



8115

PAUL A. COLBERT
Associate General Counsel
Duke Energy Ohio

RECEIVED-DOCKETING DIV

2007 NOV 23 PM 1:13

PUCO

Duke Energy Corporation
155 East Broad St.
21st Floor
Columbus, OH 43215

614 221 7551

614 221 7556 fax

paul.colbert@duke-energy.com

VIA OVERNIGHT MAIL DELIVERY

November 21, 2007

03-93-EL-ATA
et al

Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

Re: Duke Energy Ohio's Application For Rehearing

Dear Docketing Division:

Enclose please find an original and ten copies of Duke Energy Ohio's Application For Rehearing.

Very truly yours,

Paul A. Colbert
Associate General Counsel

Enclosures

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.

Technician TM Date Processed 11/23/2007

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the :
Consolidated Duke Energy Ohio, : Case Nos. 03-93-EL-ATA
Inc. Rate Stabilization Plan Remand : 03-2079-EL-AAM
and Rider Adjustment Cases : 03-2081-EL-AAM
: 03-2080-EL-ATA

DUKE ENERGY OHIO'S APPLICATION FOR REHEARING

Submitted By:

Paul A. Colbert, Trial Attorney
Associate General Counsel
Rocco D'Ascenzo, Counsel
Duke Energy Ohio
2500 Atrium II, 139 East Fourth Street
P. O. Box 960
Cincinnati, Ohio 45201-0960
(513) 419-1827

Table of Contents

| | |
|--|-----|
| Table of Authorities..... | iii |
| Application for Rehearing..... | 1 |
| Memorandum in Support..... | 4 |
| Introduction..... | 4 |
| Argument..... | 7 |
| I. There is no statute that grants the Commission authority to deprive POLR service to customers, allow customers to waive their right to rely on POLR service, or deprive DE-Ohio just and reasonable compensation for the provision of POLR service..... | 9 |
| A. DE-Ohio charges a market price for: (1) Standing by to provide all load in its certified territory an offer of firm generation service; (2) Service in the event of default by a certified provider; and (3) Accepting migration risk associated with the provision of a fixed price while forgoing the opportunity to adjust its MBSSO price with the market..... | 11 |
| B. DE-Ohio charges a reasonable market price for POLR service..... | 13 |
| C. Customers are harmed by the Commission’s Order through reduced reliability and increased exposure to volatile prices..... | 15 |
| II. DE-Ohio’s non-residential regulatory transition charge continues through December 31, 2010..... | 20 |
| III. Revised Code Section 4928.17 allows DE-Ohio to “divest itself of any generating asset at any time without Commission approval.”..... | 21 |
| Conclusion..... | 22 |
| Certificate of Service..... | 23 |

Table of Authorities

Page No.

Cases:

In re DE-Ohio's MBSSO, Case No. 03-93-El-ATA et al. (Order on Rehearing) (Apr. 13, 2005).....2, 5, 6, 12

In re DE-Ohio's MBSSO, Case No. 03-93-El-ATA et al. (Order on Remand) (Oct. 24, 2007)..... passim

In re DE-Ohio's MBSSO, Case No. 03-93-El-ATA et al. (Entry at 3) (Dec. 9, 2003).....7, 11, 12

In re DE-Ohio's MBSSO, Case No. 03-93-El-ATA et al. (Opinion and Order) (Sept. 29, 2004)..... 20

Constellation v. Pub. Util. Comm'n, 104 Ohio St. 3d 530, 538-539, 820 N.E.2d 885, 892-893(2004).....9

Elyria Foundry v. Pub. Util. Comm'n, 114 Ohio St. 3d 305, 314-315, 871 N.E.2d 1176, 1187-1188 (2007).....19

Ohio Consumers' Counsel v. Pub. Util. Comm'n, 85 Ohio St. 3d 87, 88, 706 N.E.2d 1255, 1256 (1999).....7, 21

Statutes:

Ohio Rev. Code Ann. § 4903.10 (Baldwin 2007)..... 1

Ohio Rev. Code Ann. § 4928.17 (Baldwin 2007).....1, 7, 20, 21

Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007)..... 1, 7, 8, 9, 11, 13, 16

Ohio Rev. Code Ann. § 4909.18 (Baldwin 2007)..... 7, 8

Ohio Rev. Code Ann. § 4928.05 (Baldwin 2007)..... 1,8

Ohio Rev. Code Ann. § 4905.33 (Baldwin 2007)..... 8

Ohio Rev. Code Ann. § 4905.35 (Baldwin 2007)..... 1, 8, 10, 19

Ohio Rev. Code Ann. § 4928.02 (Baldwin 2007)..... 1, 10

Ohio Rev. Code Ann. § 4928.38 (Baldwin 2007)..... 12

Ohio Rev. Code Ann. § 4928.17 (Baldwin 2007).....1, 7, 20, 21

Regulations:

