the blending percentages is only authorized "to mitigate any effect of an abrupt of 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." Unless the normal blending schedule would result in an abrupt change in the blended price (and here there was no such evidence), the Commission has no authority to alter the blending.

Nothing in § 4928.142(D) permits the Commission to set the initial blending percentages for years one through five higher than ten, twenty, thirty, forty and fifty percent, respectively. The only mechanism for setting higher blending percentages is in § 4928.142(E), which requires a finding that there would be an "abrupt or significant change" in the blended price if the percentages was not altered. FES' analysis of that requirement is non-sensical, as it is based solely on the difference between the blended price and the market price component of the blended price, a totally irrelevant comparison.[2] The only relevant comparison is between the blended price at the statutory percentages and the blended price at the altered percentages. By postulating that the market price and the legacy ESP price will converge in year three, it is mathematically guaranteed that there will be no difference in the blended price regardless of the percentages employed to get there. Because there will be no difference, there is no predicate event to justify altering the blending percentages.

The Commission committed no error by not accepting Duke's future pricing projections. Whether they are accurate or not, even if true, they did not prove the condition necessary to alter the statutory percentages – namely, that not altering the percentages would cause an abrupt or significant change to the blended price. Accepting Duke's evidence as true, the statutory blending schedule would produce a remarkably consistent blended price, so there is no need or basis for any alteration.

The Commission reasonably found that the evidence showing that the convergence of Duke's ESP price and market prices is speculative. The fact that Duke's evidence was partially based on actual forward power prices makes it no less speculative. While the forward prices might represent actual transactions, the retail price projections contained many assumptions that may or may not occur.[3] Indeed, the same witness made similar projections based on an identical

[2] FES contends that the Commission's decision deprived Duke's customers of lower prices. That is neither true nor relevant. As long as customers have a shopping option and competitive providers are active in Duke's market, customer will have the ability to obtain lower market prices.

[3] Competitive markets do not remain stagnant, but constantly change. Furthermore, the available future transaction prices represent only a fraction of the total market and it is impossible to predict that all future power could be obtained at the current futures prices. Otherwise, the futures market would carry no risk and there would be no purpose served by engaging in hedging transactions. All would be known and predictable, but it is not.

analysis in Duke's last ESP case,[4] which turned out to substantially wrong. It is irrelevant that Mr. Rose was the only witness who analyzed future prices, as even he admitted his projections were wrong in the last case. The Order cannot be faulted for noting the possibility that market prices will rise above the ESP price after 2014, as not even Mr. Rose was capable of projecting prices that far out. But that is the very risk that would be assumed if the blending percentages were prematurely changed now. Duke has taken the position that blending percentages cannot be decreased once they go to 100% - so under Duke and FES' approach, the Commission would have irrevocably assumed the risk of future higher market prices now, for no good reason. If the facts turn out differently in the future, the Commission will have an annual opportunity to adjust blending percentages in the future. There is no reason to rush to judgment now.

While the Commission has not foreclosed the possibility of shortening the blending period in the future, the circumstances that would be necessary to permit a shortening of the blending period are not likely to ever occur. A shortening of the blending period is only allowable if *not* shortening the blending period would cause the blended price to change abruptly or significantly. The only way that could happen is if the legacy ESP price were to suddenly or substantially increase relative to the market price. However, the only way the legacy ESP price can increase is through adjustments for things such as fuel, purchased power and environmental costs, factors that would likely also cause market prices to increase. And, Duke itself does not predict that such a scenario will occur (in fact, it predicts that market prices will catch up to its legacy ESP price). Therefore, no factual case has been presented for altering the blending percentages and rehearing on this issue would be meaningless.

---

[4] *In the Matter of the Application of Duke Energy Ohio, Inc. for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO.

