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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

INITIAL BRIEF OF INDUSTRIAL ENERGY USERS-OHIO'S

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I. INTRODUCTION

In 2008, the General Assembly enacted Amended Substitute Senate Bill 221 ("SB 221"), which Governor Strickland ("Governor") signed on May 1, 2008. SB 221 became effective on July 31, 2008. SB 221, among many other things, revised Ohio law related to economic or price regulation of electric distribution utilities' ("EDU") Standard Service Offer ("SSO").

Rather than leaving the Public Utilities Commission of Ohio ("Commission") with only the post-market development period's market-based approach that was the focus of Section 4928.14, Revised Code, as created by Amended Substitute Senate Bill 3 ("SB 3"), SB 221 created two avenues by which the Commission was authorized to establish pricing for the SSO [the service offering which EDUs must make available to all retail customers not obtaining electricity from a competitive supplier]. SB 221 preserved, more or less, SB 3's market-based approach (now called the "market rate offer" or "MRO") in Section 4928.142, Revised Code, but it added Section 4928.143, Revised Code, to give the Commission explicit authority, subject to specific statutory criteria and the EDU's veto right, to approve or modify and approve an "electric security plan" ("ESP").

Regardless of whether an EDU elects the MRO or ESP option, Section 4928.141, Revised Code, requires the SSO to be comparable and non-discriminatory and to include "...all competitive retail electric services necessary to maintain essential electric service to consumers, including a firm supply of electric generation service." Section 4928.141, Revised Code, also states that only an SSO authorized in accordance with Sections 4928.142 or 4928.143, Revised Code "...shall serve as the utility's standard service offer for the purpose of compliance with this section; and that standard service offer shall serve as the utility's default standard service offer for purpose of section 4928.14 of the Revised Code."

SB 221 also amended Section 4928.17(E), Revised Code. regarding corporate separation plans for Ohio EDUs. The General Assembly created Section 4928.17, Revised Code, in SB 3 to insert corporate separation safeguards into the comprehensive package of statutory changes "deregulating" the generation function. To further this goal, Section 4928.17(E), Revised Code, as created in SB 3, permitted an EDU to transfer any generating asset it owned at any time without prior Commission approval. However, in SB 221, the General Assembly amended Section 4928.17(E), Revised Code, to require Commission approval before an EDU can sell or transfer any of the generating assets that it owns in whole or in part.

In the course of performing its SSO-related duties, the Commission has emphasized that the statutory criteria that directly attach to the establishment of an SSO are only a starting place:

> Standard service offers remain subject to Commission jurisdiction under Chapter 4928 of the Revised Code. And, standard service offers must be consistent with state policy under Section 4928.02, Revised Code. *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Thus, while a standard service offer price need not reflect the sum of specific cost components, the result must produce reasonably priced retail electric service, avoid anticompetitive subsidies flowing from noncompetitive to competitive services, be consistent with protecting consumers from market deficiencies and market power, and meet other statutory requirements.[1]

Following the enactment of SB 221, the Commission reinforced its commitment to fulfill the larger obligations contained in Chapter 4928, Revised Code, stating:

> The Commission notes that Section 4928.06, Revised Code, makes the policy specified in Section 4928.02, Revised Code, more than a statement of general policy objectives. **Section 4928.06(A), Revised Code, imposes on the Commission a specific duty to "ensure the policy specified in section 4928.02 of the Revised Code is effectuated."** We have done so in rules governing MRO applications and will do so through our implementation of Section 4928.142, Revised Code, in this case.
>
> Moreover, we disagree with FirstEnergy's claim that Section 4928.02, Revised Code, does not impose any obligations or duties upon the Companies. **The Ohio Supreme Court recently held that the Commission may not approve a rate plan which violates the policy provisions of Section 4928.02, Revised Code**. *See Elyria Foundry v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305. Accordingly, an electric utility should be deemed to have met the statutory requirements of Section 4928.142(A), Revised Code, only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in Section 4928.02, Revised Code.[2]

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[1] *In the Matter of the Application of the Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Ration Option Subsequent to the Market Development Period*, Case No. 03-93-EL-ATA, *et al.*, Order on Remand at 37 (October 24, 2007).

