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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

**MEMORANDUM CONTRA OF CONSTELLATION ENERGY COMMODITIES
GROUP, INC., CONSTELLATION NEWENERGY, INC. AND
THE RETAIL ENERGY SUPPLIERS ASSOCIATION**

Pursuant to Rule 4901-1-12B of the Ohio Administrative Code, Constellation Energy Commodities Group, Inc., Constellation NewEnergy, Inc. ("CCG") and The Retail Energy Suppliers Association ("RESA") present this Memorandum Contra to the Motion to Dismiss filed by the Industrial Energy Users-Ohio's on January 4, 2011. Industrial Energy Users-Ohio ("IEU") argue that Duke Energy Ohio, Inc.'s application seeking approval of its next standard service offer ("SSO") should be dismissed because the Public Utilities Commission of Ohio lacks "subject matter jurisdiction" to even review the application. IEU asserts that Sections 4928.141 and 4928.142, Revised Code and OAC 4901:1-35 require a mandatory blending period of five years. IEU further claims that the alleged blending period discrepancy precludes the Commission from exercising any authority and thus it cannot "consider or act upon" Duke Energy Ohio, Inc.'s application. Since it cannot act the IEU believes the Commission must dismiss the application and close the docket.

The legal cornerstone of IEU's Motion to Dismiss then rests on the premise that if an application from a regulated entity does not meet statutory or Ohio Administrative Code rule

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requirements the Commission lacks subject matter jurisdiction to even consider the application.

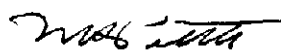
The IEU's motion offers no legal support for this premise of limited jurisdiction for the Commission and it seems at odds with clear statutory scheme established in Title 49 of the Revised Code for public utilities. Any business concern that meets the definition of a public utility under Section 4905.02, Revised Code is subject to the jurisdiction of the Commission by virtue of Section 4905.05, Revised Code. Further, Section 4905.06, Revised Code grants to the Commission "general supervision" over public utilities. There is no dispute that Duke Energy Ohio is a public utility and as such subject to the jurisdiction of the general supervisory authority of the Commission.

The reason the General Assembly has given the Commission general supervision is that otherwise there would not be a mechanism to determine whether an application in fact met the statutory standard. In other words, how could the Commission determine if an application meets the statutory standards unless the Commission takes jurisdiction and reviews it? More importantly, if the Commission does not get jurisdiction until the application meets the statutory and rule standards, then the Commission has no authority to amend applications, only reject them until they meet the standards.

There is no provision or part of Sections 4928.141, 4928.142, Revised Code or O.A.C. 4901:1-35 et. seq. which purports to limit the Commission's jurisdiction to review applications from public utilities over which the Commission has general supervisory power. Whether the application in the matter at bar complies with the statutory standards of Sections 4928.141, 4928.142, Revised Code is a question best suited for determination after a hearing when there is a factual record. Further, the Commission, because it has jurisdiction, can order changes to the application if it determines such is necessary to bring the application into compliance.

WHEREFORE, the motion for dismissal should be denied, and the Commission should continue with the scheduled proceeding to review Duke Energy Ohio, Inc.'s application on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served upon the following persons via email this 7th day of January, 2011:



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