Admin. Code. §4901-1-35 (2007)..... 1

Miscellaneous:

PJM Auction User Information, (Base Residual Market Results at 2009/2010 for RTO at \$102.04 per MW-day, posting date Oct. 17, 2007), *available at* <http://www.pjm.com/markets/rpm/downloads/2009-2010-base-residual-auction-results.xls>..... 14

Midwest Independent System Operator, *2007 Midwest ISO Summer Readiness Workshop* Resource Assessment, April 30, 2007, Revised June 28, 2007, *available at* http://www.midwestiso.org/publish/Document/4aea7c_113d8e80654_7e000a48324a/2007%20Summer%20Readiness%20Workshop-Final_Rev_6-28-07.pdf?action=download&_property=Attachment..... 17

Midwest Independent System Operator, *Proposed Enforcement Concepts for Module E at Slide 11*, (November 1, 2007), *available at* http://www.midwestiso.org/publish/Document/66d196_115dc8fa4a2_7ef20a48324a/ModuleEenforcementproposal_update10-31.pdf?action=download&_property=Attachment..... 18

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

| | | |
|-------------------------------------|---|------------------------|
| In the Matter of the | : | |
| Consolidated Duke Energy Ohio, | : | Case Nos. 03-93-EL-ATA |
| Inc. Rate Stabilization Plan Remand | : | 03-2079-EL-AAM |
| and Rider Adjustment Cases | : | 03-2081-EL-AAM |
| | : | 03-2080-EL-ATA |

DUKE ENERGY OHIO'S APPLICATION FOR REHEARING

Pursuant to R.C. 4903.10 and O.A.C. 4901-1-35, Duke Energy Ohio, Inc., (DE-Ohio) applies for rehearing of the Public Utilities Commission of Ohio's (Commission) Order on Remand (Order) issued on October 24, 2007.¹ The Commission's Order modified DE-Ohio's market-based standard service offer (MBSSO) to the detriment of customers and DE-Ohio.

The modifications to DE-Ohio's MBSSO deprive non-residential switched load that has agreed to remain off of DE-Ohio's standard MBSSO through 2008, of the statutory provider of last resort (POLR) service and deprives DE-Ohio of revenue associated with the provision of POLR service. The Commission's Order conflicts with R.C. 4905.35, 4928.02, 4928.05, 4928.14, and 4928.17, and is unjust and unlawful for the following reasons:

¹ Ohio Rev. Code Ann. § 4903.10 (Baldwin 2007); Ohio Admin. Code. §4901-1-35 (2007).

1. The Commission, without statutory authority, modified DE-Ohio's MBSSO price. Specifically, DE-Ohio objects that: (1) The Order makes the Infrastructure Maintenance Fund (IMF) avoidable for non-residential switched load that agrees to remain off DE-Ohio's standard MBSSO price through 2008 even though such customers may return to DE-Ohio at the monthly average hourly locational marginal price (LMP) MBSSO price;² and (2) The Order makes the Rate Stabilization Charge (RSC) and Annually Adjusted Component (AAC) avoidable for non-residential customers that want the option to return to DE-Ohio at the standard MBSSO price.
2. The Commission's Order, contrary to statute, deprives POLR service to non-residential switched load that agrees to remain off DE-Ohio's standard MBSSO price through 2008.
3. The Commission, without statutory authority, modified DE-Ohio's MBSSO price by making the RSC and AAC avoidable by all switched load.
4. By enabling switched load to avoid paying the IMF, AAC, and RSC, the Commission's Order conflicts with statutory policy because it requires DE-Ohio to subsidize the competitive retail electric service market.
5. The Commission's Order is unjust and unlawful because it requires DE-Ohio to retain its generating assets in conflict with statute.
6. The Commission's Order is unjust and unreasonable because it is ambiguous that the non-residential regulatory transition charge continues through December 31, 2010.

² *In re DE-Ohio's MBSSO*, Case No. 03-93-EI-ATA *et al.* (Order on Rehearing at 4) (April 13, 2005).

DE-Ohio respectfully requests that the Commission reconsider its Order and modify DE-Ohio's MBSSO by reinstating the POLR charges, and DE-Ohio's ability to manage its generation assets as more fully explained in the attached Memorandum in Support.

Respectfully Submitted,

A handwritten signature in black ink, appearing to be "Paul A. Colbert", written over a horizontal line. The signature is somewhat stylized and loops back.

