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

REPLY BRIEF OF THE OHIO MANUFACTURERS' ASSOCIATION

For the reasons stated in the Initial Brief of the Ohio Manufacturers' Association ("OMA"), and as set forth below, Duke Energy Ohio's ("Duke") proposed market rate offer ("MRO") fails to satisfy the requirements in Ohio Revised Code Section ("R.C.") 4928.142 and Ohio Administrative Code ("OAC") Rule 4901:1-35-03, and should be denied.

I. LEGAL ARGUMENT

A. The legal arguments set forth in the initial briefs of Duke and FirstEnergy Solutions are not persuasive, ignore the unambiguous language in R.C. 4928.142(D) which requires a five-year blending period, and should be rejected.

As emphasized by the majority of the parties in this case, Duke's proposed two year blending period violates R.C. 4928.142(D).[1]

Duke's Initial Brief, however, engages in a statutory analysis that completely ignores the unambiguous language in R.C. 4928.142(D) requiring Duke to establish a five year blending period as part of its first MRO filing. In fact, Duke's Merit Brief quotes R.C. 4928.142(D),[2]

[1] See e.g. Initial Brief of the Greater Cincinnati Health Council ("GCHC Brief") at 5-16; Brief of the Ohio Energy Group ("OEG Brief") at 1-7; Ohio Partners for Affordable Energy's Post-Hearing Brief ("OPAE Brief") at 2-6; Initial Post-Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio ("Staff Brief") at 17.

[2] Merit Brief of Duke Energy Ohio, Inc. ("Duke Brief") at 22.

analyzes the blending requirements for the first two years of the MRO in painstaking detail,[3] and then stops. By asking the Commission to approve a two year blending period that follows the statutory requirements in years one and two, but then ignoring the mandatory statutory percentages in years three through five,[4] Duke not only asks the Commission to violate Ohio law, but to abdicate its statutory obligation under R.C. 4928.142(D) to "determine the actual percentages for each year of years one through five."

For all of the above-stated reasons, Duke's MRO Application fails to satisfy the statutory requirements in R.C. 4928.142(D), and should be denied. No arguments made in the initial briefs of Duke or FirstEnergy Solutions overcome this fatal defect.

B. Duke's initial brief misinterprets the unambiguous language in R.C. 4928.142(E), which prohibits the Commission from altering the blending periods prior to June 1, 2013.

R.C. 4928.142(E) establishes the Commission's limited power to alter the blending percentages at some time in the future—namely "beginning in the second year" of the MRO. As the Greater Cincinnati Health Council aptly explained, "The plain language is clear that the Commission may *not* consider any adjustments to the blending schedule until the beginning of the second year of blending, which under Duke's proposal would be June 1, 2013."[5]

However, on page 25 of its Merit Brief, Duke claims that "division (E) of R.C. 4928.142 plainly does not limit how long before the second year such alterations to the blending percentages may be made." FirstEnergy Solutions raises the same argument.[6] Contrary to Duke and FirstEnergy Solutions, the General Assembly specifically identified the "second year" of the MRO

[3] Duke Brief at 22.

[4] See argument in Section III.C of OMA's Initial Brief.

[5] GCHC Brief at 9.

[6] Post-Hearing Brief of FirstEnergy Solutions Corp. ("FES Brief") at 8 and 12.

as the proper time for the Commission to consider exercising its discretion to alter the blending percentages.[7] Allowing the Commission to alter the statutorily-mandated blending percentages in R.C. 4928.142(D) as part of this proceeding violates the unambiguous language in R.C. 4928.142(E).[8] The Commission Staff agrees, explaining "Contrary to Duke's misreading and misunderstanding of the law, the Commission does not have the discretion, pursuant to R.C. 4928.142(E), to revise the blending percentages of the Company's MRO *now* (emphasis added)."[9]

Further damaging Duke's claims is the simple fact that the Commission's discretionary authority to alter the blending period is limited by a condition precedent—namely a finding 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." Duke, however, misguidedly claims that such a significant change would occur if: 1) "the market price in year three is less than the most recent SSO price;" or 2) "the market price in year three has essentially converged with the most recent SSO price."[10]

Electricity markets are volatile and dynamic by nature. A finding by the Commission of an abrupt and significant change now, as part of this MRO proceeding, would be unnecessarily

[7] FES Brief at 8 and 12. Although FirstEnergy Solutions baldly asserts that the Commission retains the authority to alter the blending periods now, it provides no support for such a conclusion.

