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Public Utilities Commission of Ohio
PUCO Docketing
180 E. Broad Street, 10th Floor
Columbus, Ohio 43215

In re: Case No. 10-2586-EL-SSO

Dear Sir/Madam:

Please find enclosed an original and twenty (20) copies of the BRIEF OF THE OHIO ENERGY GROUP fax-filed today in the above-referenced matter.

Copies have been served on all parties on the attached certificate of service. Please place this document of file.

Respectfully yours,

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MLKkew
Encl.
Cc: Certificate of Service

CERTIFICATE OF SERVICE

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BEFORE THE
PUBLIC UTILITY COMMISSION OF OHIO

In The Matter Of The Application Of Duke Energy Oho, Inc. 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

BRIEF OF THE OHIO ENERGY GROUP

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January 27, 2010

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BRIEF OF THE OHIO ENERGY GROUP

I. INTRODUCTION

Comes now, the Ohio Energy Group ("OEG") and submits this Brief in support of its recommendation that the Public Utility Commission of Ohio reject Duke Energy Ohio's Application For Approval of a Market Rate Offer ("MRO") or in the alternative require a 5-10 year MRO "*blending*" period as required by R.C. 4928.142.

II. ARGUMENT

1. Duke's 29 Month MRO "*Blending*" Proposal Violates The Statutory 5-Year Minimum Blending Period And Is Detrimental To Consumers.

As discussed in the Application and the testimony of a number of Company witnesses (e.g., James Rogers, Julia Janson, Judah Rose, William Don Wathen, Jr.), in this case, Duke is requesting that the Commission approve an MRO transition period that terminates the statutory "*blending*" period after only 29 months (January 1, 2012 to May 31, 2014) and moves to a 100% market rate beginning June 1, 2014. Duke proposes that the 5-year minimum MRO transition period set forth in R.C. 4928.142(D) be shortened to two years and that the Commission's discretion to extend the MRO transition period to a maximum of 10 years set forth in R.C. 4928.142(E) should be permanently removed in this proceeding.

a. **Duke's proposal to terminate the blending period prior to 5 years violates the plain language of R.C. 4928.142.**

R.C. 4928.142(D) requires a rate transition from the existing SSO price to full market based pricing over a <u>minimum</u> of 5 years for an electric distribution utility that owned generating resources as of July 31, 2008 that had been used and useful, which would include Duke Energy Ohio. 4928.142(D) states that:

> *"a portion of the 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 and not less than twenty per cent in year two, thirty per cent in year three, forty per cent in year four, and fifty percent in year five."*

This statute sets out a specific schedule for the blending of SSO and market rates. It does not allow for a 100% transition to market rates after year 2 of the transition period. Table 1 below compares Duke's proposed blending period to the schedule contemplated by the statute.

Table 1
Comparison of Duke MRO Blending to R.C. 4928.142(D)

	Duke Proposal		R.C. 4928.142(D)	
MRO Year	SSO	Market	SSO	Market
1	90%	10%	90%	10%
2.1 - 2.5	90%	10%	80%	20%
2.6 - 2.12	80%	20%	80%	20%
3.1 - 3.5	0%	100%	70%	30%
3.6 - 3.12	0%	100%	70%	30%
4	0%	100%	60%	40%
5	0%	100%	50%	50%
6*	0%	100%	?	[illegible]
7*	0%	100%	?	[illegible]
8*	0%	100%	?	[illegible]
9*	0%	100%	?	?
10*	0%	100%	?	?

* Pursuant to R.C. 4928.142(E), blending may be extended through year 10.

As shown above, 4928.142(D) sets out an explicit, 5-year minimum schedule for the transition period. 4928.142(E) allows the Commission to "alter" the "proportions" specified in 4928.142(D), but makes no mention of an ability to terminate the blending period prior to the completion of the 5-year schedule. The only statement allowing the Commission to change the time frame of the blending period is the provision allowing the Commission to extend the blending period to a maximum of 10 years. 4928.142(E) states that the Commission "*shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the rate offer, <u>cause the duration of the blending period to exceed ten years as counted from the effective date of the approve market rate offer</u>.*" (Emphasis added)

The plain language of the statute does not allow the Commission to end the blending period before 5 years as Duke proposes. The Ohio Supreme Court stated in <u>Family Medicine Foundation, Inc. v. Bright</u> (2002) 96 Ohio St.3d 183, 185, 772 N.E.2d 1177, 1179, that "[w]*hen weighing the parties' opposing interpretations of* [a statute a court is] *compelled to adhere to the plain language of the provision unless ambiguity exists.*" The plain language of 4928.142(D) and (E) sets out a blending period that is at least 5 years, but no longer than 10 years. Duke's proposed MRO blending schedule runs afoul of the requirements of 4928.142. On this basis alone Duke's Application should be rejected.

b. Duke's argument that its projection that SSO and market rates will converge sometime in 2014 is a "*significant change*" within the meaning of R.C. 4928.142(E) that justifies terminating the MRO blending schedule after only two years is unfounded and should be rejected.