In any event, even if Duke and FES were correct that the Commission may consider altering the blending percentages earlier than year two, there is no escaping that § 4928.142(E) is permissive, *i.e.*, the Commission "may" alter the percentages. FES approaches this case as if the Commission "must" alter the blending percentages, but the statute cannot withstand such a tortured interpretation. Even if the Commission *may* authorize a blending period that lasts less than five years (something even FES admits the Commission has not decided), nothing in the statute compels the Commission to shorten it. Even if it had the discretion to do so now, the Commission would also have the discretion *not* to shorten the blending period. The Order makes clear that the Commission is not inclined to alter the blending period now or on these facts. FES' request for rehearing presents no information or no new reason why the Commission should rule differently. The Commission has provided good reasons why it would not exercise its discretion in favor of an alteration. There is nothing that Duke or FES can do to force the Commission to act sooner. If Duke intends to pursue an MRO, it must present a plan that follows the statutory percentages. Duke will have a full opportunity beginning in year two or later to try to convince the Commission that circumstances exist that justify an alteration. Now is not that time and to persist down this path does nothing but waste time.

B. Assignment of Error 3:

The Commission's finding that it may not prospectively alter the blending percentages set forth in R.C. 4928.142(D) prior to year two, is the only reasonable interpretation of the statute.

The Commission's determination that it must wait until year two of an MRO to consider whether the blending percentages should be altered pursuant to R.C. § 4928.142(E) is the only reasonable construction of the statute. Revised Code § 4928.142(E) states that the Commission can alter the blend "beginning in the second year." It does not say that the Commission can alter the blending any time before that, only to be effective beginning in the second year.

Grammatically, the placement of the phrase "beginning in the second year" at the beginning of the sentence modifies it in its entirety, not just with respect to the effective date of any alteration.

If § 4928.142(E) could be used to alter the blending percentages before the beginning of the second year, the prescribed percentages in part (D) would be essentially meaningless. It is clear from the legislative history that the General Assembly did not mean to empower the Commission to alter the percentages before year two. This issue has been thoroughly vetted by arguments from all parties and neither Duke nor FES sheds any new light on the subject.

This conclusion is reinforced by the proper interpretation of the "not less than" language in R.C. § 4928.142(D). That language only applies to the second year of an MRO – even Duke agrees that the percentages in years three, four and five are fixed by statute at thirty, forty and fifty percent, respectively. R.C. § 4928.142(D) affords the Commission no discretion at the outset of its consideration of an MRO application, except to set the blending percentage for year two below twenty percent. Revised Code § 4928.142(E) first provides the Commission with authority to alter those percentages, beginning in the second year. Beginning in year two, the Commission has discretion to alter the theretofore fixed blending percentages for years three through five. The statute is very simple and logical.

Duke fails to explain its haste to alter the blending percentages. A decision altering the blending percentages now could be irrevocable, but wrong. In its last SSO proceeding Duke's projections, by the same witness, based on the identical types of information and analysis, proved to be seriously wrong. Duke's application also contemplated that a change in RTOs from MISO to PJM and divestiture of its generation assets, neither of which has yet occurred and the effect of which on the market is unknown. As time passes, future circumstances will become more predictable. If Duke's predictions of future relationships between its legacy ESP and market prices come true, it will have an opportunity to present those circumstances beginning in year two, with plenty of time for the Commission to make an alteration that would be effective in the future. Making such a decision now is not only unauthorized by the law, but would be unduly speculative.

C. Assignment of Error 4:

The Commission's determination that it cannot pass upon the Application, as submitted, was lawful and reasonable and does not force Duke Energy Ohio to file an application that conforms to an improper statutory interpretation.

The Commission is correct that Duke's application suffers from a fundamental defect. The statute unquestionably requires the initial MRO application by an EDU owning generation assets to include a five year blending period. The Commission correctly determined that R.C. § 4928.142 requires Duke's initial MRO Application to include a five-year blending period. The statute and Commission rules require Duke to provide information about the full five year term, which Duke failed to provide. The Commission has clearly specified what Duke needs to do to remedy its application; but Duke does not like the advice it has received. It has been told repeatedly, formally and informally, by the Commission and numerous intervenors that it must present a five year blending plan at the outset. Requiring Duke to file such an application does not force it to comply with an improper statutory interpretation. It is Duke and FES that continue to cling to an untenable position. It was improper for Duke to propose a shorter blending period in its Application, so it was proper for the Commission to reject the Application. Thus, the Commission committed no error by stating that it could process the application no further. Because Duke refuses to conform to the law, the statute mandates that Duke "shall withdraw the application." Revised Code § 4928.142(B)(3).