[8] See Staff Brief at 4-6. See also Tr. Vol. V at 1104 (Staff witness Strom testified that any alteration, including a shortening of the blending period "should happen in the context of no earlier than year 2, meaning at a time when they [Duke] are in the second year of the MRO").

[9] Staff Brief at 4.

[10] Duke Brief at 28.

speculative,[11] imprudent,[12] and contrary to R.C. 4928.142(E). As the Commission's authority to alter the blending period only exists in year two of the MRO (or sometime in 2013 in this case), it follows that a Commission inquiry regarding an abrupt or significant change in the standard service offer price should occur at that time, and be based on actual information.[13] The "statute clearly means that a determination to alter the proportions is to be made based on the actual circumstances that exist at some future time."[14]

For the above-stated reasons, Duke's MRO Application violates the unambiguous language in R.C. 4928.142(E), and should be denied. The flawed interpretations of Duke and FirstEnergy Solutions do not overcome this fatal defect

C. Duke's failure to identify the effect of its competitive bid plan on transmission rates as a result of the costs associated with Duke's migration to PJM violates OAC Rules 4901:1-35-03(B)(2)(b) and 4901:1-35-03(B)(2)(c), thereby rendering its MRO Application fatally deficient.

Duke's Merit Brief incorrectly claims on page 19 that "no party challenged Duke Energy Ohio's anticipated realignment to PJM as complicating any aspect of the CBP." Duke further claims that it "does not anticipate that the proposed CBP will have any effect on Duke Energy Ohio's distribution or transmission rates."[15] Duke is incorrect on both counts.

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[11] See OEG Brief at 4 (explaining that "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. 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"). Notably, this expert (Judah Rose) is the same witness who incorrectly "predicted that market prices in 2011 would be higher than the ESP prices then requested by Duke." GCHC Brief at 12.

[12] As page 5 of Ohio Partners for Affordable Energy's Post-Hearing Brief ("OPAE Brief") states, "[b]y shortening the blending period to a mere 29 months, market risk is shifted to customers who would no longer have the legacy ESP price options in years three through ten as the statutes contemplate."

[13] See GCHC Brief at 10 ("The Commission would have more current information about market conditions at that point in time in order to make a better decision"). See also OEG Brief at 4-5 (explaining that the "statute contemplates that an actual change of circumstances actually occur. It does not encompass mere speculation that a change may occur in the future").

[14] OPAE Brief at 3.

[15] Duke Brief at 35.

The OMA raised both issues in its Initial Brief, arguing that: 1) the record is devoid of any explanation by Duke as to how the cost of its realignment from MISO to PJM will figure into transmission rates (at page 6); 2) the Commission is being asked to approve a MRO when the potentially significant upward push on rates (in particular *transmission* rates) remains a possibility (at page 6); and 3) Duke proposes to recover MTEP costs, RTEPP costs, MISO exit fees, and PJM integration fees associated with Duke's migration from MISO to PJM from Ohio ratepayers through Rider BTR, but not Kentucky ratepayers (at pages 6-8). OMA's arguments are further supported by the initial briefs of other intervening parties.[16]

Notwithstanding the fact that numerous parties challenged Duke's election to realign RTOs, it is Duke's burden of proving that this election will not "complicate any aspect of the CBP," or at least explaining to what degree the realignment will complicate the CBP. It is not the obligation of intervening parties to do so. Duke has not satisfied its burden of proof as part of this proceeding.

