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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) Case No. 10-2586-EL-SSO
Process for Standard Service Offer Electric)
Generation Supply, Accounting Modifications,)
and Tariffs for Generation Service.)

INDUSTRIAL ENERGY USERS-OHIO'S
MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT

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**INDUSTRIAL ENERGY USERS-OHIO'S
MOTION TO DISMISS**

On November 15, 2010, Duke Energy Ohio, Inc. ("DEO") filed an application ("Application") seeking approval of its next standard service offer ("SSO"). More specifically, DEO's Application requests the Public Utilities Commission of Ohio ("Commission") to establish DEO's next SSO pursuant to Sections 4928.141 and 4928.142, Revised Code, and Chapter 4901:1-35, Ohio Administrative Code ("O.A.C."). At page 1 of its Application, DEO alleges "... that the Application and accompanying documents meet the requirements of R.C. 4928.141 and 4928.142 and O.A.C. Chapter 4901:1-35 ..." and asserts that the Application should be approved on or before February 14, 2011.

Sections 4928.141 and 4928.142, Revised Code, permit the Commission to establish an SSO that relies upon a blend of the results of a competitive bidding process ("CBP") approved by the Commission and existing rates subject to potential adjustments. DEO's Application (at page 3) acknowledges that DEO is subject to this blending requirement. Section 4928.142(D), Revised Code, states as follows:

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 ...

At page 11 of the Application, DEO requests the Commission to end the blending period at the end of two years.

For the reasons explained more fully in the Memorandum in Support attached hereto and incorporated herein, the Industrial Energy Users-Ohio ("IEU-Ohio") urges the Commission to dismiss the Application:

Respectfully submitted,



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MEMORANDUM IN SUPPORT

On November 15, 2010, DEO filed an Application seeking approval of its next SSO. More specifically, DEO's application requests the Commission to establish DEO's next SSO pursuant to Sections 4928.141 and 4928.142, Revised Code, and Chapter 4901:1-35, O.A.C. Sections 4928.141 and 4928.142, Revised Code, permit the Commission to establish an SSO that, in DEO's case, relies upon a blend of the results of a CBP approved by the Commission and existing rates subject to potential adjustments.

At page 1 of its Application, DEO alleges "... that the Application and accompanying documents meet the requirements of R.C. 4928.141 and 4928.142 and O.A.C. Chapter 4901:1-35 ..." and asserts that the Application should be approved on or before February 14, 2011.

Sections 4928.141 and 4928.142, Revised Code, permit the Commission to establish SSO prices that rely upon a blend of the results of a CBP approved by the Commission and existing rates subject to potential adjustments. DEO's Application (at

page 3) acknowledges that DEO is subject to this blending requirement. Section 4928.142(D), Revised Code, states as follows:

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 ...

At page 11 of the Application, DEO requests the Commission to end the blending period at the end of two years and approve the use of a CBP to set its market rate offer ("MRO") form of the SSO. DEO has not amended its Application.

Section 4928.141(A), Revised Code, states that "[o]nly a standard service offer authorized in accordance with section 4928.142 or 4928.143 of the Revised Code, shall serve as the utility's standard service offer for the purpose of compliance with this section ..." As applied to DEO and to effectively engage the Commission's jurisdiction, Section 4928.142(D), Revised Code, obligates DEO to file an application that requires that a portion of its SSO load shall be competitively bid for the first five years of the MRO. Because of the clear conflict between the statutory mandate regarding the form and content of an MRO application and DEO's Application, IEU-Ohio urges the Commission to dismiss the Application. It is IEU-Ohio's position that the Commission does not have subject matter jurisdiction to consider an MRO application that does not propose to competitively bid a portion of the SSO for the first five years. Contrary to the allegations in DEO's Application, the Application does not meet the requirements of Sections 4928.141 and 4928.142, Revised Code, and Chapter 4901:1-35, O.A.C.

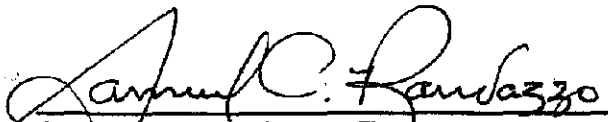
Since DEO's Application would, if approved, cause all (and not a portion) of the SSO load to be competitively bid after two years, it is IEU-Ohio's position that:

(1) DEO's Application cannot satisfy the requirements that attach to its first MRO application; and, (2) the Commission, therefore, has no authority to consider or act upon DEO's Application.

IEU-Ohio is mindful that the evidentiary phase of this proceeding is scheduled to commence soon. It is clear at this point that DEO does not intend to amend its Application. Accordingly, IEU-Ohio is raising a threshold question (through its Motion to Dismiss) which IEU-Ohio believes would be best resolved soon. Based on IEU-Ohio's understanding of the requirements of Sections 4928.141 and 4928.142, Revised Code, the jurisdictional defect in DEO's Application cannot be cured through the presentation of evidence. A hearing on the merits of DEO's Application would therefore do nothing more than waste the time and resources of the Commission, DEO and other parties.

For the reasons stated herein, IEU-Ohio urges the Commission to dismiss DEO's Application because DEO failed to conform the Application to the mandatory statutory requirements. IEU-Ohio also urges the Commission to find that DEO's Application cannot be its first MRO application because the Application failed to satisfy the statutory requirements.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Motion to Dismiss and Memorandum in Support* was served upon the following parties of record this 4th day of January 2011, via electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.



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