In support of its proposed abbreviated MRO blending schedule Duke states:

> *"Beginning in year two of the MRO, R.C. 4928.142(E) authorizes the Commission to alter the blending percentages prospectively, where such an alteration serves to mitigate 'an abrupt or significant change in the electric distribution utility's [SSO] price that would otherwise result from the blending of prices.' That prospective blending would, thus, relate only to years three and beyond' The transition to full market prices -at deliberate intervals- was undoubtedly intended to lessen the risk of dramatic prices changes for customers while simultaneously ensuring appropriate recovery by an electric distribution utility of the costs of serving its SSO customers.*

But with some degree of foresight, the General Assembly also contemplated a circumstance under which an acceleration of the blending period could more quickly realize a fully competitive market as it conferred upon the Commission the ability to alter the blending period. Notably, however, any such alteration cannot affect any period before the third year of the MRO, with the Commission bound to adopt blending amounts of 10% and no more than 20% in years one and two, respectively."[1]

According to Duke, the "*abrupt or significant change*" in the SSO that necessitates shortening the minimum 5-year MRO transition period to only 2 years is the projection of Duke's witness Judah Rose that "*the MRO price will also be equal to the ESP price and the retail market price*" by 2014. Duke reasons that once its "*current, unadjusted ESP price equals the retail market price, the goal of full competition will have been achieved*,"[2] and a MRO transition period is no longer needed.

Here, Duke makes an astounding leap in statutory interpretation. According to Duke's reading of the statute, the provision of R.C. 4928.142(E) that states that "*the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration*;" allows the Commission to end the MRO blending period after only 2 years. Duke argues that their expert witness's educated guess that 2014 market prices will converge, perhaps only temporarily, with Duke's SSO price qualifies as an "*significant change*" within the meaning of the statute.[3]

The event that Duke argues is a "*significant change*" in the SSO price is just a projection of one of its witnesses. It is a guess that circumstances will change. It is not an actual change. Mr. Rose's projection does not even include an estimate of market prices beyond 2014. The statute contemplates that <u>an actual</u> change of circumstances <u>actually</u> occur. It does not encompass mere speculation that a change may occur

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[1] Duke Application pp. 10-11.
[2] Duke Application p. 11.
[3] Duke witness William Wathen, Jr. stated at hearing that Duke believes that its projected convergence of market and SSO prices in 2014 represents a "*significant*" change, but not an "*abrupt*" change. See TR Volume III, p. 623, lines 2-18.

in the future. A prophecy is not evidence to support a determination that the minimum statutory MRO transition period should terminate 3 years early. "*It is a cardinal rule of statutory construction that a statute should not be interpreted to yield and absurd result.*" Mishr v. Bd. Of Zoning. Appeals (1996), 76 Ohio St.3d 238, 240, 667 N.E.2d 365. Allowing Duke to circumvent the consumer protections provided in 4928.142 based only on a prospective estimate of market and SSO rates by a Duke expert witness would be a truly absurd result.

Duke's projection that SSO and market prices will converge in 2014 is overly simplistic and likely to be in error. Projecting a convergence of market and SSO prices involves many moving parts. But, while it is difficult enough to project the market price at a point in 2014, that is only one piece of the analysis. The analysis also requires an accurate estimate of the MRO price in 2014. The MRO price is made up of several volatile components. For example, one component of the standard offer is the Fuel and Economy Purchased Power Rider (Rider PTC-FPP). Experience demonstrates that Rider PTC-FPP is subject to dramatic swings from month-to-month. In September of 2010, Duke updated its Rider PTC-FPP rates to reflect a 5.3 cents/kWh charge for non-residential customers. In December of the same year Duke again updated its Rider PTC-FPP to reflect a 3.6 cents/kWh charge for non-residential customers. The Rider decreased by 1.7 cents/kWh or 32% in only 3 months.[4] And again, this is only one component of a customer's total bill. Other components of SSO rates also fluctuate from month-to-month. Duke's claim that it can not only predict the price of market power in 2014, but that it can also predict the price of SSO rates in 2014 is highly suspect.