[2] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO, Opinion and Order at 13-14 (November 25, 2008) (hereinafter "*FirstEnergy MRO*") (emphasis added); *see* also *Elyria Foundry v. Public Utilities Commission*, 114 Ohio St. 3d. 305 (2007).

On November 15, 2010, Duke Energy Ohio, Inc. ("DEO") filed an Application for Approval of an MRO.[3] The Application (at page 1) states that it was filed pursuant to Sections 4928.141 and 4928.142, Revised Code. Upon closer inspection, however, the claims made in and the relief sought by the Application conflict with the requirements of Section 4928.141, Section 4928.142 and the Commission's precedent regarding the requirements that an EDU must satisfy to secure approval of an SSO pursuant to Chapter 4928, Revised Code.

For the reasons explained below, the Industrial Energy Users-Ohio ("IEU-Ohio) urge the Commission to find that DEO's Application violates essential requirements of Ohio law that apply to the MRO option. IEU-Ohio also urges the Commission to provide such other relief as may be appropriate based on the law and facts.

IEU-Ohio's arguments below are focused on the conflict between DEO's Application and applicable legal requirements and DEO's requested relief to establish placeholder mechanisms that will, if approved, make it easier for DEO to press a future legal claim that the Commission has no authority to determine what Federal Energy Regulatory Commission ("FERC") approved charges may be recovered from electric consumers. IEU-Ohio's failure to address other issues in this brief should not be construed to indicate that IEU-Ohio does not dispute positions advanced by DEO but not addressed by IEU-Ohio in this brief.

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[3] *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) (citation omitted) (hereinafter "Application").

II. DEO's APPLICATION

DEO's Application asks the 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.[4]

[4] It is IEU-Ohio's position that the Commission lacks subject matter jurisdiction to entertain DEO's Application because it proposes an improper blending period as IEU-Ohio explained in its Motion to Dismiss filed in this proceeding on January 4, 2011. IEU-Ohio renews its Motion to Dismiss below. But even assuming that the Commission has jurisdiction to address DEO's Application, any MRO approved by the Commission must require DEO to implement a blending period that complies with the five-year minimum statutory period. Of course, the Commission has discretion to extend the blending period or to allow DEO to eliminate the blend once the five-year required blending period expires.

If the blending period proposed in the Application is approved, DEO agrees to freeze riders for fuel and purchase power ("FPP") and environmental investment ("EIR"). But if the Commission directs DEO to extend the blending period, DEO then proposes that it be permitted to adjust Riders FPP and EIR to recover incremental costs associated with fuel and purchase power and environmental investment, as permitted by Section 4928.142(D)(4).[5] DEO's witness, Brian D. Savoy, admitted that there may be benefits — such as tax benefits — that would offset these incremental costs.[6] DEO's Application, however, does not provide a process for identifying and including any benefits that may become available to DEO in the calculation of these Riders.

The Application also requests "placeholder" approval of Riders Regional Transmission Operator ("RTO") and Base Transmission Rider ("BTR"). DEO has not identified the level of revenue that would be collected from customers if these RTO and BTR Riders are approved by the Commission. Qualitatively, these Riders appear to be designed to require DEO's Ohio customers to absorb complete responsibility for "exit fees" associated with DEO's election to terminate its transmission-owner membership status in the Midwest Independent Transmission System Operator ("MISO"), costs associated with MISO's Transmission Expansion Plan ("MTEP"), costs related to the integration of DEO (as a transmission owner) into PJM Interconnection LLC ("PJM") and regional transmission expansion planning process ("RTEPP") costs. At page 5 of its Application, DEO stated that it discussed its RTO-related plans even though the subject need not be addressed to secure approval of an MRO. Given the lack of detail provided

[5] Co. Ex. 16 at 13.

