

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

12
RECEIVED-DOCKETING DIV
2011 APR -4 PM 4:00
PUCO

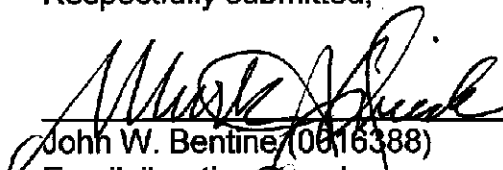
In the Matter of the Application of Duke)
Energy Ohio for Approval of a Market Rate) Case No. 10-2586-EL-SSO
Offer to Conduct a Competitive Bidding)
Process for Standard Service Offer Electric)
Generation Supply, Accounting)
Modifications, and Tariffs for Generation)
Service.

**THE KROGER CO.'S MEMORANDUM CONTRA THE APPLICATION FOR
REHEARING OF DUKE ENERGY OHIO, INC.**

I. INTRODUCTION

On February 23, 2011, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order ("Order") finding that Duke Energy Ohio failed to file an application for an MRO within the meaning of Ohio Revised Code Section 4928.142 ("R.C."); as such, the Commission held that the matter could not proceed as filed. On March 25, 2011 Duke filed an application for rehearing ("Application for Rehearing") submitting eight alleged errors for the Commission's consideration and urging the Commission to reverse the conclusions referenced in its Order.

Respectfully submitted,



John W. Bentine (0016388)
Email: jbentine@cwslaw.com
Direct: (614) 334-6121
Mark S. Yurick (0039176)
Email: myurick@cwslaw.com
Direct: (614) 334-7197
CHESTER WILLCOX & SAXBE LLP
65 E. State Street, Suite 1000
Columbus, Ohio 43215
Facsimile: (614) 221-4012

This is to certify that the images appearing are accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician A Date Processed APR 04 2011

MEMORANDUM CONTRA

II. LEGAL STANDARD

A. Ohio Revised Code 4903.10.

R.C. 4903.10 states in part:

"After any order has been made by the public utilities commission, any party who has entered an appearance in person or by counsel in the proceeding may apply for a rehearing in respect to any matters determined in the proceeding..."

The statute states further, "Where such application for rehearing has been filed, the commission may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear."

B. Ohio Administrative Code Section 4901-1-35.

Ohio Administrative Code ("OAC") Section 4901-1-35 states in part:

- (A) ***An application for rehearing must set forth the specific ground or grounds upon which the applicant considers the commission order to be unreasonable or unlawful. An application for rehearing must be accompanied by a memorandum in support, which sets forth an explanation of the basis for each ground for rehearing identified in the application for rehearing..."

Duke's Application for Rehearing in the present case simply restates and repeats arguments made during the hearing on Duke's market rate offer ("MRO") filing. No real or specific grounds for granting a rehearing are stated therein, no new or different authority is cited by Duke in support of its positions.¹ Without repeating all arguments made by the parties to the original MRO application, those arguments and support are incorporated herein by reference as if fully restated. Failure to set forth an argument on

¹ Ultimately, the standard to be applied is "unlawful or unreasonable" standard as articulated in *Monongahela Power Co. v. Public Utilities Commission* (2004), 104 Ohio St.3d 571, 820 N.E.2d 921. As stated by the Court therein, "We will not reverse or modify a PUCO decision as to questions of fact when the record contains sufficient probative evidence to show that the commission's decision was not manifestly against the weight of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty."

any particular issue in this memorandum contra should not be interpreted as assent or agreement with Duke's position.

III. ARGUMENT

A. The Blended Price Period in Duke's MRO Application Must be at Least Five (5) Years Long as Mandated by R.C. 4928.142.

As it has been noted numerous times by the parties in this action and the Commission itself, Section 4928.142 of the Ohio Revised Code ("R.C.") sets forth mandatory pricing criteria for an electric distribution utility, such as Duke, seeking its first MRO and which, as of July 31, 2008, directly owned operating electric generating facilities that were used and useful in Ohio. It is undisputed that Duke directly owned operating electric generating facilities that were used and useful in Ohio as of July 31, 2008 and that Duke's Application for an MRO in this case was Duke's first application for an MRO.