Also, up to this point this discussion has treated the issue of Duke's market projection as if there is only one price for SSO and market service. But, of course, this is not the case. The SSO is allocated differently to the separate customer classes, and market rates typically depend on voltage level, time of use

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[4] See Attachment 1.

characteristic, etc. Duke's argument that market rates will converge with SSO rates in 2014 begs the question; which market rates will converge with which SSO rates? With Residential rates? Non-residential rates? Industrial rates? R.C. 4928.142(E) includes a provision specifying that any alteration of the blending period made as a result of an abrupt or significant change in the SSO mitigate the effect of the change to the various customers classes . The statute provides that "*the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration...*" (Emphasis added) 4928.142(E). Duke has not even attempted to line up projections of future SSO and market rates for the various customer groups. The Commission should reject Duke's overly simplistic analysis of future market and SSO prices.

Duke reasons that if market rates and SSO rates converge in 2014 there is no need to continue the MRO transition period and thus a "*significant change*" has occurred.[5] However, nowhere in the statute is it stated that the purpose of the MRO transition period is to rush to market-based rates as soon as possible. The purpose of the MRO transition period is two-fold. The first purpose of the MRO transition period is to allow rates to move toward the market gradually using a diversified combination of prices consisting of a market component and an SSO component. This is evidenced by the fact that the statute provides a minimum of 5 year transition period. As noted above, there is a provision to extend the transition period to 10 years, but absolutely no mention of an ability to end the transition period before 5 years. The provision of the statute that Duke seeks to invoke only allows for the Commission to alter "*the proportions*" specified in the 5-year transition period schedule.[6] It does not contemplate ending the transition period within the initial 5 years.

[5] See TR Volume III, p. 623, lines 18-25. Duke witness William Don Wathen Jr. states: *"I view significant the fact that the ESP price and the market price will converge and we will have a situation where the markets are in equilibrium and we won't have to adjust anymore. Further adjusting is introducing arbitrary elements to a market that don't belong."*

[6] R.C. 4928.142(E)

The second function of the MRO transition period is to provide an emergency mechanism in the form of Commission jurisdiction over rates to protect consumers against unexpected price surges. Mr. Rose addresses projected ESP SSO rates and projected market rates and concludes that "*the MRO price will also be equal to the ESP price and the retail market price*" by 2014. Of course, if Mr. Rose's projections are wrong, and experience shows us that many market projections prove to be wrong, market rates could substantially exceed the otherwise applicable blended ESP SSO/Market rates. Even if Mr. Rose is correct that market rates and SSO rates will converge sometime in 2014 it does not mean that such a convergence will be permanent. If market rates soar well above SSO rates in 2014 they will necessarily converge at some point if only for a brief moment. Mr. Rose notes on page 24 of his Direct Testimony that *"2014 prices are 40% above the prices of the last 12 months and 52% above 2009 prices."* Since Mr. Rose expects substantial increases in markets prices through 2014, which closes the gap with the Company's ESP SSO rates by May of 2014, it certainly seems reasonable to believe that market rates could continue accelerating beyond the ESP SSO rates in 2015 and 2016. If market rates increase in price beyond the ESP SSO rates in 2015 and 2016, then that would precisely be the time that ratepayers need the protection afforded by the statutory minimum 5 year blend and the Commission needs the power to extend and mitigate the blending for 10 years.[7]

[7] Direct Testimony of Stephen J. Baron p. 8.

c. **Duke's argument relating to its stated desire to transfer its legacy generation assets to an affiliate are speculative and should not be given any weight in this proceeding.**

Through the Direct Testimony of its witness William Wathen Jr.,[8] Duke argues that if its impending proposal to transfer its legacy generation assets to an affiliate on or before May 31, 2014 is achieved, the blended rate following asset transfer would be comprised of a weighted average of the price of power purchased under a Purchased Power Agreement ("PPA") and a market rate. Since the PPA would logically be priced at market as well, Mr. Wathen argues that once the legacy generation assets have been transferred, there would be no need for any blending of the ESP SSO rate and market rates.[9]