[6] TR. Vol. III at 555-556.

by DEO regarding these Riders and their placeholder status, DEO has not explained why it is necessary that these Riders be included as part of its MRO.

DEO's intended future use of these placeholder Riders was made clear by the testimony it sponsored during the evidentiary hearings. DEO witness William Don Wathen Jr. testified that, if approved, Rider BTR will include regional transmission expansion costs to the extent that DEO is charged these FERC-authorized costs.[7] Mr. Wathen cited an April 30, 2010 Post Hearing Brief of the Commission Staff in Case No. 10-388-EL-SSO in support of his assertion (clearly a legal opinion) that Section 4928.05, Revised Code, compels the Commission to allow DEO to recover (from retail customers) MISO exit fees, duplicative transmission expansion costs (RTEPP and MTEP) and PJM integration costs.[8] In his testimony, Mr. Wathen stated that "**the Company is exercising its rights**, as fully supported by the Staff's comments in FirstEnergy's ESP case, **to recover all costs billed to the Company under FERC-approved tariffs**."[9]

Mr. Wathen further illuminated DEO's ambitions during his cross-examination. Mr. Wathen offered his opinion that Section 4928.05, Revised Code, requires automatic pass-through of any FERC-approved costs to retail customers.[10] Mr. Wathen also opined that any consideration by the Commission, pursuant to Rule 4901:1-36-03(C),

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[7] Co. Ex. 16 at 24.

[8] Co. Ex. 16 at 24-25.

[9] *Id* at 25 (emphasis added).

[10] Tr. Vol. III at 645-646.

O.A.C., of whether such costs were prudently incurred is trumped by Section 4928.05, Revised Code.[11]

Any remaining mystery about DEO's intended future use, this error was made because somebody made a global change of Riders BTR and Rider RTO was eliminated by a comparison of DEO's proposed tariff sheets for these placeholder Riders with current tariff sheets. Language in DEO's current Commission-approved tariff that expressly provides that any costs recovered through the Transmission Cost Recovery Rider ("Rider TCR") require approval by both FERC and the Commission. DEO deleted this language from its proposed Rider RTO and omitted the conditioning language from proposed Rider BTR.[12]

Of course, if DEO's legal position about the nature and scope of the Commission's jurisdiction with regard to FERC-approved rates and charges is correct, then there is no need for the placeholder Riders in the first place.

DEO's direct case in support of its Application failed to disclose DEO's real reason for moving its transmission-owner membership from MISO to PJM. But the real reason was identified through cross-examination and exhibits that are now part of the evidentiary record before the Commission. The so-called RTO realignment activities of DEO rely on the FERC-enabled opportunity for DEO to jump from one RTO to another for the purpose of [redacted]

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[11] Tr. Vol. III at 646. Of course, DEO fails to mention that FERC does not support its position. In fact, FERC, in its recent Realignment Order approving an initial step in DEO's move from MISO to PJM, explicitly stated that "... nothing in this order should be interpreted as interfering with state regulatory authority or requirements." *Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc.*, 133 FERC ¶ 61,058 at P 18 (2010) ("Realignment Order").

[12] Co. Ex. 17 at Attachment JEZ-2, at 86 of 152 and 136 of 152; *see also* Tr. Vol. III at 701-702.

that are owned or controlled by DEO or affiliates. Corporate separation requirements, principles of comparability and non-discrimination and the alleged independence of RTOs are all things that are supposed to preclude an EDU from using its vertically integrated status and control over regulated services (such as transmission) [redacted] But there is no hint in the record that these requirements, principles or FERC-approved independent institutions were treated by DEO as anything more than a speed bump on the road to higher consumer prices.