For the above-stated reasons, this Commission should prohibit Duke from recovering any costs associated with its migration from MISO to PJM as part of this proceeding or any other proceeding. Alternatively, as the Commission Staff recommends, the Commission should specifically state that it is not approving cost recovery and address the cost recovery issue as part of a separate proceeding.[17]

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[16] See Staff Brief at 23 (explaining their "concern. . . that proposed Rider BTR would automatically permit Duke to fully recover all MISO exit fees, PJM entrance fees, and RTEP expansion planning costs and other similar type costs without any Commission review of their appropriateness." See also Initial Brief of Industrial Energy Users-Ohio ("IEU-Ohio Brief") at 6-7; GCHC Brief at 19-20; OEG Brief at 13; and Initial Brief by the Office of the Ohio Consumers' Counsel ("OCC Brief") at 25-30.

[17] See Staff Brief at 23.

D. Duke's MRO application and initial brief fail to adequately explain the justification for making Riders RECON and SCR non-bypassable.

Duke's MRO Application, supporting testimony, evidence presented at the hearing, and Merit Brief fail to justify making the charges in Rider RECON and Rider SCR non-bypassable for shopping customers.

Rider RECON is a generation-related rider that should be fully bypassable for shopping customers. As FirstEnergy Solutions persuasively explained, "Rider RECON is designed to reconcile Riders PTC-FPP and SRA-SRT, both of which are generation related riders" and "generation-related costs should be borne by those who incur them. . . . Customers who do not take generation service from Duke should not be forced to pay for it through a non-bypassable charge."[18] Staff agreed, noting that "Rider RECON essentially combines Riders PTC-FPP and SRA-SRT from Duke's current ESP, which are both generation-related riders," and "Duke's generation-related costs should not be attributed to customers not taking generation service from Duke."[19] For this reason, and others suggested by numerous intervening parties,[20] Rider RECON should be fully bypassable.

The only justifications offered by Duke for making Rider SCR non-bypassable are because: 1) it "avoids the theoretical risk that only one remaining non-switched customer would pay all of these costs;"[21] and 2) FirstEnergy did so. This statement ignores a number of simple

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[18] FES' Brief at 14. See also OEG Brief at 17; Initial Brief of Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. ("Constellation Brief") at 16 (noting that a "similar prohibition on making non generation customers pay for generation expenses exists in Illinois, Pennsylvania, New York, Texas, New Jersey, Maryland, Connecticut, Massachusetts, Maine, the District of Columbia and Delaware").

[19] Staff Brief at 17. See also OPAE Brief at 9 (supporting Staff's testimony).

[20] See OEG Brief at 17; GCHC Brief at 17 (explaining that Rider RECON should be bypassable "to avoid cross-subsidization"); Initial Brief of Wal-Mart Stores East, LP ("Wal-Mart Brief") at 6 (explaining that "costs should be allocated to the extent possible to the cost causer. The Company's proposed Rider RECON will impose generation-related costs on competitively-supplied customers who, by definition, do not take generation service from the Company").

[21] Duke Brief at 33.

truths: 1) Duke's justification is based on a theoretical risk unlikely to ever occur,[22] 2) the circuit breaker mechanism inherent in proposed Rider SCR unfairly shifts the alleged risk from Duke to shopping customers;[23] 3) the proposed non-bypassability of Rider SCR offers no benefit to shopping customers;[24] 4) the FirstEnergy ESP Stipulation that Duke relies upon was a negotiated settlement through which all signatory parties made concessions to achieve a balanced result—none of which are reflected in Duke's unilateral MRO application; and 5) the FirstEnergy ESP Stipulation expressly states that it was "submitted for purposes of this [ESP] proceeding only, and is not deemed binding in any other proceeding,"[25] especially this MRO proceeding which involves a different utility and a completely different set of circumstances.[26]

III. CONCLUSION

For the reasons stated herein, Duke's MRO Application fails to comply with Ohio law. Accordingly, OMA respectfully requests that the Commission deny the MRO Application.

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[22] GCHC Brief at 18 ("While this may be theoretically possible, it is doubtful that it would ever occur, particularly if blending progresses at the statutory pace and not Duke's accelerated schedule"). See also Constellation Brief at 18 (citing to the hearing testimony of Staff witness Turkenton); OPAE Brief at 9 (supporting Staff's testimony).

