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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

INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA
APPLICATION FOR REHEARING OF DUKE ENERGY OHIO, INC.

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**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA
APPLICATION FOR REHEARING OF DUKE ENERGY OHIO, INC.**

I. INTRODUCTION

On November 15, 2010, Duke Energy Ohio ("Duke") filed an Application¹ for approval of a market rate offer ("MRO") to conduct a competitive bidding process for standard service offer ("SSO") electric generation supply pursuant to Sections 4928.141 and 4928.142, Revised Code. The Public Utilities Commission of Ohio ("Commission") determined that the Application was deficient because it proposed an improper blending period. The Commission also advised Duke that there were several problems with the Application. In particular, the Commission suggested that the Application improperly sought recovery of regional transmission organization switching costs in an Application for an MRO.² On March 25, 2011, Duke filed for rehearing.³

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) (hereinafter "Application" or "Duke MRO").

² *Duke MRO*, Case No. 10-2586-EL-SSO, Opinion and Order at 74-75 (February 23, 2011).

³ *Duke MRO*, Case No. 10-2586-EL-SSO, Application for Rehearing (March 25, 2011).

This Memorandum Contra focuses on aspects of Duke's Application for Rehearing that allege the Commission's Opinion and Order was unlawful and unreasonable inasmuch as it rejected Duke's proposed blending period and denied approval for regional transmission operator ("RTO") switching costs through the Base Transmission Rider ("BTR") and Rider Regional Transmission Operator ("Rider RTO").

II. BACKGROUND

Duke's Application proposed to competitively bid 100% of the SSO after the second year of the MRO.⁴ The Commission determined that Duke's proposed two-year blending period was not compliant with Section 4928.142, Revised Code and the Commission's rules.⁵ Since the Application failed to satisfy the statutory criteria, the Commission concluded that the Application could not be processed as filed. The Commission stated:

As Duke points out, the statute provides that the Commission shall determine whether the application meets the necessary requirements. The Commission can only make this determination if the applicant first complies with the statute and submits all of the information required for the Commission's analysis and determination. The statute does not call for a determination in the situation where a utility files an incomplete application. In light of the fact that Duke has failed to file an application for a five-year MRO, as required by statute, setting forth all of the information necessary in order for the Commission to make a determination, Duke's application is not an application within the meaning of Section 4928.142, Revised Code, because, on its face, it is deficient. Therefore, we can not consider this filing to be an MRO filing under the statute and we have no choice other than to find that Duke's application does not meet the requirements of the statute. **Since Duke has not presented a complete MRO application, the application is in noncompliance with the statute and this case can not proceed as filed.**⁶

⁴ *Duke MRO*, Case No. 10-2586-EL-SSO, Application at 11 (November 15, 2010).

⁵ *Duke MRO*, Case No. 10-2586-EL-SSO, Opinion and Order at 26 (February 23, 2011).

⁶ *Id.* (emphasis added).

Duke, without making any new arguments, continues to allege that the blending period need not exceed two years.⁷

Even though the Commission determined that Duke filed an incomplete Application—so the Commission could not address the merits—the Commission stated that “in order to provide useful guidance for any future application filed by Duke, we have gone to great lengths in this order to provide guidance on some of the issues raised by various parties.”⁸ In particular, the Commission determined that it was necessary to provide guidance to Duke regarding the collection of RTO switching costs.⁹ Despite the fact that the Commission styled its discussion of RTO issues as guidance—and not a holding of the Opinion and Order—Duke filed for rehearing of that portion of the Commission’s decision.¹⁰

In providing guidance to Duke, the Commission determined that recovery of transmission costs cannot be approved as part of any MRO application, and that Duke should seek recovery of transmission costs through a separate application pursuant to Section 4928.05, Revised Code.¹¹ Furthermore, the Commission rejected Duke’s position that the Commission must authorize recovery of Federal Energy Regulatory

⁷ Application at 2-7.

⁸ *Duke MRO*, Case No. 10-2586-EL-SSO, Opinion and Order at 27 (February 23, 2011).

⁹ Duke’s RTO switching costs are a product of Duke’s attempt to transfer control of its transmission assets from the Midwest Independent Transmission System Operator (“MISO”) to PJM Interconnection, LLC (“PJM”). The costs of the move include: MISO exit fees, MISO transmission expansion planning costs (“MTEP”), and PJM regional transmission expansion planning process (“RTEPP”) costs. In its Application, Duke sought to recover these costs through the BTR and Rider RTO.

¹⁰ *Duke MRO*, Case No. 10-2586-EL-SSO, Application for Rehearing at 19-20 (March 25, 2011).

¹¹ *Duke MRO*, Case No. 10-2586-EL-SSO, Opinion and Order at 74-75 (February 23, 2011).

Commission ("FERC") approved transmission costs regardless of the prudence and reasonableness of switching RTOs. The Commission stated:

Riders BTR and RTO would not be approved as part of this application or as part of any MRO application. The Commission believes 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 this Commission to recover the costs associated with its move from the Midwest ISO to PJM, it will be required to demonstrate that its incurred costs are not extraordinary, and that its decision to move to the PJM RTO was reasonable and prudent, before it can recover any of the costs of its move from ratepayers.¹²

On Rehearing, Duke alleges that the Commission's determination was unlawful and unreasonable because its determination misinterprets Section 4928.05, Revised Code, and imposes additional obligations on Duke.¹³

Duke makes three arguments to support its position. First, it asserts that Section 4928.05, Revised Code, is a "supervisory section, rather than an enabling statute" and therefore it is an improper vehicle for establishing a rider.¹⁴ Second, Duke alleges that the Commission imposed additional obligations on Duke by requiring the "Company to demonstrate that its incurred costs under its transmission riders are not extraordinary, and that its decision to move to PJM from the Midwest ISO was reasonable and prudent." *Id.* Third, Duke alleges that Rule 4901:1-36, Ohio Administrative Code ("OAC"), which interprets and implements Section 4928.05, Revised Code, does not support the Commission's determination.¹⁵ Duke alleges that the Rule does not "restrict

¹² *Duke MRO*, Case No. 10-2586-EL-SSO, Opinion and Order at 75 (February 23, 2011).