Of course, this argument in support of a shortened blending period only has merit if the Company is permitted to transfer its legacy generation assets to an affiliate within a 29 month period. OEG, and presumably many others, would oppose such a plan. If the Commission denies the legacy generation asset transfer request, then customers would continue to be protected during the full five-year minimum transition period ending in December 2016, and perhaps up to an additional five years beyond. Unless the Commission denies the legacy generation asset transfer, Duke's retail customers would effectively face SSO rates set at 100% market even if the five year or longer transition period is adopted by the Commission.[10] In the end, Duke's argument seems to be that the PUCO might just as well end the blend in 29 months since Duke will by then divest itself of the generation assets effectively ending blending anyway. OEG's point is the Commission should deny Duke both the abbreviated blending and permission to transfer its generating assets. If Duke's generation assets are transferred to an unregulated affiliate that is not subject to this Commission's jurisdiction, then Duke would look like FirstEnergy. This would mean that consumers would not have access to ESP SSO generation at legacy pricing. This would harm consumers,

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[8] Direct Testimony of William Don Wathen Jr. pp. 11-12.
[9] Direct Testimony of Stephen J. Baron pp. 9-10.
[10] Id. at 10.

which is presumably why the MRO statute contains a 5-10 year transition to full market pricing for those who do not shop for competitive generation.

In short, Duke's arguments related to its forthcoming proposal to transfer its generation assets to an affiliate should be given zero weight in this proceeding because Duke has not even made such a request to date. Whether the Commission will ultimately approve such a request is pure speculation.

d. Duke has failed to comply with the Commission rules requiring MRO applicants to provide rate projections "*for the duration of the blending period*."

Duke's Application does not comply with the Commission's rules governing an MRO. OAC 4901:1-35-03 (B)(2)(j) requires that the electric utility "*provide its best current estimate of anticipated adjustment amounts for the duration of the blending period, and compare the projected adjusted generation service prices under the CBP plan to the projected adjusted generation service prices*" under its proposal. Duke did not present any legacy ESP rate projections or projected market prices under the CBP plan beyond 2014, the requested termination year for Duke's MRO blending. Duke witness Judah Rose only developed projections for the period up to the requested termination of the Company's MRO in 2014. While Mr. Rose predicts that the legacy ESP prices will be close to market prices by the time of the proposed termination of the MRO blending period, there is no evidence presented regarding adjusted legacy ESP prices and market prices for MRO years beyond the 29 month blending period proposed by Duke.[11] For this reason, in addition to the others mentioned above, the Commission should deny Duke's request to terminate the MRO transition period in 2014.

[11] Id. at 13-14.

e. Duke's offer to forego adjustments to the ESP component of the blended generation rate if the Commission allows Duke to terminate the MRO transition period in 2014 is not a compelling reason to prematurely terminate the MRO blending period.

On pages 13 and 14 of his Direct Testimony, Mr. Wathen discusses the Company's proposal to forgo adjustments to the ESP component of the blended generation rate for changes in fuel, purchased power and environmental costs, if the Company's "*Blending Period ends before June 1, 2014.*" Mr. Wathen notes that "*if the Blending Period is extended and the asset transfer does not occur before June 1, 2014, these tariffs would be used to adjust the ESP component on a quarterly basis beginning as early as year one…*"[12] Duke is attempting to entice the Commission to approve its proposed shortened blending period by offering to forego future increases to the SSO.

But it is possible that the ESP portion of the blended rate could decrease during this period. As discussed above, Rider PTC-FPP, a major component of the blended rate, decreased by 1.7 cents/kWh or 32% for non-residential customers in the span of 3 months at the end of 2010. Adjustments to the ESP cut both ways. Duke's offer to freeze the ESP component of the blended rate may actually cost ratepayers money.

Also, while it is correct that R.C. 4928.142(D)(1) through R.C. 4928.142(D)(4) permits such adjustments to the "*most recent standard service offer price*," upward adjustments to the SSO are far from automatic, as Duke seems to imply. The statute places an earnings test on the ability of the Company to recover any such adjustments. Specifically, R.C. 4928.142(D) states as follows:

> *"The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess of the return on common equity that is earned by publicly traded companies, including utilities,*

[12] Wathen Direct p. 13, lines 15 and 16 and at page 14, lines 4 to 6.

that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. <u>The burden of proof for demonstrating that significantly excessive earnings will not occur shall be on the electric distribution utility.</u>" (Emphasis added).

The statute requires the Company to establish "*burden of proof*" each time that it files for adjustments to its ESP rate for fuel and purchased power costs, and environmental costs that these adjustments will not result in significantly excessive earnings. This is an additional consumer protection provided by the MRO. Cost increases for the ESP portion of the blended rate are not necessarily recoverable because the approval of the adjustments depends on the utility's projected return on equity.[13]

The value to ratepayers of Duke's offer to forego requesting these adjustments is uncertain. Duke's SSO portion of the blended rate may decrease over the period, because of a reduction in Riders, etc. Also, Duke cannot show that it is under-earning per the earnings test it will not be entitled to any upward adjustment in its SSO rate.