While DEO's RTO move objective may be troubling from a legal and public interest perspective, there seems to have been no internal discipline within DEO or its parent organization's governance structure to manage the risk that the corporate interest [redacted] might cross the line. It does not appear that DEO (the owner of the transmission assets) employees performed any of the studies that were relied upon by DEO's Transaction Review Committee ("TRC"). In fact, Ms. Janson, President of DEO, stated that studies and analyses to quantify the benefits of moving to PJM were not conducted at her direction[13] or by the direction of employees under her supervision.[14]

The decision to transfer control of DEO's functionally-separated transmission assets from MISO to PJM was made by DEO's TRC and DEO's Chief Executive Officer, James Rogers. Based on the testimony of DEO's witnesses and exhibits that are

[13] The person who did direct that studies and analyses be performed to evaluate withdrawing from MISO is even more troubling. Ms. Janson stated on cross-examination that those studies were performed under the supervision of Lee Barrett. But Mr. Barrett is under the supervision of Mr. Whitlock, President of Midwest Commercial Generation. Tr. Vol. I at 57; *see also* Tr. Vol. II at 358. Such conduct raises serious questions regarding DEO's compliance—or non-compliance—with corporate separation requirements. *See also* Section 4828.17, Revised Code; Rule 4901:1-20-16, O.A.C.

[14] Tr. Vol. II, Confidential Excerpts, at 340.

documents that the TRC relied upon in making the decision to withdraw from MISO, it is apparent that DEO's decision was dictated by the objective [redacted].[15] More specifically, the testimony and exhibits show that DEO's RTO move was driven by the desire to [redacted] to the PJM footprint:

> **Business Case Benefits**
>
> PJM's forward capacity clearing market is based on the intersection of supply and demand. DEO's market area footprint in MISO (i.e. all generation and load) [redacted] Transferring DEO's transmission assets, including accompanying load and generation assets, from MISO to PJM, [redacted] that [redacted] the [redacted]. As a result, DEO's new overall net generation capacity [redacted] is [redacted] from [redacted] to roughly [redacted] thus [redacted] . . . . Under the Base Case, the proposed transfer creates approximately [redacted] in [redacted] and a total contribution to [redacted] over a [redacted].[16]

Each of the documents relied upon by the TRC confirms that the RTO move was and is being driven by the goal of [redacted].[17] Of course, [redacted], especially

[15] IEU-Ohio Ex. 4 at 2 and 3 of 4; IEU-Ohio Ex. 1 at 1, 3, 4, and 5 of 5; IEU-Ohio Ex. 2 at 1 of 3; IEU-Ohio Ex. 3 at 3 and 4 of 7; IEU-Ohio Ex. 4 at 2 and 3 of 4; IEU-Ohio Ex. 5 at 1 of 1; IEU-Ohio Ex. 6 at 1 of 1; IEU-Ohio Ex. 8 at 1-5 of 5; IEU-Ohio Ex. 9 at 2 and 3 of 4; IEU-Ohio Ex. 10 at 2-4 of 7.

[16] IEU-Ohio Ex. 1 at 1 of 5 (citation omitted).

[17] IEU-Ohio Ex. 4 at 2-3 of 4; IEU-Ohio Ex. 1 at 1, 3, 4, and 5 of 5; IEU-Ohio Ex. 2 at 1 of 3; IEU-Ohio Ex. 3 at 3-4 of 7; IEU-Ohio Ex. 4 at 2-3 of 4; IEU-Ohio Ex. 5 at 1 of 1; IEU-Ohio Ex. 6 at 1 of 1; IEU-Ohio Ex. 8 at 1-5 of 5; IEU-Ohio Ex. 9 at 2-3 of 4; IEU-Ohio Ex. 10 at 2-4 of 7.

if DEO can bypass the blending period requirements in Section 4928.142, Revised Code.

The corporate [redacted] is further demonstrated by DEO's interaction with MISO. On March 22, 2010, B. Keith Trent and Charles Whitlock both attended a meeting with John Bear and Richard Doying of MISO.[18] Both Messrs Trent and Whitlock work for DEO's unregulated generation business, yet they met with MISO to discuss concerns of DEO, the regulated utility.[19] Chief among those concerns was MISO's lack of a capacity market for generation. IEU-Ohio Ex. 12, Attachments B and C.