Paul A. Colbert, Trial Attorney
Associate General Counsel
Rocco D'Ascenzo, Counsel
Duke Energy Ohio
2500 Atrium II, 139 East Fourth Street
P. O. Box 960
Cincinnati, Ohio 45201-0960
(513) 419-1827

MEMORANDUM IN SUPPORT

INTRODUCTION:

The Public Utilities Commission of Ohio's (Commission) Order on Remand (Order) upheld several components of Duke Energy Ohio, Inc's (DE-Ohio) market-based standard service offer (MBSSO). The Order, however, makes certain critical changes to DE-Ohio's MBSSO that are not supported by Ohio law. By depriving specified non-residential customers of the opportunity to return to DE-Ohio at the market price and negating DE-Ohio's ability to transfer its generating facilities to an affiliate, the Order directly contravenes Ohio statutes.

DE-Ohio requests rehearing on the Order to ensure that it is able to continue providing reliable service at a just and reasonable price. The Commission decided "that a nonresidential customer who agrees that it will remain off Duke's service and that it will not avail itself of Duke's POLR service does not, by definition, cause Duke to incur any risk."³ DE-Ohio respectfully disagrees with the Commission's conclusion. It is indisputable that a non-residential customer who agrees that it will remain off DE-Ohio's service may still return to DE-Ohio's service at the higher of the standard MBSSO price or the monthly average hourly

³ *In re DE-Ohio's MBSSO*, Case No. 03-93-EI-ATA *et al.* (Order on Remand at 38) (October 24, 2007).

locational marginal (LMP) MBSSO price.⁴ It is also undisputed that DE-Ohio must maintain sufficient capacity to serve such customers. Therefore, the Commission's conclusion is simply incorrect.

If nonresidential customers that agree to remain off of DE-Ohio's market-based standard service offer (MBSSO) are permitted to avoid the Infrastructure Maintenance Fund (IMF), then those customers would have no right to rely on DE-Ohio's capacity, both owned and purchased, to serve their load. The Commission's decision in this regard is not a matter of price risk to the customer who switches and elects to stay off DE-Ohio's system, but is a matter of whether the customer can even be served as required by statute. If a customer waives its ability to rely upon DE-Ohio to provide it POLR service and DE-Ohio does not account for those customers as part of its MBSSO POLR load, capacity necessary to serve those customers may not be available in the market should they need to return to MBSSO service for any reason under the POLR. The revenues provided by the IMF are particularly critical because DE-Ohio is short capacity and must have funding to purchase capacity in the market to assure customers an offer of firm generation service. If DE-Ohio does not secure capacity resources for the nonresidential customers specified by the Commission, the inability to isolate specific customers could result in the unintended consequence that other customers will be without service should capacity be unavailable in the market when load

⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-EI-ATA *et al.* (Order on Rehearing at 4) (April 13, 2005).

returns to DE-Ohio. Such a result is contrary to statute and contrary to the Commission's policy of maintaining reliable service for all customers.

Similarly, the Commission permitted some customers to choose to pay the Rate Stabilization Charge (RSC) and the Annually Adjusted Component (AAC) so that they may return to DE-Ohio at the standard MBSSO price instead of the LMP MBSSO price.⁵ The Order allows all customers to bypass the RSC and AAC depriving customers of the option to pay those charges and therefore, the ability to return to DE-Ohio at the standard MBSSO price. Forcing customers to pay the LMP MBSSO price may deprive such customers of their ability to choose a just and reasonable price, the standard MBSSO price. This is fundamentally unfair to customers and an unjust and unlawful amendment to DE-Ohio's market price because the Commission lacks statutory authority to adjust DE-Ohio's MBSSO price absent DE-Ohio's consent.

The Commission's determination that DE-Ohio's Corporate Separation Plan should "be amended to require it to retain its generating assets during the RSP" also is incorrect and unsupported by the law.⁶ DE-Ohio must maintain the ability to sell, purchase, and dedicate its generating assets to serve MBSSO load to provide a just and reasonable price for customers. DE-Ohio asserts that the Commission lacks the statutory authority to sustain this portion of its Order because R.C.

⁵ *In re DE-Ohio's MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Rehearing at 2-5) (April 13, 2005).

⁶ *In re DE-Ohio's MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Remand at 40) (October 24, 2007).

4928.17 expressly grants DE-Ohio the authority to divest its generating assets without Commission approval.⁷ DE-Ohio respectfully asks the Commission to grant DE-Ohio's Application for Rehearing in regard to these issues.