2. **<u>If The Proposed MRO Is Not Entirely Rejected The Commission Should Require A Full Five-Year Blending Period Consistent With The Provisions Of R.C. 4928.142(D) And Establish Annual Reviews Of The Current Market Rates In Order To Determine if The Blending Period Should Be Extended Beyond The 5-Year Minimum.</u>**

The Commission should reject the Company's request to terminate the MRO transition blending period after 29 months. Irrespective of the Company's forecasted market prices, there is no reason to deny Duke's customers the protection afforded by S.B. 221. Rather, the Commission should require a full five-year minimum blending period consistent with the provisions of R.C. 4928.142(D).[14]

In addition, the Commission should establish annual reviews by the Commission Staff and other parties of the current market rates and the impact on the blended MRO SSO rate charged to customers. To the extent that such annual reviews find that the five year blending period may result in an abrupt or

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[13] Direct Testimony of Stephen J. Baron pp. 17-18.
[14] <u>Id</u>. at 15.

significant change in general SSO rates or the SSO rates of a specific rate class or rate schedule, the Commission should make appropriate changes in the blending proportions and evaluate whether an extension of the blending period up to ten years, as allowed by R.C. 4928.142(E), is appropriate.[15] This is a necessary consumer protection because of the very volatile nature of electric generation pricing.

3. <u>The Company's Proposal To Recover Transmission Costs Through A Base Transmission Rider ("BTR") And An RTO rider ("RTO") Should Be Decided In A Separate Case.</u>

As a result of Duke's voluntary withdrawal from MISO and realignment into PJM, Duke is proposing to recover most of its transmission costs through a non-bypassable rider (Rider BTR). Currently, shopping customers pay for transmission costs through charges paid to a Competitive Retail Electric Service ("CRES") provider. Only SSO customers pay Duke directly for transmission service.[16]

As discussed in the Testimony of Duke witness William Don Wathen, Jr., the Company is proposing Rider BTR, which is to recover basic network integrated transmission service costs (NITS), as well as some other transmission costs billed to the Company by PJM on the basis of total retail load (not just SSO load). However, Rider BTR would also recover all costs incurred as a result of the Company's withdrawal from MISO and on-going MISO transmission expansion costs for which the Company has a continuing liability. The first of these two costs is an exit fee imposed on Duke by MISO as a result of its voluntary withdrawal from MISO. The second charge represents Duke's ongoing liability for MISO Transmission Expansion Plan ("MTEP") costs for projects approved by MISO while Duke was a MISO member. Duke's MTEP liability includes the costs of major transmission projects that have 40 to 50 year useful lives. These transmission projects will provide little or no benefit to ratepayers once the move to PJM is complete.[17]

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[15] <u>Id</u>. at 15.
[16] <u>Id</u>. at 19.
[17] <u>Id</u>. at 19.

The second rider, Rider RTO is a bypassable charge that is designed to recover costs strictly related to serving SSO load. Shopping customers would not pay charges for Rider RTO. According to Mr. Wathen, these RTO charges are billed directly to load serving entities and thus, for shopping customers, these costs would be recovered through CRES charges.[18] Included in these RTO charges are: RTO "*administrative fees, ancillary services charges, revenue sufficiency guarantees, etc.*"[19]

The most troubling aspect of the Company's proposal is that it would automatically permit Duke to fully recover all MISO exit fees and MTEP charges from ratepayers. The decision to withdraw from MISO and join PJM was a unilateral decision made by the Company, with full knowledge of the financial consequences, specifically the imposition of an exit fee by MISO. With regard to the ongoing MTEP charges associated with the costs of MISO construction projects approved during Duke's membership, customers are being asked to pay these costs even though Ohio ratepayers will receive little or no benefit because Duke will no longer be a member of MISO, and Duke will incur PJM RTEP costs (regional transmission expansion plan) that it will also charge to ratepayers. Duke is asking ratepayers to pay for the transmission expansion costs of its former RTO (MISO), as well as for the transmission expansion costs of its new RTO (PJM).[20]

It is certainly questionable whether the decision to withdraw from MISO and join PJM was reasonable and in the interests of its customers. As such, the Company's actions raise an issue of prudence that may justify the Commission disallowing some or all of these MISO costs. The prudence of Duke's decision to withdraw from MISO and join PJM is a legitimate issue that can be addressed by the

[18] Id. at 20.

[19] Wathen Direct Testimony p. 26, footnote No. 6.