R.C. 4928.142(D), states:

The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state 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. Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five. [Emphasis added.]

Under R.C. 4928.142(D), therefore, Duke's application for an MRO must provide for blended rates. The "blended" SSO price is required to be part bid price and part generation service price for the SSO load; the "non-bid" portion being equal the electric distribution utility's most recent SSO price, adjusted upward or downward by the

Commission to reflect certain prudently-incurred costs.² The portion of Duke's SSO load competitively bid for the first five (5) years of the MRO, must be such that ten percent (10%) of the SSO load is competitively bid in year one, and not more than twenty percent (20%) of SSO load is competitively bid in year two (2), thirty percent (30%) in year three (3), forty percent (40%) in year four (4), and fifty percent (50%) in year five (5). The very next sentence of this division states, "Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five." [Emphasis added.]³

In any reasonable understanding of the English language, the modifier "not more than" would apply to all items that follow it. Duke again proposes in its Application for Rehearing a blending period lasting only two (2) years.⁴ The argument that the statute permits an elimination of the blending period after the second year was made at length in the merit briefs and correctly rejected by the Commission.⁵ Under Duke's proposed MRO, the bid price would constitute ten percent (10%) of the blended price in the first year of the MRO⁶ and twenty percent (20%) in the second year. Starting in the third year, Duke proposes that one hundred percent (100%) of the SSO load be served through market rates. Duke suggests that this is possible if the words "not more than" are read to only apply to the twenty percent (20%) figure in year 2 of the five (5) year blending period.⁷

² 4928.142(D).

³ Id.

⁴ Duke Application for Rehearing ("Duke App.") at 3-4.

⁵ Opinion and Order in Case No. 10-2586-EL-SSO, Issued February 23, 2011 ("Opinion and Order"), at pages 25-27.

⁶ For the purposes of this filing, Duke requests that the "first year" actually be equal to 17 months.

⁷ Duke App. at 2-5.

R.C. 4928.142 does grant limited discretion to the Commission with respect to the blending proportions by permitting the Commission to extend the duration of the blending period from five (5) years to up to ten (10) years under a limited set of articulated circumstances.⁸ Duke claims that this discretion allows the Commission to completely eliminate the blending period after year two.

However, after enumerating the blending percentages, R.C. 4928.142(D) states that, "**Consistent with those percentages**, the commission shall determine the actual percentages for each year of years one through five."

For the Commission to determine *actual* percentages that are *consistent* with the enumerated percentages, some *range* of percentages is implicit. However, according to Duke's interpretation of Division (D), a range of percentages is indicated only for the second year of the MRO. The logical extension of Duke's interpretation of the first sentence of Division (D) is that the second sentence of Division (D) is relevant only to the second year, and not to the third, fourth, or fifth years.

On the other hand, if Division (D) is interpreted as requiring that the proportionate weight given to the bid price for years three, four, and five of the MRO can be no more than thirty percent, forty percent, and fifty percent, respectively, then the Commission could adjust the bid price proportion in an amount up to the enumerated percentages, but not beyond. This more rational interpretation would rule out completely eliminating the status quo portion⁹ of the blended price in years three, four, and five as Duke is

⁸ R.C. 4928.142(E). Blending period shall not exceed ten years.

⁹ The "status quo" portion would be the Company's most recent SSO price.

proposing.¹⁰ Also, this interpretation is more reasonable since the most volatile portion of the MRO blended price will logically be the market rate component.

Therefore, Duke has not presented an MRO Application that complies with the mandatory requirements of R.C. 4928.142(D). Nor is Duke's proposed MRO compatible with a rational policy of gradual transformation to market pricing for SSO generation service. Since Duke's MRO Application provides for less than a five year blending period, the Commission was correct in finding the MRO Application deficient in that respect.