ARGUMENT:

The issues raised by DE-Ohio in this Application for Rehearing are based upon a common legal foundation. First, the Commission is a creature of statute and therefore, possesses only that statutory authority expressly granted to it.⁸ Second, R.C. 4928.14 requires DE-Ohio to establish an MBSSO that maintains its ability to offer all consumers "a firm supply of electric generation service" and requires DE-Ohio to provide service to all customers served by a certified supplier that defaults on its obligations to its customers.⁹ DE-Ohio filed its MBSSO application under R.C. 4909.18 that permits the Commission to set the matter for hearing if it determines that the application may be unjust or unreasonable.¹⁰

The Commission determined in the above referenced cases that DE-Ohio's MBSSO application might have been unjust or unreasonable and did, in fact, set the matter for hearing.¹¹ At the hearing DE-Ohio had the burden of proof to demonstrate that its application was just and

⁷ Ohio Rev. Code Ann. § 4928.17 (Baldwin 2007).

⁸ *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 85 Ohio St. 3d 87, 88, 706 N.E.2d 1255, 1256 (1999).

⁹ Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

¹⁰ Ohio Rev. Code Ann. § 4909.18 (Baldwin 2007).

¹¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-El-ATA *et al.* (Entry at 3) (December 9, 2003).

reasonable.¹² The Commission was required to determine whether the application was just and reasonable and “issue an appropriate order.”¹³ Revised Code Section 4928.05 sets forth the standard for determining whether an application is just and reasonable.¹⁴ Pursuant to R.C. 4928.05 an MBSSO price that is set below cost for the purpose of destroying competition or that is discriminatory is deemed unjust and unreasonable.¹⁵ Based on the evidence presented in the original record and on remand in these cases, DE-Ohio’s MBSSO and charges meet this statutory standard, and the Commission so held in the Order.¹⁶

The MBSSO includes a POLR set at a market price and that is unavoidable by consumers that use the POLR service.¹⁷ While DE-Ohio agrees with the Commission’s finding that there is an unavoidable POLR set at a market price it disagrees with the Commission’s POLR amendments to DE-Ohio’s MBSSO application. Because DE-Ohio’s POLR charges meet the statutory just and reasonable standard the Commission’s modifications permitting specified non-residential customers to avoid POLR charges is unlawful in conflict with R.C. 4928.14.

¹² Ohio Rev. Code Ann. § 4909.18 (Baldwin 2007).

¹³ *Id.*

¹⁴ Ohio Rev. Code Ann. § 4928.05 (Baldwin 2007).

¹⁵ Ohio Rev. Code Ann. §§ 4905.33, 4905.35, 4928.05 (Baldwin 2007).

¹⁶ *In re DE-Ohio’s MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Remand at 41) (October 24, 2007).

¹⁷ *Id.* at 37-38.

I. There is no statute that grants the Commission authority to deprive POLR service to customers, allow customers to waive their right to rely on POLR service, or deprive DE-Ohio just and reasonable compensation for the provision of POLR service.

The Commission agrees that R.C. 4928.14 requires DE-Ohio to provide POLR service.¹⁸ It also agrees that DE-Ohio must charge a market price for the POLR service, and that such charge should “be unavoidable by any customer who may use the POLR service.”¹⁹ Indeed, the Commission acknowledged that “[t]he Supreme Court of Ohio has approved the concept of an unavoidable charge to recover, for an electric distribution utility, the costs of providing POLR services.”²⁰ Nevertheless, the Commission made three changes to DE-Ohio’s POLR, in its Order.

First, the Commission held that customers that agree to stay off DE-Ohio’s standard MBSSO service through 2008 and return only at the LMP MBSSO price, may avoid the IMF because such customers do “not, by definition, cause Duke to incur any risk.”²¹ Second, the Commission amended DE-Ohio’s POLR charge to make the RSC and AAC avoidable by

¹⁸ *In re DE-Ohio’s MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Remand at 37-38) (October 24, 2007).

¹⁹ *Id.*

²⁰ *In re DE-Ohio’s MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Remand at 31) (October 24, 2007) (citing *Constellation v. Pub. Util. Comm’n*, 104 Ohio St. 3d 530, 538-539, 820 N.E.2d 885, 892-893(2004)).

²¹ *In re DE-Ohio’s MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Remand at 37-38) (October 24, 2007).

all switched load.²² Third, although the Commission acknowledged its April 13, 2005, Order on Rehearing that permitted switched customers to choose to pay the RSC and AAC so they could return at the standard MBSSO price instead of the LMP MBSSO price; that portion of the Commission's Order making the RSC and AAC avoidable by all switched load appears to eliminate the customer choice permitted by the April 13, 2005, Order on Rehearing. All of these changes to the POLR charge are unreasonable, unlawful, and without justification.

