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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**REPLY BRIEF
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Ann M. Hotz, Counsel of Record
Jody M. Kyler
Richard C. Reese
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (T)
hotz@occ.state.oh.us
kyler@occ.state.oh.us
reese@occ.state.oh.us

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") files this Reply Brief in response to the Briefs filed in this case on January 27, 2010, as part of the hearing addressing Duke Energy Ohio Inc.'s ("Duke") Application for Approval of a Market Rate Offer ("MRO"). OCC is filing on behalf of almost 612,000 residential customers of Duke.

In this Reply Brief, OCC responds to issues raised by the other parties who have filed Briefs in this case: Duke Energy Ohio, Inc ("Duke"), Ohio Partners for Affordable Energy ("OPAE"), The Ohio Environmental Council ("OEC"), Ohio Advanced Energy ("OAE"), Dominion Retail, Inc. ("Dominion"), The Ohio Manufacturer's Association ("OMA"), Retail Energy Supply Association ("RESA"), The Kroger Co. ("Kroger"), Eagle Energy, LLC ("Eagle"), The Greater Cincinnati Health Council ("GCHC"), Wal-Mart Stores East, LP, and Sam's East, Inc. ("Wal-Mart"), The Staff of the Public Utilities Commission of Ohio ("Staff"), Industrial Energy Users-Ohio's ("IEU"), FirstEnergy

Solutions ("FirstEnergy"), Ohio Energy Group ("OEG"), and Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. ("Constellation").

II. LAW AND ARGUMENT

A. The Commission Should Approve Duke's MRO Subject to Modifications.

Duke's MRO plan can be remedied to meet the legal requirements of R.C.

4928.142. The Staff's notion that Duke's MRO plan is "deficient in its entirety"¹ because Duke's proposal for a three year blending period is "the centerpiece"² of Duke's MRO plan is misplaced. The Staff incorrectly concludes that "the Commission should deny Duke's MRO application for being deficient in its entirety."³ The R.C.

4928.142(B)(3) does not permit the Commission to deny an MRO application in its entirety:

The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. If the finding is negative as to one or more requirements, the commission in the order **shall direct** the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction; **otherwise, the electric distribution utility shall withdraw the application** (Emphasis added).

Accordingly, the Commission must identify the portions of the plan that are not meeting the requirements of the law and must give Duke the opportunity to remedy the

¹ Staff Brief at 3

² Staff Brief at 2.

³ Staff Brief at 3.

plan. If Duke chooses not to make the changes necessary to meet the requirements of the law, Duke must withdraw the application.

Contrary to the Staff's arguments,⁴ the remaining parts of the MRO plan can be easily reconfigured to include a planned five-year rather than three-year blending period. The Commission should simply order Duke to change the three-year blending period proposal to the statutorily required five-year blending period in order to remedy the unlawful provision. With that change and some additional modifications Duke's MRO should be approved.

The only other deficit that Staff identifies in Duke's MRO application, besides Duke's proposed three-year blending period, is the lack of financial projections for year four and five.⁵ The Staff's argument that the Commission should deny the MRO based upon the lack of financial projections for year four and five is also unlawful. The Commission's only appropriate response to Duke's failure to meet requirements under R.C. 4928.142(B)(3) is to order the Company to "remedy" the application:

The commission shall initiate a proceeding and, within ninety days after the application's filing date, shall determine by order whether the electric distribution utility and its market-rate offer meet all of the foregoing requirements. If the finding is positive, the electric distribution utility may initiate its competitive bidding process. **If the finding is negative as to one or more requirements, the commission in the order shall direct the electric distribution utility regarding how any deficiency may be remedied in a timely manner to the commission's satisfaction;** otherwise, the electric distribution utility shall withdraw the application. However, if such remedy is made and the subsequent finding is positive and also if the electric distribution utility made a simultaneous filing under this section and section 4928.143 of the Revised Code, the utility shall not

⁴ Staff Brief at 2.

⁵ Staff Brief at 8.

initiate is competitive bid until at least one hundred fifty days after the filing date of those applications. (Emphasis added).

The Commission should not give credence to the Staff's implication that Duke's plan to transfer its legacy assets to an affiliate is an additional deficiency in the application.⁶ Duke's plan to transfer its legacy assets is not a part of this application.⁷ And to the extent that the corporate separation plan affects the financial projections for years four and five, it is part of the same problem the Staff identified above. That problem can be easily remedied under R.C. 4928.142(B)(3), as quoted above. Accordingly, the Commission should order the Company to provide the financial projections for year four and five.

The Staff also expresses concern over the lack of customer participation in the time differentiated rate programs that Duke offers.⁸ Staff is concerned about that because in the FirstEnergy Corp. ("FirstEnergy") MRO application, the Commission identified FirstEnergy's failure to provide time-differentiated rates as a reason for not approving FirstEnergy's MRO application.⁹

In this case, however, Duke already has time-differentiated and dynamic-retail pricing options. Although there is not much customer participation in those programs, the Commission is able to require Duke to improve the pricing options if necessary under R.C. 4905.30.

⁶ Staff Brief at 9.

⁷ Duke Exh. 3 at 5 ("Application").