The Commission's Order could have stopped at page 27, after concluding that the Application was fatally defective. However, the Commission went on for another fifty pages, commenting in detail on numerous issues raised by Duke's application and advising Duke how it should correct numerous problems. Inexplicably, Duke contends that the Commission did not advise it how to correct any deficiencies, despite the Commission's explanations.[5] Rather than file a corrected application, Duke appears to be pursuing an appellate path that is unlikely to be completed before the expiration of the current ESP term. Duke has provided no explanation of how it intends to satisfy its SSO obligations effective January 1, 2012.

D. Assignments of Error 5, 6, and 7

The Commission's determinations that the Company has not presented sufficient information on the record to satisfy the open, fair, and transparent competitive solicitation requirement, the clear product definition requirement, and the requirement for oversight by an independent third party, pursuant to R.C. 4928.142(A)(1), were reasonable.

The Commission's conclusion that Duke Energy Ohio has not demonstrated that the Application's proposed rate design advances the state policies enumerated in R.C. 4928.02 is reasonable.

The Commission's repeated criticism of Duke Energy Ohio's application was reasonable and did not improperly disadvantage an MRO application in comparison to an ESP application.

While it obviously does not like the advice it received, Duke admits that the Commission analyzed the components of its Application and provided guidance on the issues raised by various parties. Nevertheless, Duke continues to believe that its MRO must be approved, primarily because it mimics the competitive bidding process that was approved for FirstEnergy in Case No. 10-388-EL-SS0.[6] There is no such legal requirement. Duke must prove that its proposal is appropriate for its circumstances in its market.

Duke attributes the Commission's rejection of various aspects of its application to a

---

[5] See, *e.g.*, pp. 34-36, 41-42, 49-50, 57, 63, 66, 74.

[6] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company.and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form an Electric Security Plan,* Case No. 10-388-F1.-SSO (Opinion and Order, August 25, 2010).

preference for an ESP over an MRO. But Duke fails to appreciate major distinctions between its case and that of FirstEnergy. The FirstEnergy case was largely stipulated. In this case, nothing was stipulated between any parties. Duke was required to prove that all of the elements of its plan complied with all of the statutory requirements, including the satisfaction of Ohio energy policies embodied in R.C. § 4928.02.[7] The Commission found that Duke's proof was lacking in a number of respects.

In this case, various parties contested various assertions made by Duke and the Commission determined that Duke had not carried its burden of proof. Not stopping there, the Commission gave Duke an advisory opinion explaining exactly what Duke needed to do to pass these hurdles. Duke criticizes the Commission for pointing out that Duke has not answered concerns raised on the record by intervenors. Duke seems to discount concerns about the lack of evidence or analysis from its witnesses if an intervenor did not present its own witness on a topic. However, only Duke has the burden of proof in this proceeding. No other party is required to produce any witness or evidence, but is entitled to contest the evidence presented by Duke and to make legal arguments why Duke's case is defective, either factually or legally. Duke fails to appreciate that everything presented in this case, either through testimony or briefing, is "on the record" and must be addressed.

FirstEnergy did not own any generation assets, while Duke does. Thus, unlike Duke, it was not bound by the blending requirements in R.C. § 4928.142(D) and the attendant requirements that attach to the five year term. Ownership of generation assets is a substantial market distinction having bearing on the best means of obtaining generation supply. Duke presented only superficial evidence of the competitive landscape in its service territory, asserting

[7] *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164.

that it had no market power because of the level of shopping and its corporate separation plan. But the vast majority of Duke's shopping customers purchase power from its own affiliate and Duke did not disclose the degree to which Duke itself provided the generation supply to its affiliate or the terms of that arrangement. These circumstances raise serious questions whether Duke's market is sufficiently competitive for a reverse auction process to succeed. Invoking Ohio energy policies in R.C. § 4928.02, the Commission raised legitimate concerns whether the proposed procurement plan, as applied to Duke's market, would be sufficient to ensure effective competition and to prevent Duke from exercising market power.