The IMF should be unavoidable by all customers because all customers benefit from the dedication of capacity to serve all load, switched and unswitched, in DE-Ohio's service territory. Further, customers that choose to return at the standard MBSSO price instead of the LMP MBSSO price should pay DE-Ohio an amount equivalent to the AAC and RSC. DE-Ohio agrees to permit the RSC and AAC to be avoidable by all switched load if such customers are permitted to return to POLR service at the standard MBSSO price because DE-Ohio agrees that a smaller POLR charge enhances the competitive retail electric market. All customers that benefit from the POLR, however, should pay for the POLR to avoid improper cross subsidies as required by R.C. 4928.02 or discriminatory prices as required by R.C. 4905.35.²³

²² *Id.* at 34-35

²³ Ohio Rev. Code Ann. §§ 4928.02, 4905.35 (Baldwin 2007).

- A. DE-Ohio charges a market price for: (1) Standing by to provide all load in its certified territory an offer of firm generation service; (2) Service in the event of default by a certified provider; and (3) Accepting migration risk associated with the provision of a fixed price while forgoing the opportunity to adjust its MBSSO price with the market.**

The statutory POLR service is defined in R.C. 4928.14(A) and R.C. 4928.14(C).²⁴ Those provisions require DE-Ohio to standby with an offer of firm generation service for *all load* and to offer such service when an alternative supplier defaults.²⁵ The only way to provide the statutory POLR service is for DE-Ohio to maintain and dedicate sufficient generating capacity, owned or otherwise, to serve the entire load in its certified territory. This may be accomplished by constructing or purchasing physical capacity, or, if deemed reliable by the Commission, purchasing financial capacity instruments. Because R.C. 4928.14 requires DE-Ohio to provide the POLR service for all “consumers” in its certified territory, the POLR service benefits all consumers and should be non-by-passable.²⁶

In these proceedings, the Commission asked that DE-Ohio provide an additional POLR service as part of its voluntary rate stabilization plan (RSP) MBSSO.²⁷ One tenet of the RSP MBSSO requested by the

²⁴ Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *In re DE-Ohio's MBSSO*, Case No. 03-93-El-ATA *et al.* (Entry at 5) (December 9, 2003).

Commission was that DE-Ohio provide a stable price for consumers and forfeit its ability to adjust its market price based upon market conditions at the time of the offer.²⁸ This Commission imposed condition caused DE-Ohio to assume additional migration risk because of its inability to respond to market conditions. The rate stabilized price condition of the Commission's proposed RSP MBSSO was, and remains, in direct conflict with R.C. 4928.38 which provides in pertinent part that "the utility shall be fully on its own in the competitive market."²⁹

Under the Commission's RSP MBSSO, the only way that DE-Ohio could protect itself from the market risks associated with the RSP MBSSO, namely the provision of a stabilized market price to consumers insulated from market volatility, was to limit its migration risk through unavoidable charges. The result was the limited ability for switched load to bypass the RSC and AAC, eventually set at 25% of residential switched load and 50% of non-residential switched load.

Customers sought similar protections against price volatility resulting from the RSP MBSSO and proposed that non-residential switched load should maintain the choice to pay the RSC and AAC so that it could return at the standard MBSSO price instead of the more volatile LMP MBSSO price.³⁰ Customers were not willing to risk the volatility of the short term market price. Thus the structures limiting the

²⁸ *Id.*

²⁹ Ohio Rev. Code Ann. § 4928.38 (Baldwin 2007).

³⁰ *In re DE-Ohio's MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Rehearing at 2-5) (April 13, 2005).

avoidability of the RSC and AAC by the percent of switched load and permitting some switched load to pay the RSC and AAC served to limit market risks associated with the RSP MBSSO for DE-Ohio and customers alike.

The unavoidable pricing structure, therefore, properly compensated DE-Ohio for: (1) Owned capacity commitments through the IMF at a market price acceptable to DE-Ohio; (2) The cost of maintaining planning reserves through the SRT; and (3) The additional migration risk associated with the provision of stable prices by limiting the avoidability of the RSC and AAC. Collectively, this pricing structure represents DE-Ohio's statutory compensation for POLR service.³¹ Additionally, the pricing structure permitted customers to pay the RSC and AAC to avoid returning to the MBSSO service at the LMP MBSSO price.

B. DE-Ohio charges a reasonable market price for POLR service.

In its Order the Commission properly found that the market price charged by DE-Ohio for POLR service complies with the statutory requirements and is just and reasonable.³² The Commission's determination that DE-Ohio's POLR price is just and reasonable is supported by the record evidence, which DE-Ohio will not repeat herein. Current market prices also support this conclusion. For example and with respect to market prices, DE-Ohio charges approximately \$45

³¹ Ohio Rev. Code Ann. § 4928.14 (Baldwin 2007).