[20] Direct Testimony of Stephen J. Baron pp. 20-21.

Commission in its evaluation of cost recovery. The outcome of such an evaluation could have an impact on the recoverability of these MISO costs from Duke's ratepayers.[21]

Duke witness Kenneth Jennings identifies three benefits of joining PJM. These are: 1) the joint ownership with PJM utilities of some of the Company's generation assets, 2) the benefit of all utilities in Ohio being a member of a single RTO (Duke would be the only non-PJM Ohio utility if it had not realigned into PJM), and 3) the benefit of PJM's forward capacity market. None of these benefits have been quantified, nor have these benefits been compared to the costs of withdrawal from MISO. This information would be material in any Commission evaluation of the decision by the Company to join PJM and approve cost recovery of RTO charges.[22]

In its October 21, 2010 Order Addressing RTO Realignment Request (FERC Docket Nos. ER10-1562 and ER10-2254), the FERC approved the withdrawal of Duke from MISO and its realignment into PJM, including Duke's proposed Fixed Resource Requirement Integration Plan (FRR Integration Plan). The FERC specifically did not address the recovery of any MISO exit fees or MTEP costs that may be imposed by MISO on Duke, declined to make "*a general statement regarding a withdrawing transmission-owning utility's transmission planning and cost obligation to its former RTO and new RTO,*" and whether Ohio retail customers should be charged the costs associated with any exit fees or MTEP costs imposed by MISO on Duke.[23]

Duke's ability to recover RTO costs associated with both MISO and PJM seems to fall squarely within the PUCO's jurisdiction per the prudence of choice exception to the federal filed rate doctrine. This is also known as the Pike County doctrine and is well recognized by the courts and by FERC. It holds that in setting retail electric rates a state commission is not required by preemption or the filed rate doctrine to

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[21] Id. at 21.
[22] Id. at 21-22.

[23] FERC Order of October 21, 2010 at paragraphs 73, 74 and 75.

authorize recovery of a particular FERC-approved rate (e.g., PJM) if the utility acted imprudently by failing to choose a lower cost FERC-approved option (e.g., MISO). This April 21, 2008 description by FERC is a comprehensive summary of the prudence of choice exception to the file rate doctrine.

> *"415. Additionally, with respect to Consumer Advocates' argument that the Commission has overlooked the economic fact that wholesale buyers/re-sellers do not bear the risk of loss because the prices paid by wholesale buyers/re-sellers "must be passed through to retail ratepayers," not only is this argument irrelevant to whether the Commission has legal authority to permit market-based rates as just and reasonable under the FPA, the argument also is not accurate. [FN595 omitted] It is true that only the Commission has the authority to determine the justness and reasonableness of a public utility's wholesale rates and that a state cannot disallow pass-through in retail rates on the basis that it disagrees with the Commission's just and reasonable determination. However, the Commission has consistently recognized that wholesale ratemaking does not, as a general matter, determine whether a purchaser has prudently chosen among available supply options. [FN596]*[24]
>
> *416. In most circumstances "a state commission may legitimately inquire into whether the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source." [FN597]*[25] *It is in the narrow situation where the Commission, in setting a wholesale rate, leaves the purchaser no legal choice but to purchase a specified amount of power that such determinations would be precluded. [FN598 omitted] Thus, we reject Consumer Advocates' arguments that these cases are relevant to the issue at hand."* Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, 123 FERC 61,055 at pp. 114-115 (April 21, 2008). (Emphasis added).

In Monongahela Power Co. v. Schriber, 322 F. Supp. 2d 902 (S.D. Ohio 2004), the Federal District Court recognized that the prudence of choice exception, or Pike County doctrine, applies to this Commission:

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[24] FN596. See Philadelphia Electric Co., 15 FERC ¶ 61,264, at 61,601 (1981); Pennsylvania Power & Light Co., 23 FERC ¶ 61,006, order on reh'g, 23 FERC ¶ 61,325, at 61,716 (1983) (*"We do not view our responsibilities under the Federal Power Act as including a determination that the purchaser has purchased wisely or has made the best deal available."*); Southern Company Service, 26 FERC ¶ 61,360, at 61,795 (1984); Pacific Power & Light Co., 27 FERC ¶ 61,080, at 61,148 (1984); Minnesota Power & Light Co., 43 FERC ¶ 61,104, at 61,342-43, reh'g denied, 43 FERC ¶ 61,502, order denying reconsideration, 44 FERC ¶ 61,302 (1988); Palisades Generating Co., 48 FERC ¶ 61,144, at 61,574 and n.10 (1989).