[23] Staff Brief at 19.

[24] See Wal-Mart Brief at 8.

[25] Stipulation and Recommendation in Case No. 08-935-EL-SSO, ¶ K.

[26] Throughout this proceeding, and its initial brief, Duke refers to and relies upon the Commission order approving an ESP stipulation in FirstEnergy's most recent SSO case (Case No. 10-388-EL-SSO). See e.g. Duke Brief at 32, footnote 55. For the reasons set forth above, such reliance is inappropriate.

Respectfully submitted on behalf of
OHIO MANUFACTURERS' ASSOCIATION

Matthew W. Warnock
BRICKER & ECKLER LLP
100 South Third Street
Columbus, OH 43215-4291
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
E-mail: mwarnock@bricker.com

Kevin Schmidt
The Ohio Manufacturers' Association
33 N. High Street, Suite 600
Columbus, OH 43215
Telephone: 614-629-6816
E-mail: kschmidt@ohiomfg.com
Counsel for the Ohio Manufacturers' Association

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the parties of record listed below this 3rd day of February 2011 *via* electronic mail.

Matthew W. Warnock

Amy B. Spiller
Associate General Counsel
Elizabeth H. Watts
Assistant General Counsel
Rocco O. D'Ascenzo
Senior Counsel
Duke Energy Business Services
139 East Fourth Street, 1313-Main
Cincinnati, OH 45202

Ann M. Hotz
Kyle L. Verrett
Jody M. Kyler
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
hotz@occ.state.oh.us
verret@occ.state.oh.us
kyler@occ.state.oh.us

John W. Bentine
Mark Yurick
Matthew S. White
Chester, Wilcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213
jbentine@cwslaw.com
myurick@cwslaw.com
mwhite@cwslaw.com

William T. Reisinger
Nolan Moser
Trent A. Dougherty
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
will@theoec.org
nolan@theoec.org
trent@.theoec.org

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com

Samuel Randazzo
Joseph Oilker
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, OH 43215
sam@mwncmh.com
joliker@mwncmh.com

Michael D. Dortch
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, OH 43215
mdortch@kravitzllc.com

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

David A. Kutik
Jones Day
North Point
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour, and Pease LLP
52 East Gay Street
PO Box 1008
Columbus, OH o 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

Grant W. Garber
Jones Day
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215-2673
gwgarber@jonesday.com

Mary Christensen
Counsel for People Working Cooperatively, Inc.
8760 Orion Place, Suite 300
Columbus OH 43240
mchristensen@columbuslaw.org

Barth E, Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215
barthrover@aol.com

Gary A. Jeffries
Senior Cotmsel
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212
Garv.A.Jeffries@dom.com

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com

Douglas E. Hart
Attorney for The Greater Cincinnati Health Council
441 Vine Street, Suite 4192
Cincinnati, OH 45202
dhart@douglasehart.com

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
P.O. Box 1793
Findlay, OH 45839-1793
drinebolt@ohiopartners.org
cmooney2@columbus.rr.com

Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources LLC
550 W. Washington St., Suite 300
Chicago, IL 60661
Cynthia.bradv@constellation.com

Steven Beeler
John Jones
Assistant Attorneys General
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215
Steven,beeler@puc.state.oh.us
John.jones@puc.state.oh.us

Richard Chamberlain
Behrens, Wheeler & Chamberlain
6 N.E. 63rd Street, Suite 400
Oklahoma City, OK 73105
rdc_law@swbell.net

Kevin J. Osterkamp
Roetzel & Anderss, LPA
155 E. Broad Street, 12th Floor
Columbus, OH 43215
kosterkamp@ralaw.com

Anne M. Vogel, Attorney for
AEP Retail Energy Partners LLC
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
amvogel@aep.com

Matthew J. Satterwhite
American Electric Power Service
Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
mjsatterwhite@aep.com

Terrence O'Donnell
Christopher Montgomery
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com