³² *In re DE-Ohio's MBSSO*, Case No. 03-93-EI-ATA *et al.* (Order on Remand at 41) (October 24, 2007).

million per year through the IMF for committing its capacity to load in its certified territory. If DE-Ohio sold the same capacity in the market today it could receive approximately \$160 million per year.³³

The Commission, however, modified the extent to which DE-Ohio may apply its POLR charge. Specifically, it determined that DE-Ohio may not charge certain customers for POLR service. It also changed the price that switched customers may pay to avoid returning to DE-Ohio at the LMP MBSSO price. DE-Ohio submits that these modifications are not supported by the law or justified by the facts.

The Commission's alterations on Remand are in direct conflict with one of the Commission's enumerated goals in establishing the RSP MBSSO price, namely, financial stability for the utility. The Commission's Order results in DE-Ohio losing approximately \$7 million in revenues from switched load per annum. DE-Ohio will also lose another \$1 million per year associated with non-residential switched load that will no longer pay the RSC and AAC to avoid returning to DE-Ohio at the LMP MBSSO price. If additional non-residential load switches because of the newly determined IMF avoidability, DE-Ohio will lose additional revenue.

³³ See, PJM Auction User Information, (Base Residual Market Results at 2009/2010 for RTO at \$102.04 per MW-day, posting date Oct. 17, 2007), available at <http://www.pjm.com/markets/rpm/downloads/2009-2010-base-residual-auction-results.xls> (last visited November 20, 2007).

In 2004, DE-Ohio was willing to charge less for its POLR service than it could get in the short term market because its RSP MBSSO represented a long term capacity commitment; four years for non-residential load and three years for residential load. Consumers benefited from DE-Ohio's POLR price because they received a lower price than is available to them in the short term capacity markets. The same is true today. Both DE-Ohio and all consumers benefit by receiving price certainty over a longer term. DE-Ohio avoids annual market risks associated with the sale of capacity, and customers gain predictability. It is important to note, however, that if DE-Ohio were to sell capacity into the market, such sales are unavoidable by purchasers. In other words, DE-Ohio is guaranteed to collect its price in a true competitive retail market. The Commission's Order deprives DE-Ohio of expected revenue and places it at risk for additional revenue losses associated with switched load.

C. Customers are harmed by the Commission's Order through reduced reliability and increased exposure to volatile prices.

As the Commission is aware, DE-Ohio's owned generation capacity is insufficient to satisfy the company's total load. To provide the POLR function by maintaining an offer of firm generation service for all load in its certified territory, DE-Ohio must purchase capacity in the market. The revenues that DE-Ohio receives through the IMF, RSC, and AAC, are critical to DE-Ohio's ability to purchase the additional capacity necessary

to maintain the POLR service. If, as the Commission concluded, customers that agree to remain off of DE-Ohio's MBSSO service through 2008, do "not, by definition, cause Duke to incur any risk," then conversely, DE-Ohio is not obligated to serve the load.³⁴ If the Commission's Order regarding avoidability of the IMF stands, DE-Ohio will not have a funding source to purchase capacity for such customers should they need to return to DE-Ohio for any reason. Whether intentional or not, the Commission has now unlawfully transferred all the capacity risk to those customers.

Depriving such customers POLR service is not permissible under R.C. 4928.14, and undermines DE-Ohio's ability to fulfill its obligation to provide POLR service to all consumers. It is unclear what DE-Ohio's options are if the Commission permits those customers to avoid payment of the IMF charge and thereby leave DE-Ohio without the funds to purchase the capacity necessary for such service. Under the Order, an entire class of non-residential customers may avoid paying for any POLR service. Under the circumstances described in the Order, if applicable load seeks to return to MBSSO service, due to supplier default or for any other reason, DE-Ohio may not have access to the capacity resources necessary to provide system reliability.

A capacity shortage could, and indeed, is likely to occur in DE-Ohio's certified territory. DE-Ohio's certified territory is located in the

³⁴ *In re DE-Ohio's MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Remand at 38) (October 24, 2007).

Midwest Independent System Operator (MISO) region. MISO prepares an annual reliability forecast that includes three potential summer load occurrences: (1) Low Load; (2) Mid Load; and (3) High Load.³⁵ According to MISO, if the High Load Forecast occurs there is a 49% chance of insufficient capacity resources.³⁶ The 2007 High Load Forecast for MISO did occur and due only to fortunate weather patterns – the heat was localized in MISO instead of throughout MISO – and a lack of forced outages, there were no adequacy issues during the summer of 2007. Next summer, if there is a reoccurrence of hot weather and new record peak load requirements are set in MISO we may not be as fortunate. Regardless of weather and outage conditions, defaults by competitive suppliers happen. For example, five competitive suppliers have defaulted on their obligations to customers during DE-Ohio's competitive retail gas and electric choice programs. Such suppliers include Titan Energy, Energy Coop, Enron, New Power, and My Choice.