[25] FN597. Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n, 465 A.2d 735, 738 (1983) (Pike County) (finding that while the state cannot review the reasonableness of the wholesale rate set by the Commission, it may determine whether it is in the public interest for the wholesale purchaser whose retail rates it regulates to pay a particular price in light of its alternatives). The Supreme Court's decisions in Nantahala, 476 U.S. 953 and Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988) do not preclude, in every circumstance, state regulators from reviewing the prudence of a utility's purchasing decisions. See, e.g., Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n, 837 F.2d 600, 609 (3d Cir.) cert. denied, 488 U.S. 941 (1988) (Kentucky West Virginia); Doswell Limited Partnership, 50 FERC ¶ 61,251, at 61,758 n.18 (1990).

Moreover, this Court is also concerned that the PUCO have the opportunity to conduct what is termed a Pike County analysis. See Pike County Light and Power Co.—Elec. Div. v. Pennsylvania Pub. Util. Comm'n, 77 Pa. Cmwlth. 268, 465 A.2d 735 (1983); See also Public Serv. Co. of New Hampshire v. Patch, 167 F.3d 15, 27 (1st Cir.1998) (citing Pike County with approval); Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n (3d Cir.1998). [Footnote omitted]. Under the Pike County analysis which is somewhat of an exception to the filed-rate doctrine, the PUCO has the authority to determine whether cheaper alternatives of wholesale power were available to Mon Power. If this Court were to simply grant the relief requested by Mon Power under Count One, it would effectively deprive the PUCO of its Pike County discretionary authority.

In sum, the FERC leaves to the states the question of whether a utility has made a prudent choice where alternative federal rates are available. Therefore, Duke may be at risk of disallowance of transmission and generation costs in standard service offer rates if the Commission finds that its decision to leave MISO was not prudent.

OEG recommends that the Commission reject these riders in this case and require the Company to re-file its request in a separate proceeding, not tied to the MRO approval proceeding. The MRO has a statutory time frame for a Commission decision that is very brief and does not lend itself to the evaluation of other issues, such as the Company's transmission cost recovery proposals. There is nothing in the S.B. 221 that requires the Commission to make a determination on transmission cost recovery mechanisms within an MRO case and within the limited timeframe provided for an MRO determination. The issues raised by the Company's request for transmission cost recovery are complex and require a full evaluation by the Commission, including an opportunity for the Commission to consider prudence issues. The Company's request in this case is not an approval for withdrawing from MISO and joining PJM; rather it is for cost recovery only. Duke will not join PJM until January 2012, providing sufficient time for a full consideration by the Commission of this issue outside the confines of an accelerated MRO proceeding.[26]

4. OEG Agrees With Staff's Recommendations With Respect to Rider RECON and Rider UE-GEN.

OEG supports the recommendation of Staff witness Tamara Turkenton with respect to the treatment of Rider RECON and Rider UE-GEN.

Duke is requesting the establishment of Rider RECON in order to collect the over or under recovery balances remaining as of December 31, 2011 pertaining to Rider PTC-FPP and Rider SRA-SRT under the current ESP. OEG agrees with Staff that Rider RECON should only be collected on a fully bypassable basis. It is appropriate to collect Rider RECON on the same fully bypassable basis as Rider PTC-FPP. [27]

Duke's proposed Rider UE-GEN seeks to recover the cost of bad debt associated with Duke's SSO. With respect to Rider UE-GEN Kroger agrees with Staff that an uncollectible rider for generation is not allowable under R.C. 4928.142(D). Duke's request to recover these costs through Rider UE-GEN should be rejected.[28]

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[26] Direct Testimony of Stephen J. Baron p. 23.
[27] Direct Testimony of Tamara Turkenton pp. 4-5.
[28] Direct Testimony of Tamara Turkenton p. 6.

III. CONCLUSION

It is the policy of this state to: *"(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."*[29] The Commission should be very concerned that Duke's customers will not be afforded the protections envisioned in R.C. 4928.142(D) and R.C. 4928.02 by virtue of the Company's truncated blending period. Duke's statement that if Mr. Rose's projections are accurate there is no benefit of further blending beyond May 31, 2014 is incorrect. Duke's proposed 29 month transition plan effectively eliminates any possibility of providing emergency protection to retail consumers. The blending provisions in R.C. 4928.142(D) establish a schedule that gradually submerges customers into the cold water of market prices, always with the ability to pull back if they turn blue. Duke proposes to substantially shorten this blending period and also eliminate the potential relief available to the Commission pursuant to R.C. 4928.142(E) to extend the blending through year 10 of the MRO. If adopted by the Commission, customers will sink or swim in 29 months since there would no longer be a legacy ESP price option available to customers in years 3, 4 and 5 (and possibly longer) in the event that market prices began to escalate substantially above the adjusted ESP price. Thus, even if Mr. Rose is correct, customers are being harmed, relative to R.C. 4928.142(D), because of the loss of the critical protection that the ability to alter the plan in the out-years provides.