B. MRO Rate Design Should be Modified to Mitigate the Effect of the Design on High Load Factor Customers in Demand Based Rate Classes

As noted in the Initial Brief of the Kroger Co., and supported in the Commission's Order¹¹, a significant portion of Duke's ESP generation rate is currently comprised of demand charges for rate schedules billed on a demand basis. This is an appropriate design for ensuring a proper alignment between capacity-related costs and like charges. Appropriately, Duke proposed to retain this design in the ESP component of its blended price.¹² However, the bid price component of the proposed MRO is priced solely on a kilowatt-hour basis.¹³ This abrupt and significant change in rates for customers on a demand billed rate schedule will be accompanied by a material impact on customer rates within each demand-billed rate schedule: higher-load-factor customers within each demand-billed rate schedule will see their rates negatively impacted, whereas lower-load-factor customers will receive a windfall benefit.¹⁴

¹⁰ Id. at p. 10, lines 6-12.

¹¹ Opinion and Order at pages 52-56.

¹² Id., at lines 19-23, p. 13, lines 1 and 2.

¹³ Kroger Exhibit 1 at p. 13, lines 3-11.

¹⁴ Kroger's Exhibit 1 at p. 13, lines 3-11, and Transcript of Proceedings in Case Number 10-2586-EL-SSO, Volume III, dated January 13, 2011 at p. 566 – 573.

Although Duke's application for re-hearing states that Duke has proven its rate design furthers state policies, Duke's Application does not specifically explain how the rate design accomplishes this goal, or what policies are furthered by a drastic change in electric rates to high load factor customers. In contrast, Kroger's witness Kevin Higgins submitted testimony that he examined the significant rate impacts that would result from Duke's proposed rate design change. By the third year of the proposed MRO, an 80% load factor customer on the DP rate schedule would see its generation rates deteriorate by approximately 21% relative to a 30% load factor customer.¹⁵ Similarly, a 90% load factor customer on the TS rate schedule would see its generation rates deteriorate by approximately 17% relative to a 50% load factor customer.¹⁶ This type of rate impact is not reasonable and furthers no stated goal.¹⁷ These potential rate impacts are largely the result of Duke's rate design choice to eliminate retail demand charges for the bid price component of the SSO.

In response to Higgins findings that the rate design chosen by Duke will have dramatic negative impacts on high load factor customers in demand billed rate schedules, Duke merely states that there is no statutory requirement for Duke to submit a retail rate design that incorporates demand charges. "Thus, Duke Energy Ohio's proposed rate design satisfies the applicable requirements."¹⁸ This statement does not constitute proof or evidence of any kind and, of course, also fails to prove that any state policy is furthered by the late design.

¹⁵ 4.20% to (-16.54%).

¹⁶ Kroger's Exhibit 1 at p. 14, lines 1-17.

¹⁷ Id. at p. 15, lines 1-5.

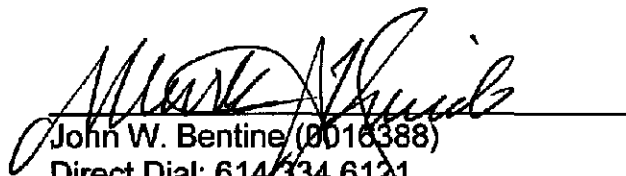
¹⁸ Merit Brief of Duke Energy at 31-32, and Duke App. at Assignment of Error 6. While making this contention an assignment of error, Duke offers no support for this assignment and it is blended in with two other assignments of error.

The Commission was correct in ruling that Duke's proposed rate design is faulty in the context of Duke's MRO filing.¹⁹ The fact that there is no specific statutory requirement for Duke to incorporate demand charges in a retail rate design is not sufficient reason to propose or adopt a rate design that dramatically and negatively impacts high load factor customers on existing demand based billing schedules. Since Duke Energy has yet to offer any substantial reason for ignoring the impact of Duke's proposed rate design on high load factor demand based customers, the Commission correctly ruled that Duke's proposed rate design should be altered to temper its effect.

IV. CONCLUSION

In summary, Duke's Application for Rehearing covers no new ground. Duke's Application fails to conform to the mandatory filing requirements for a first MRO related to the length of the blending period as well as the make-up of the blend percentages. Also, Duke's rate design unreasonably and unnecessarily has major negative impacts on high load factor customers in rate classes currently billed through demand rates. There is no principle or cost based reason for these significant negative impacts, and *the Commission acted properly in rejecting the MRO Application.*

Respectfully submitted,


John W. Bentine (0016388)
Direct Dial: 614.334.6121
Email: jbentine@cwsllaw.com
Mark S. Yurick (0039176)
Direct Dial: 614.334.7197
Email: myurick@cwsllaw.com
CHESTER WILLCOX & SAXBE LLP

¹⁹ Opinion and Order at 56.