Also, customers return to DE-Ohio's POLR service for other reasons. In the first year of competitive service a group of customers purposely signed nine month contracts to return to standard MBSSO service during the summer peak season. Other customers discover that economics dictate they return to standard MBSSO service. Some

³⁵ See, Midwest Independent System Operator, *2007 Midwest ISO Summer Readiness Workshop* Resource Assessment, April 30, 2007, Revised June 28, 2007, available at http://www.midwestiso.org/publish/Document/4aea7c_113d8e80654_7e000a48324a/2007%20Summer%20Readiness%20Workshop-Final_Rev_6-28-07.pdf?action=download&_property=Attachment (last visited November 20, 2007).

³⁶ *Id.* at Slide 18.

customers may add load that their alternative supplier cannot supply. For all these reasons and others the POLR service is used on a daily basis as customers transfer between DE-Ohio and competitive retail electric service providers.

MISO has proposed targeted load shedding such that capacity deficient load serving entities would be targeted for load shedding. In other words, if DE-Ohio has insufficient capacity to serve its load at peak, MISO will target DE-Ohio and its customers such that DE-Ohio may be unable to maintain reliable service.³⁷ If there is insufficient capacity in MISO and DE-Ohio is targeted for load shedding DE-Ohio could attempt to shed the load of those customers that return to LMP MBSSO service because, pursuant to the Order, such customers have no POLR service. Such targeted load shedding, however, is not practical. Things are just not that simple. Presently, DE-Ohio does not have the capability to target such customers for load shedding, therefore, other customers may suffer.

Additionally, because all customers may avoid the RSC and AAC pursuant to the Order, DE-Ohio would no longer be compensated for maintaining a standard MBSSO pricing option for non-residential switched load. If such customers return to DE-Ohio they will need to

³⁷ See Midwest Independent System Operator, *Proposed Enforcement Concepts for Module E at Slide 11*, (November 1, 2007), available at http://www.midwestiso.org/publish/Document/66d196_115dc8fa4a2_-7ef20a48324a/ModuleEenforcementproposal_update10-31.pdf?action=download&property=Attachment (last visited November 20, 2007).

return at the LMP MBSSO price. No customers will have the ability to choose to return at the standard MBSSO price.

In its Order the Commission held that the RSP MBSSO must be consistent with state policy such that there are no anticompetitive subsidies.³⁸ The Commission's analysis, in that regard, is consistent with *Elyria Foundry v. Pub. Util. Comm'n (Elyria)* that held that it is unlawful to permit subsidies flowing from non-competitive services to competitive services.³⁹ However, in these cases, if the Commission interprets its Order to require DE-Ohio to maintain POLR service for non-residential switched load that agree to stay off MBSSO service and yet requires DE-Ohio to permit other non-residential switched load to return to the standard MBSSO service without paying the RSC and AAC, the remaining consumers are directly subsidizing the POLR service of the non-residential switched load in clear violation of *Elyria*. The Commission should not permit such a result.

The Order, if interpreted to require a subsidy, violates R.C. 4905.35, which prohibits discriminatory pricing.⁴⁰ Under any theory, the Order permitting specified non-residential customers to avoid the IMF, waive any and all POLR service, and if they choose to return at the standard MBSSO price, avoid the RSC and AAC, is unlawful.

³⁸ *In re DE-Ohio's MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Remand at 37) (October 24, 2007).

³⁹ *Elyria Foundry v. Pub. Util. Comm'n*, 114 Ohio St. 3d 305, 314-315, 871 N.E.2d 1176, 1187-1188 (2007).

⁴⁰ Ohio Rev. Code Ann. § 4905.35 (Baldwin 2007).

DE-Ohio respectfully requests that the Commission grant DE-Ohio's Application for Rehearing and require all load to pay the IMF, thereby retaining POLR service for all load at a reasonable price and permit non-residential switched load to pay DE-Ohio an amount equivalent to the old RSC and the AAC in exchange for the ability to return at the standard MBSSO price. If the Commission grants DE-Ohio's Rehearing request, DE-Ohio agrees that all switched load may bypass little g, including the RSC and the AAC.

II. DE-Ohio's non-residential regulatory transition charge continues through December 31, 2010.

In its Order the Commission held the termination of the regulatory transition charge (RTC) at the end of 2008 will encourage competition.⁴¹ The basis for the Commission's Order was page 36 of its original Opinion and Order in these cases discussing residential RTC exclusively.⁴² It is apparent from the Commission's discussion of this issue, therefore, that the Commission did not intend to change its previous holding on the termination date of the RTC for non-residential consumers. DE-Ohio, therefore, requests that the Commission clarify that its Order refers only to residential RTC and not to non-residential RTC.