Duke's MRO filing fails mainly in this, most important, respect. For this and the other reasons stated herein the filing should be rejected.

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[29] 4928.02(A)

Respectfully submitted,

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Kurt J. Boehm, Esq.
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January 27, 2011

COUNSEL FOR THE OHIO ENERGY GROUP

Attachment 1

FILE

Duke Energy.

DUKE ENERGY CORPORATION
139 East Fourth St.
P.O. Box 960
Cincinnati, OH 45201-0960

2

RECEIVED-DOCKETING DIV

2010 SEP 24 AM 10: 24

PUCO

September 24, 2010

Public Utilities Commission of Ohio
Attention: Docketing Division
180 East Broad Street
Columbus, Ohio 43215-3793

RE: Case No. 10-974-EL-FAC

Docketing Division:

Enclosed, pursuant to the above referenced cases, are four (4) copies of Rider FPP - Fuel and Economy Purchased Power effective September 30, 2010.

One copy of the enclosed tariff is to be designated for TRF Docket Number 89-6002-EL-TRF.

Please time-stamp the enclosed extra copies and return for our file. Thank you.

Very truly yours,

Lisa D Steinkuhl

Lisa D. Steinkuhl

Enclosure

Duke Energy Ohio
139 East Fourth Street
Cincinnati, Ohio 45202

RIDER PTC-FPP

FUEL AND ECONOMY PURCHASED POWER RIDER

APPLICABILITY

Applicable to all jurisdictional retail customers in the Company's electric service area, except those customers receiving generation service from a Certified Supplier.

CHARGE

The Fuel and Economy Purchased Power rate (PTC-FPP) to be charged under this tariff will be updated every three months pending approval by the Public Utilities Commission of Ohio. The current rate is:

Residential	\$0.042048 per kilowatt-hour
Non-residential	\$0.053036 per kilowatt-hour
Voltage-reduction	\$0.052108 per kilowatt-hour

BASE FUEL RATE

Effective with the first billing cycle of January 2009, the PTC-FPP rate will include the Company's base fuel rate of \$0.012453 per kWh.

Filed pursuant to an Order dated September 22, 2010 in Case No. 09-974-EL-FAC before the Public Utilities Commission of Ohio.

Issued: September 23, 2010 Effective: September 30, 2010

Issued by Julie Janson, President

Duke Energy Ohio
139 East Fourth Street
Cincinnati, Ohio 45202

RIDER PTC-FPP

FUEL AND ECONOMY PURCHASED POWER RIDER

APPLICABILITY

Applicable to all jurisdictional retail customers in the Company's electric service area, except those customers receiving generation service from a Certified Supplier.

CHARGE

The Fuel and Economy Purchased Power rate (PTC-FPP) to be charged under this tariff will be updated every three months pending approval by the Public Utilities Commission of Ohio. The current rate is:

Residential	$0.030399 per kilowatt-hour
Non-residential	$0.036473 per kilowatt-hour
Voltage-reduction	$0.035986 per kilowatt-hour

BASE FUEL RATE

Effective with the first billing cycle of January 2009, the PTC-FPP rate will include the Company's base fuel rate of $0.012453 per kWh.

FILE

Duke Energy.

2

Duke Energy Corporation
139 East Fourth Street
P.O. Box 960
Cincinnati, Ohio 45201-0960

RECEIVED-DOCKETING DIV

2010 DEC 21 AM 9:45

PUCO

December 21, 2010

Public Utilities Commission of Ohio
Attention: Docketing Division
180 East Broad Street
Columbus, Ohio 43215-3793

RE: Case No. 10-974-EL-FAC

Docketing Division:

Enclosed, pursuant to the above referenced cases, are ten (10) copies of Rider FPP - Fuel and Economy Purchased Power effective January 4, 2011.

One copy of the enclosed tariff is to be designated for TRF Docket Number 89-6002-EL-TRF.

Please time-stamp the enclosed extra copies and return for our file. Thank you.

Very truly yours,

Lisa D Steinkuhl

Lisa D. Steinkuhl

Enclosure