When the TRC made the decision to withdraw from MISO, the TRC took into consideration [redacted].[20] The TRC assumed that — [redacted][21] On cross-examination, Ms. Janson [redacted].[22]

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[18] Tr. Vol. II at 372-374.

[19] When Ms. Janson, the President of DEO, was asked whether DEO ever communicated a June 1, 2014 withdrawal date to MISO, she responded, "I am not—I don't know specifically. I think you should ask either Witness Whitlock or Witness Trent." Tr. Vol. II at 316.

[20] IEU-Ohio Ex. 1 at 2-3 and 5 of 5; IEU-Ohio Ex. 2 at 2-3 of 3; IEU-Ohio Ex. 3 at 6-7 of 7; IEU-Ohio Ex. 4 at 2 of 4; IEU-Ohio Ex. 5 at 1 of 1; IEU-Ohio Exhibit 9 at 4 of 4; IEU-Ohio Ex. 10 at 2-4 of 7.

[21] IEU-Ohio Ex. 1 at 1-3 & 5 of 5, IEU-Ohio Ex. 2 at 1 of 3; IEU-Ohio Ex. 3 at 6 of 7; IEU-Ohio Ex. 4 at 2-3 of 4; IEU-Ohio Ex. 5 at 1 of 1; IEU-Ohio Ex. 8 at 1-5 of 5; IEU-Ohio Ex. 9 at 3-4 of 4; IEU-Ohio Ex. 10 at 2-4 of 7.

[22] Tr. Vol. II, Confidential Transcript, at 342-343.

Given the revenue and profit enhancing objective behind the RTO move, one might expect DEO to be able to successfully resist the temptation to also propose to raise electric rates in Ohio by slamming MTEP costs, costs related to the integration of DEO (as a transmission owner) into PJM and RTEPP costs onto the bills of its customers through the placeholder Riders. But DEO's Application and the positions it has advanced throughout this proceeding demonstrate that this expectation should not apply in the case of DEO. Through its proposed placeholder Riders, DEO is effectively asking the Commission to permit the RTO-related move costs to become the responsibility of DEO's customers [redacted]. [redacted].[23]

DEO's Application also seeks approval of another new rider: the Supplier Cost Reconciliation Rider ("Rider SCR"). As proposed and if approved, Rider SCR would permit DEO to reconcile the revenues collected from SSO customers to the payments DEO must make to winning bidders that acquire tranches under DEO's proposed CBP.[24] Rider SCR as proposed is avoidable, maybe. If the rate to be collected through Rider SCR exceeds five percent (5%) of the SSO generation price, Rider SCR becomes non-bypassable, and all customers, including shopping customers, become subject to Rider SCR.[25]

[23] Tr. Vol. II, Confidential Transcript, at 342-343.

[24] Co. Ex. 16 at 18.

[25] *Id.*

At page 5 of the Application, DEO noted its "...intention of acquiring generation supply from diverse, competitive suppliers..." and informed the Commission of DEO's "...intention to subsequently seek approval to transfer its legacy generation assets." Thus, the Application itself did not seek authority to transfer legacy or any other DEO generating assets.

III. ARGUMENT

A. DEO's Application Must Satisfy Both the Statutory Criteria for an MRO and State Policy Requirements.

An MRO must satisfy the criteria of Section 4928.142, Revised Code. As discussed above, however, consideration of the direct statutory criteria is only the starting place for the evaluation that must be conducted by the Commission. The Commission cannot approve an MRO that does not advance state policy requirements.

DEO's Application is deficient. The Application is not consistent with the statutory requirements in Section 4928.142, Revised Code. The Application does not allege the relief requested is consistent with the requirements of Section 4928.02, Revised Code. The evidence DEO offered in support of its Application does not show that the relief requested by DEO is consistent with the requirements of Section 4928.02, Revised Code. DEO has not made a *prima facie* case in support of the relief it requested in its Application even though DEO has the affirmative duty to make such a case.

Based on the record in this proceeding and applicable legal requirements, IEU-Ohio urges the Commission to dismiss DEO's Application without prejudice based on DEO's failure to sustain DEO's burden of proof.