¹³ *Duke MRO*, Case No. 10-2586-EL-SSO, Application for Rehearing at 19-20 (March 25, 2011).

¹⁴ *Id.* at 19.

¹⁵ *Id.* at 20.

recovery of transmission and transmission-related costs to only those [not] extraordinary costs incurred by the utility."¹⁶

Duke's arguments should be rejected because the Commission correctly found that the Application was not in compliance with the statutory requirements. The remainder of Duke's arguments regarding RTO switching costs should be rejected as it is not a proper subject for rehearing because the matter was not determined by the Commission's Opinion and Order. To the extent the Commission addresses Duke's arguments pertaining to RTO switching costs, they should be rejected. The Commission correctly advised Duke to file a separate application and that RTO switching costs would only be approved if they are deemed prudent. The Ohio Revised Code, the Commission's rules, and federal case law reinforce the Commission's determination.

III. ARGUMENT

The Commission correctly determined that Duke's Application failed to comply with the blending requirements of Section 4928.142, Revised Code. Section 4928.142(D), Revised Code provides:

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.¹⁷

¹⁶ *Id* [sic].

¹⁷ Section 4928.142(D), Revised Code (emphasis added).

Duke's Application provided that the SSO be competitively bid for only the first two years.¹⁸ The statute, however, provides that the SSO must be blended for the first five years. Therefore, the Commission rightly determined that the Application failed to comply with the statutory requirements and could not proceed as filed.

To the extent that Duke complains about the Commission's treatment of its transmission riders, those complaints are not properly before the Commission. Section 4903.10, Revised Code provides that "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."¹⁹ Given that the Commission concluded that the Application could not proceed as filed, it did not address or determine the merits of the various riders.²⁰ Thus, Duke should not be permitted to seek rehearing of any issue that the Commission styled as "guidance". Particularly, Duke should not be permitted to seek rehearing of the Commission's guidance regarding recovery of RTO switching costs. To the extent that the Commission entertains Duke's arguments pertaining to RTO switching costs, they should be rejected for the reasons provided below. Likewise, Duke's allegation that the Commission erred in imposing the requirement that costs incurred must not be extraordinary is not before the Commission at this time.

The Commission rightly rejected Duke's allegation that the Commission has no authority to preclude Duke from collecting RTO switching costs from distribution customers. Section 4928.05, Revised Code, permits the Commission to authorize recovery of transmission-related costs. But nothing in the statute prevents the

¹⁸ *Duke MRO*, Case No. 10-2586-EL-SSO, Application at 11 (November 15, 2010).

¹⁹ Section 4903.10, Revised Code (emphasis added).

²⁰ *Duke MRO*, Case No. 10-2586-EL-SSO, Opinion and Order at 27 (February 23, 2011).

Commission from exercising discretion in its application of that authority. The statute provides:

Notwithstanding Chapters 4905. and 4909. of the Revised Code, commission authority under this chapter shall include the authority 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.

Rule 4901:1-36, OAC—which Duke agrees is the rule that interprets Section 4928.05, Revised Code²¹—further supports this position. Particularly, Rule 4901:1-36-03(A), OAC, provides that, **"[e]ach electric utility which seeks recovery of transmission and transmission-related costs shall file an application with the commission for a transmission cost recovery rider.** The initial application shall include all information set forth in the appendix to this rule."²² Moreover, the Commission rules specifically provide that the application may be set for hearing and authorizes resources to be allocated to review the prudence of the costs to be recovered through the rider.²³

Regardless of the Commission's authority to conduct prudence review pursuant to Rule 4901:1-36, OAC, an extensive body of federal case law holds that the Commission has the authority to prohibit Duke from collecting costs that are not

²¹ *Duke MRO*, Case No. 10-2586-EL-SSO, Application for Rehearing at 20 (March 23, 2011).

²² Rule 4901:1-36-03, OAC (emphasis added).

²³ Rule 4901:1-36-05, OAC; Rule 4901:1-36-03(C), OAC

prudently incurred. *Pike County Light & Power Co. v. Pennsylvania Public Utility Commission*, 465 A.2d 735, 738 (1983).

The Commission should deny Duke's Application for Rehearing. Duke's Application proposed an improper blending period in violation of statutory requirements and the Commission's rules. As a result, the Commission properly determined that the Application could not proceed as filed and the merits could not be addressed. Duke's filing for rehearing of a matter not determined by the Commission's Opinion and Order is inappropriate at this time and also inconsistent with the applicable laws. Regardless, the Commission is correct that it has the authority to deny recovery of RTO switching costs if those costs are deemed imprudent. The Ohio Revised Code, the Commission's rules, and an extensive body of federal case law support this determination.

IV. CONCLUSION

For the reasons stated above, Duke's Application for Rehearing should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Application for Rehearing of Duke Energy Ohio, Inc.* was served upon the following parties of record this 4th day of April 2011, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.


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