Duke objects to the Commission's conclusion that Duke did not adequately consider alternative procurement methods for its proposed MRO because the Commission allegedly did not require that of FirstEnergy. The two cases cannot be fairly compared in this regard because the FirstEnergy case was stipulated and this one was not. Duke bore the burden of proof that it has complied with all requirements. The Commission correctly found that the Company did not sufficiently address alternative methods of procurement other than using a descending clock auction. The Company's "discussion" of alternative methods of procurements was essentially to state that it had dismissed them, without adequate justification. The Commission also raised concerns regarding the clarity of the product definition, including the large uncertainty in the capacity commitments bidders would have to make, one of the very risks Duke desires to eliminate by divesting its own generation assets.

The Commission was also within its rights to insist upon control over the auction manager. Unlike the FirstEnergy ESP proceeding, which has a limited duration, Duke proposed a perpetual MRO with a preselected auction manager and no procedure for Commission oversight or replacement. These are legitimate concerns of the Commission that Duke glosses over.

Several parties raised issues with Duke's rate design, a subject that is also within the Commission's discretion to approve and is one of the topics covered by Ohio energy policies in R.C. § 4928.02. Among those concerns were the elimination of demand charges and the allocation of capacity costs.

The Commission did not interpret the requirements of R.C. § 4928.141 differently for an MRO as opposed to an ESP. Rather, it addressed the specifics of Duke's proposal, its evidence and its market. The Commission only pointed out how an ESP might be advantageous to Duke given its strong desire to obtain generation supply from competitive sources in greater quantities than an MRO would allow. In addition, Duke has announced plans to change RTOs and to transfer ownership of its generation assets. An ESP would provide an opportunity to bridge the time necessary to absorb the impact of those events and better assess the appropriateness of an MRO to ensure effective competition. Despite its apparent anathema to an ESP, there is a substantial difference between an ESP and an MRO that would be to Duke's advantage. In an ESP, Duke would not be bound by the blending percentages specified in R.C. § 4928.142(D), as those provisions only apply to an MRO. Duke could conceivably acquire one hundred percent of its generation requirements from competitive sources in year one under an otherwise approvable ESP, something it cannot do under an MRO.

Because of the myriad differences between Duke and FirstEnergy's competitive situations, the Commission was not bound to reach the same conclusions in both cases. Duke acknowledges that it must meet the statutory requirements for an SSO, including the state policy requirements set forth in R.C. § 4928.02. There is no requirement to approve Duke's plan just because it is closely based upon the FirstEnergy plan that was approved in Case No. 10-388-EL-SSO. Duke must show that the plan is appropriate for *it*, not for FirstEnergy.

E. Assignment of Error 8:

The Commission's determination that Riders RECON, SCR, GEN, FPP, EIR, RTO, and BTR could not be approved as proposed in the Application is reasonable.

The Commission correctly determined that various riders could not be approved as proposed. The applicable statutory scheme and regulations prohibit cross-subsidization between competitive and non-competitive services. Yet, Duke persisted in attempting to include features in its proposed riders that would recover costs associated with competitive generation services from distribution customers.

Duke's proposed Rider RECON would have been unavoidable, even though it represented a reconciliation of ESP-era riders, which were bypassable. Duke's excuse that the rider would only be in effect for one year makes it no less of a cross-subsidy. Similarly, Rider SCR could not be approved as proposed in the Application because the proposed circuit-breaker provision would create an anticompetitive subsidy. Whether or not a circuit-breaker creates a greater overall benefit for shopping, it is an unlawful cross-subsidy. Duke was also vague about what costs would be included in the rider.

The Commission was within its rights to reject Riders GEN, FPP, and EIR as overly complex. Duke's current rate structure is too complex and difficult to follow for the average customer. There is no reason to perpetuate this complexity in an MRO. Price adjustments could be accomplished using a single rate element, rather than three individual riders. The Commission can certainly insist on rate simplification if the same costs can be recovered in a more straightforward way.