B. Requiring DEO's Distribution Customers to Bear Responsibility for MISO Exit Fees, MTEP and RTEPP Costs, and PJM Integration Costs Fails to Align Costs with Benefits.

To the extent that the Commission does not dismiss the Application as a result of DEO's failure to sustain its burden of proof, IEU-Ohio nonetheless urges the Commission to reject DEO's proposal to saddle customers with the costs of the RTO move discussed herein [redacted]. This proposal violates the regulatory principle that works to cause benefits to flow to the persons responsible for the costs. Under longstanding regulatory principle, costs recovered through rates must be aligned with the benefits associated with such costs.[26]

C. Requiring DEO's Distribution Customers to Bear the Costs of MISO Exit Fees and Duplicative Transmission Expansion Costs While Allowing the [redacted] is an Unlawful Subsidy.

A regulated utility cannot subsidize its unregulated generation business. Such conduct is against the policy of the state of Ohio. Specifically, it is the policy of the state of Ohio to:

[26] See *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of Vectren Energy Delivery of Ohio, Inc. and Related Matters*, PUCO Case Nos. 00-220-GA-GCR, *et al.*, Opinion and Order at 12 (September 25, 2001) (requiring gas cost recovery ("GCR") customers to receive all of the benefits of pipeline capacity release transactions because GCR customers purchased the pipeline capacity, unless otherwise approved by the Commission. The Commission further explained that only the Commission can make an apportionment of benefits decision and chided Dayton Power and Light Company ("DP&L") for taking benefits associated with transactions utilizing ratepayer-funded assets without Commission approval); *In the Matter of the Application of the Cleveland Electric Illuminating Company for an Increase in Rates*, PUCO Case No. 84-188-EL-AIR, Opinion and Order at 21 (March 7, 1985) (mandating that off-system sales revenue be shared with jurisdictional customers because the utility uses plant paid for by jurisdictional customers to make the off-system sales); *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio and Related Matters*, PUCO Case Nos. 03-219-GA-GCR, *et al.*, Opinion and Order at 12 (March 2, 2005) (noting the Commission has "long required" local distribution companies ("LDCs") to credit GCR customers with revenue from the third-party use of GCR-financed assets).

> (H) Ensure effective competition in the provision of retail electric service **by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service** or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates;[27]

Similarly, Section 4928.141, Revised Code, requires the SSO to be comparable and non-discriminatory.

Section 4928.06, Revised Code, requires the Commission to ensure that the policy in Section 4928.02, Revised Code, is advanced by the SSO it may approve for any EDU. DEO's Application is part of a larger scheme [redacted]. DEO is pushing to transfer control over its transmission assets from MISO to PJM for the purpose of [redacted].[28] According to DEO, the RTO move also has costs — MISO exit fees, duplicative transmission expansion costs (MTEP and RTEPP), and PJM integration costs. DEO's Application proposes to collect the RTO move costs (that arise exclusively from its voluntary election) from DEO's distribution customers through the placeholder Riders. As proposed, DEO's distribution customers would pay the costs of the RTO move [redacted] that are created by the RTO move according to [redacted]. The end result is an unlawful subsidy flowing through DEO's placeholder Riders paid by DEO's customers [redacted]. This end result conflicts with the

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[27] Section 4928.02(H), Revised Code (emphasis added); *see also Elyria Foundry v. Public Utilities Commission*, 114 Ohio St. 3d. 305, 314-316 (2007).

[28] IEU-Ohio Ex. 4 at 2 and 3 of 4; IEU-Ohio Ex. 1 at 1, 3, 4, and 5 of 5; IEU-Ohio Ex. 2 at 1 of 3; IEU-Ohio Ex. 3 at 3 and 4 of 7; IEU-Ohio Ex. 4 at 2 and 3 of 4; IEU-Ohio Ex. 5 at 1 of 1; IEU-Ohio Ex. 6 at 1 of 1; IEU-Ohio Ex. 8 at 1-5 of 5; IEU-Ohio Ex. 9 at 2 and 3 of 4; IEU-Ohio Ex. 10 at 2-4 of 7.

requirements of Section 4928.02(H), Revised Code. *See also Elyria Foundry v. Public Utilities Commission*, 114 Ohio St. 3d 305, 314-316 (2007).