65 East State Street, Suite 1000
Columbus, Ohio 43215
Facsimile: 614.221.4012
Attorneys for The Kroger Co.

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of *The Kroger Co.'s Memorandum Contra the Application for Rehearing of Duke Energy Ohio, Inc.* was served upon the following persons listed below by electronic mail, this 4th day of April, 2011.

Amy B. Spiller
Elizabeth H. Watts
Rocco D'Ascenzo
2500 Atrium II
Cincinnati, Ohio 45201
Email: Amy.Spiller@duke-energy.com

Samuel C. Randazzo
Joseph E. Olikier
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
Email: sam@mwncmh.com
Email: joliker@mwncmh.com

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202
Email: dboehm@BKLawfirm.com
Email: mkurtz@BKLawfirm.com

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839
Email: cmooney2@columbus.rr.com
Email: drinebolt@ohiopartners.org

William T. Reisinger
Nolan Moser
Trent A. Dougherty
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212
Email: will@theoec.org
Email: Nolan@theoec.org
Email: trent@theoec.org

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

David A. Kutik
Jones Day
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
Email: dakutick@jonesday.com

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

Grant W. Garber
Jones Day
P.O. Box 165017
Columbus, Ohio 43216-5017
Email: gwggarber@jonesday.com

Douglas E. Hart
441 Vine Street, Suite 4192
Cincinnati, Ohio 45202
Email: dhart@douglasshart.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43216
Email: mhpetricoff@vorys.com
Email: smhoward@vorys.com

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

Gary A. Jeffries
Senior Counsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, Pennsylvania 15212
Email: Gary.A.Jeffries@dom.com

Kevin J. Osterkamp
Roetzel & Andress, LPA
155 E. Broad Street, 12th Floor
Columbus, Ohio 43215
Email: kosterkamp@ralaw.com

Matthew J. Satterwhite
American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Email: mjsatterwhite@aep.com

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Email: tobrien@bricker.com

Terrence O'Donnell
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Email: todonnell@bricker.com

Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources, LLC
550 W. Washington Street, Suite 300
Chicago, Illinois 60661
Email: cynthia.brady@constellation.com

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215
Email: BarthRoyer@aol.com

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

Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Email: mwarnock@bricker.com

Anne M. Vogel
American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
Email: amvogel@aep.com

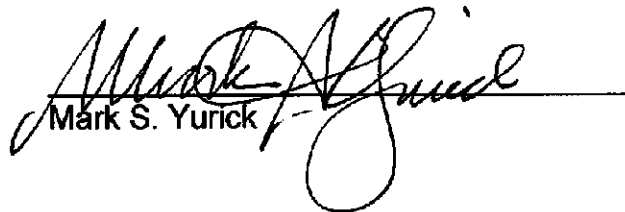
Mary W. Christensen
Christensen & Christensen LLP
8760 Orion Place, Suite 300
Columbus, Ohio 43240
Email: mchristensen@columbuslaw.org

Christopher Montgomery
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
Email: cmontgomery@bricker.com

Christine M.T. Pirik
Katie Stenman
Attorney Examiners
The Public Utilities Commission of Ohio
180 E. Broad Street
Columbus, Ohio 43215
Email: Christine.Pirik@puc.state.oh.us
Email: Katie.Stenman@puc.state.oh.us

John Jones
Steven Beeler
Assistant Attorney Generals
The Public Utilities Commission of Ohio
180 E. Broad Street
Columbus, Ohio 43215
Email: John.Jones@puc.state.oh.us
Email: steven.beeler@puc.state.oh.us

Kevin Schmidt
The Ohio Manufacturers' Association
33 N. High Street, Suite 600
Columbus, Ohio 43215
Email: kschmidt@ohiomfg.com


Mark S. Yurick

4832-1830-6313, v. 2