The Commission also acted appropriately with regard to Riders RTO and BTR. Any decision on those riders would be premature and is unnecessary to an MRO. Duke has not yet changed RTOs and still does not know how much it will have to pay to either MISO or PJM for various categories of costs as a result of the proposed realignment. The type, magnitude and prudence of such costs (and who is responsible for them) are yet to be determined both by the FERC and this Commission. Even Duke acknowledged that transmission cost recovery issues should be decided in a different proceeding, not this one. So, there is no reason to address transmission riders in this case, when no transmission costs or rates can be determined. The only thing that would be accomplished by Duke's proposed tariff pages would be to *eliminate* any role of the Commission in reviewing or approving Duke's transmission costs. There is no need to hastily approve tariff language that would cut the Commission out of the approval process when there is so much that is yet unknown. The only prudent course of action at this time would be to reject the proposed transmission riders.

IV. CONCLUSION

The Commission did not evade its statutory obligation to assess Duke Energy Ohio's Application. Duke's proposal was not compliant with the initial five-year blending requirements. Thus, it cannot be surprised that the application was rejected as not a proper MRO application. Duke could have easily cured that defect by resubmitting the plan with the default five-year blending schedule, but it continues to refuse to do so. Duke has instead filed an application for rehearing, which has no chance of success because Duke's position on the blending period is erroneous. Having been instructed how to cure that problem and others, as Duke contends the Commission is obligated to do under R.C. § 4928.142(B), Duke has nevertheless ignored the Commission's advice. GCHC urges the Commission to deny rehearing.

Respectfully submitted,

Douglas E. Hart
441 Vine Street
Suite 4192
Cincinnati, OH 45202
(513) 621-6709
(513) 621-6981 fax
dhart@douglasehart.com

Attorney for the Greater
Cincinnati Health Council

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Initial Brief of the Greater Cincinnati Health Council has been served to the parties listed below by electronic delivery this 4th day of April 2011.

Amy B. Spiller
Elizabeth Watts
Rocco O. D'Ascenzo
Duke Energy Business Services, Inc.
139 Fourth Street, 25 Atrium II
P.O. Box 960
Cincinnati, OH 45202-0960
Amy.spiller@duke-energy.com
Elizabeth.watts@duke-energy.com
Rocco.dascenzo@duke-energy.com

Samuel C. Randazzo
Joseph C. Oliker
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com
joliker@mwncmh.com

Robert A. Weishaar, Jr.
McNees Wallace & Nurick LLC
777 North Capitol Street, NE
Suite 401
Washington, DC 20002-4292
rweishaar@mwn.com

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, OH 45839-1793
drinebolt@aol.com
cmooney2@columbus.rr.com

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street
Suite 1510
Cincinnati, OH 45202
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com

John W. Bentine
Mark Yurick
Chester, Wilcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, OH 43215-4213
jbentine@cwslaw.com
myurick@cwslaw.com

William Reisinger
Nolan Moser
Trent A. Daugherty
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, OH 43212-3449
will@theoec.org
Nolan@theoec.org
trent@theoec.org

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources, LLC
550 W. Washington St., Suite 300
Chicago, IL 60661
Cynthia.brady@constellation.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

Ann M. Hotz
Kyle L. Verret
Jody M. Kyler
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
hotz@occ.state.oh.us
Verrett@occ.state.oh.us
kyler@occ.state.oh.us

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, OH 43215-3927
barthroyer@aol.com

Thomas J. O'Brien
Terrence O'Donnell
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
tobrien@bricker.com
todonnell@bricker.com
mwarnock@bricker.com

Michael D. Dortch
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, OH 43215
mdortch@kravitzllc.com

David A. Kutik
Jones Day
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Grant W. Garber
Jones Day
525 John H. McConnell Blvd.
Suite 600
Columbus, OH 43215-2673
gwgarber@jonesday.com

Rick D. Chamberlain
Behrens, Wheeler & Chamberlain
6 N.E. 63rd Street, Suite 400
Oklahoma City, OK 73105
rdc_law@swbell.net

Mary W. Christensen
Christensen & Christensen LLP
8760 Orion Place, Suite 300
Columbus, OH 43240
mchristensen@columbuslaw.org

John H. Jones
Steven L. Beeler
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Floor
Columbus, OH 43215-3793
John.jones@puc.state.oh.us
Steven.beeler@puc.state.oh.us