Accordingly and assuming the Commission does not dismiss DEO's Application for failure of DEO to sustain its burden of proof, IEU-Ohio urges the Commission to find that DEO's Application fails to comply with state policy that requires that the SSO satisfy non-discrimination and comparability requirements. By design, DEO's Application is part of a larger scheme to secure outcomes that conflict irreconcilably with the letter and spirit of Chapter 4928, Revised Code.

D. Rider SCR Should be Fully Avoidable by Shopping Customers.

Rider SCR is one of several new Riders proposed by DEO in this proceeding. As proposed, Rider SCR allows DEO to reconcile the revenues collected from SSO customers with the payments DEO must make to winning bidders that acquire tranches under DEO's proposed CBP.[29] Rider SCR as proposed is avoidable, but only maybe. If the rate to be collected through Rider SCR exceeds 5% of the SSO generation price, Rider SCR becomes non-bypassable, and all customers, including shopping customers, then would pay Rider SCR.[30]

As discussed in the testimony of Commission Staff witness Tamara S. Turkenton, if the Commission approves Rider SCR it should direct DEO to modify Rider SCR such that it is fully avoidable by shopping customers.[31] Rider SCR recovers costs that are incurred as a result of serving customers that elect to remain on SSO. As such,

[29] Co. Ex. 16 at 18.

[30] *Id.*

[31] Staff Ex. 1 at 8.

it is inconsistent with the principles of cost causation to subject shopping customers to Rider SCR. Further, DEO has offered no compelling evidence that the threshold trigger to make Rider SCR non-bypassable is necessary. In fact, DEO witness William Don Wathen Jr. testified that until such time as 100% of the SSO load is being procured through an auction, the likelihood of the threshold being triggered is minimal.[32]

E. DEO Has Failed to Identify the Benefits That Must Be Flowed Back to Customers.

DEO President Julie S. Janson testified that DEO's Application seeks Commission approval of its plan to transition to 100% of SSO being supplied through a CBP in the third year of the plan, and that DEO was not seeking guidance from the Commission that a longer blending period to transition to market is required.[33] But the testimony of DEO witness William Don Wathen Jr. suggests that DEO wanted to hedge the possibility that the Commission might find the proposed 29-month blending period was unlawful. Specifically, Mr. Wathen testified that if the Commission accepted a blending period that ended on June 1, 2014 as proposed by DEO, the company would agree to freeze Riders (FPP and EIR) to recover costs associated with incremental fuel and purchased power costs and incremental environmental costs.[34] However, if the Commission directed DEO to extend its blending period, DEO would then activate the otherwise mothballed Riders FPP and EIR to recover costs associated with incremental fuel and purchased power costs and incremental environmental costs.[35]

[32] Co. Ex. 16 at 20.

[33] Tr. Vol. I at 41-42.

[34] Co. Ex. 16 at 13.

[35] *Id.* at 13-14; *see also* Tr. Vol. III at 591-593.

DEO's Application for an MRO has been submitted pursuant to Sections 4928.141 and 4928.142, Revised Code.[36] Pursuant to Section 4928.142(D), Revised Code, an EDU is permitted to propose adjustments to the portion of a blended SSO rate set by the legacy ESP rate to reflect upward or downward known and measurable changes to certain categories of costs, including prudently incurred costs for fuel used to produce power; prudently incurred purchased power costs; prudently incurred costs of satisfying the supply and demand portfolio requirements of Ohio, including, but not limited to, renewable energy resource and energy efficiency requirements; and costs prudently incurred to comply with environmental laws and regulations, with consideration of the derating of any facility associated with those costs. But, if an electric distribution company includes such adjustment mechanisms, as DEO has conditionally done in this proceeding, it is required to identify and flow back benefits to customers:

> In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, **the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment, including, but not limited to, the utility's receipt of emissions credits or its receipt of tax benefits or of other benefits**, and, accordingly, the commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost responsibility.