⁴¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EI-ATA *et al.* (Order on Remand at 38) (October 24, 2007).

⁴² *In re DE-Ohio's MBSSO*, Case No. 03-93-EI-ATA *et al.* (Opinion and Order at 36) (September 29, 2004).

III. Revised Code Section 4928.17 allows DE-Ohio to “divest itself of any generating asset at any time without Commission approval.”⁴³

DE-Ohio agrees with the Commission that it makes sense to dedicate generating assets to serve MBSSO load.⁴⁴ To require DE-Ohio to amend its corporate separation plan “to *require it* to retain its generating assets” as the Commission does in its Order, however, exceeds the Commission’s authority under the law.⁴⁵ It is hornbook law that the Commission has no authority but that granted by statute.⁴⁶ This determination by the Commission exceeds its statutory authority.

Revised Code Section 4928.17 expressly allows DE-Ohio to divest its generating assets without Commission approval.⁴⁷ The Commission may permit DE-Ohio to amend its corporate separation plan so that it is no longer required to transfer its assets to an EWG by a date certain, but cannot forbid it to divest its assets altogether.⁴⁸ Further, it is important that DE-Ohio be permitted to sell and obtain generating assets to maintain a proper, and reasonably priced, resource mix to serve its load. DE-Ohio respectfully requests that the Commission amend its Order to permit DE-Ohio to void its requirement, as part of its corporate

⁴³ Ohio Rev. Code Ann. § 4928.17 (Baldwin 2007).

⁴⁴ *In re DE-Ohio’s MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Remand at 40) (October 24, 2007).

⁴⁵ *In re DE-Ohio’s MBSSO*, Case No. 03-93-El-ATA *et al.* (Order on Remand at 40) (October 24, 2007).

⁴⁶ *Ohio Consumers’ Counsel v. Pub. Util. Comm’n*, 85 Ohio St. 3d 87, 88, 706 N.E.2d 1255, 1256 (1999).

⁴⁷ Ohio Rev. Code Ann. § 4928.17 (Baldwin 2007).

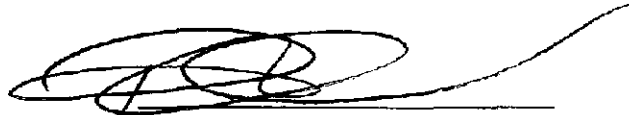
⁴⁸ *Id.*

separation plan, to transfer its assets to an EWG, and rescind the requirement that it retain its generating assets.

CONCLUSION:

For the reasons fully discussed above DE-Ohio respectfully requests the Commission grant this Application for Rehearing to restore the unavailability of the IMF, permit those non-residential customers that choose to do so to pay an amount equivalent to the RSC and AAC for the right to return to DE-Ohio at the standard MBSSO price, and rescind the requirement that DE-Ohio retain its generating assets.

Respectfully Submitted,



Paul A. Colbert, Trial Attorney
Associate General Counsel
Rocco D'Ascenzo, Counsel
Duke Energy Ohio
2500 Atrium II, 139 East Fourth Street
P. O. Box 960
Cincinnati, Ohio 45201-0960
(513) 419-1827

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically on the following parties this 23rd day of November 2007.



Paul A. Colbert

Rocco D'Ascenzo, Counsel

Anne.Hammerstein@puc.state.oh.us
BarthRoyer@aol.com;
Stephen.Reilly@puc.state.oh.us
ricks@ohanet.org;
Scott.Farkas@puc.state.oh.us
shawn.leyden@pseg.com
Thomas.McNamee@puc.state.oh.us
mchristensen@columbuslaw.org;
Werner.Margard@puc.state.oh.us
cmooney2@columbus.rr.com
rsmithla@aol.com
nmorgan@lascinti.org
schwartz@evainc.com
dane.stinson@baileycavalieri.com
cgoodman@energymarketers.com;
sbloomfield@bricker.com
dboehm@bkllawfirm.com;
TOBrien@bricker.com;
mkurtz@bkllawfirm.com;
anita.schafer@duke-energy.com
michael.pahutski@duke-energy.com
paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
tschneider@mgsglaw.com
korkosza@firstenergycorp.com
eagleenergy@fuse.net;
dneilsen@mwncmh.com;
JKubacki@strategicenergy.com
jbowser@mwncmh.com;
lmcaster@mwncmh.com;
sam@mwncmh.com;
bingham@occ.state.oh.us
HOTZ@occ.state.oh.us
SAUER@occ.state.oh.us

MHPetricoff@vssp.com
SMALL@occ.state.oh.us
mdortch@kravitzllc.com