Section 4928.142(D)(4), Revised Code (emphasis added).

In its Application, DEO did not identify any specific benefits that have become available to it, or that may become available to it (as the statute specifies) during such time that a blended SSO rate may be in effect and how those benefits would be

[36] Co. Ex. 1 at 1.

recognized. However, DEO witness Brian D. Savoy acknowledged that recent changes in federal tax law will provide DEO benefits. [37] Those benefits include bonus depreciation for capital expenditures.[38]

The types of environmental costs that the company is proposing to collect through Rider EIR may very well include capital expenditures and hence trigger eligibility for bonus depreciation due to the changes in federal tax law. This is an example of the types of benefits that are recognized in Section 4928.142(D)(4), Revised Code. Therefore, DEO and the Commission are required to recognize these benefits in any adjustment mechanism that applied to the SSO price of the MRO variety. Moreover, Section 4928.142(D)(4), Revised Code, requires recognition of not only known benefits, but includes benefits that may become available in the future.

During his cross-examination, DEO witness William Don Wathen Jr. suggested that Rider FPP and the Rider EIR could be used to flow such benefits back to customers.[39] But, DEO's MRO plan does not provide any process by which known benefits as well as benefits that may become available would be identified to the Commission for appropriate recognition in any SSO price adjustment mechanisms. Therefore, this aspect of DEO's Application fails to satisfy the requirements of Section 4928.142(D)(4), Revised Code.

F. Motion to Dismiss.

Section 4901-1-15(F), Ohio Administrative Code, states:

[37] Tr. Vol. III at 555.

[38] *Id* at 556.

[39] *Id* at 648-649.

> Any party that is adversely affected by a ruling issued under rule 4901-1-14 of the Administrative Code or any oral ruling issued during a public hearing or prehearing conference and that (1) elects not to take an interlocutory appeal from the ruling or (2) files an interlocutory appeal that is not certified by the attorney examiner **may still raise the propriety of that ruling as an issue for the commission's consideration by discussing the matter as a distinct issue in its initial brief** or in any other appropriate filing prior to the issuance of the commission's opinion and order or finding and order in the case. (emphasis added).

As noted above, IEU-Ohio previously moved to dismiss the Application filed in this proceeding without prejudice because the Application proposes a blending period that does not comply with the requirements of Section 4928.142, Revised Code. Accordingly, the Commission must find that IEU-Ohio's motion to dismiss, without prejudice, should have been granted as a matter of law.

IV. CONCLUSION

DEO's Application conflicts with essential requirements that apply to an MRO. The Application fails to satisfy the statutory criteria for an MRO, Chapter 4928, it runs afoul of Commission precedent, and it violates longstanding regulatory principles. Particularly, the Application violates the longstanding regulatory principle that costs recovered through rates must be aligned with benefits. Additionally, the placeholder Riders provide an illegal cross-subsidy between DEO's regulated distribution company [redacted]. Thus, the Commission must not permit DEO to recover the costs associated with migrating to PJM because it does not align costs with benefits and provides an illegal cross-subsidy.

The non-bypassable portion of Rider SCR is inconsistent with the principle of cost causation, and DEO has not offered sufficient evidence to demonstrate that the non-bypassable portion of the rider is necessary. The Application fails to identify how benefits will flow back to customers as a result of adjustments to Riders FPP and EIR. Finally, the Application proposes an improper blending period. DEO's Application must rejected or modified to ensure that it complies with Ohio statutes, Commission precedent, and longstanding regulatory principles.

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I hereby certify that a copy of the foregoing *Initial Brief of Industrial Energy Users-Ohio,* was served upon the following parties of record this 27th day of January 2010, *via* electronic transmission, hand-delivery or first class U.S. mail, postage prepaid.

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