⁸ Staff Brief at 16.

⁹ *In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating company, and the Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 08-936-EL-SSO, Opinion and Order (September 24, 2010) at 24.

Rather than reject Duke's MRO application, the Commission should focus on improving the MRO. As the Staff emphasizes, the Commission has the obligation to provide ongoing oversight of Duke's competitive bidding process ("CBP"). The Commission should assert its jurisdiction to remedy the CBP.

Staff rightly "has concerns with Duke's position regarding the Commission's ongoing review of the CBP."¹⁰ OPAE voiced the same concerns.¹¹ The conduct of the CBP and future modifications to the CBP will impact the extent to which alternative suppliers participate and the extent to which Duke and Duke's affiliates have an unfair advantage over the CBP. Most importantly, the extent to which the Commission ensures that the CBP is appropriately conducted will affect the degree to which customers will pay competitive prices for generation.

But the Staff's view of the Commission's authority to ensure the effectiveness of the CBP is too limited. For example, because Duke included the name of Charles Rivers Associates as the auction manager, the Staff is concerned that the Commission would have no jurisdiction to require a change to the auction manager.¹² The Commission should simply order Duke to remove the name of the current auction manager from the application before the Commission approves the MRO application. Moreover, the General Assembly explicitly provided for the Commission's authority to improve and modify the CBP through rules under R.C. 4928.142(A)(2):

The public utilities commission shall modify rules, or adopt new rules as necessary, concerning the conduct of the competitive bidding process and the qualifications of bidders, which rules shall

¹⁰ Staff Brief at 13.

¹¹ OPAE at 7-8.

¹² Staff Brief at 15.

foster supplier participation in the bidding process and shall be consistent with the requirements of division (A)(1) of this section.

The law directs the Commission to determine if certain criteria have been met for each bid and if the criteria have been met the Commission shall choose the bid winners in each competitive bid under R.C. 4928.142(C). The Commission should be confident that its oversight is well established within the Revised Code and should approve an MRO. A well-regulated CBP is the only means whereby customers can truly get the competitive rates intended by the General Assembly. But in order to ensure an effective CBP the Commission should require Duke to make additional modifications to its MRO.

B. Modifications to the MRO that are Necessary

1. Certain adjustments to the CBP are essential for an effective competitive bid.

In OCC's initial comments OCC identified changes that need to be made to the CBP, including: the need for an increase in the number of solicitations, the need for longer term product auctions, the need for an annual stakeholder collaborative with Duke to improve the CBP, and a need for the Commission, rather than Duke, to apply sanctions based on supplier non-compliance. The Briefs submitted by other parties identified additional adjustments to the CBP that are necessary.

a. The Commission should consider implementing a load cap under certain circumstances.

Both Staff¹³ and OPAE¹⁴ ask the Commission to require a load cap, or a limit on the load an individual bidder can win in an auction, in the CBP. Staff suggests the Commission require a load cap "subject to change, depending on the circumstances of

¹³ Staff Brief at 26.

¹⁴ OPAE Brief at 7-8.

the CBP at any given time.”¹⁵ OCC supports this concept but believes that its implementation should be deferred until such time as the majority of Duke’s SSO load is being auctioned. Early implementation of a load cap where the amount of load being auctioned is minimal runs the risk of setting the size of the winnable load so low that bidder interest will likely be reduced.

Moreover, the Commission should consider the stringency of the CBP credit requirements when setting a load cap. “Loose” credit limits could encourage unreliable providers to undercut reputable bidders, a risk which could be mitigated in part by a stringent load cap. On the other hand, if the credit limits are too stringent the risk of minimizing the number of potential bidders becomes a factor in that larger companies can usually accept more stringent requirements than smaller companies. It is key to strike the right balance so as to encourage the largest number of bidders while also reducing the risk of default and protecting customers.

The Commission should also consider the interplay between credit requirements, the load cap, and Duke’s ability to control the market. Duke should not be allowed to manipulate the credit limits in order to exclude potential bidders. If the credit requirements are permissive enough to encourage a large number of bidders to participate, then Duke should be permitted to win more of the bid. For those reasons, the implementation details surrounding a load cap should be addressed as part of the stakeholder process that OCC proposed in its initial comments and discussed further below.

¹⁵ Staff Brief at 26.

- b. The Commission should not allow Duke to maintain a reserve price for the auction but should provide the auction manager with “circuit breaker” authority to call off the auction if a discrete event occurs, which causes severe market turbulence.**

Constellation expresses serious concerns about Duke’s proposal to use a reserve price.¹⁶ As Constellation explains the reserve price seems contrary to an open and transparent CBP and would seem to afford Duke with the ability to manipulate the auction results. And not all auctions have reserve prices.¹⁷ The Commission should do everything within its authority to ensure a fair and transparent auction process in order to encourage bidder participation. Unless Duke can articulate a valid reason for the reserve price the Commission should disallow it.

In place of the reserve price, the Commission should authorize the bid manager to call off the auction should a discrete event, such as a terrorist attack, cause severe market turbulence. Substituting this “circuit breaker” authority for a reserve price would serve to shield customers from genuine market risk while minimizing the opportunity for auction manipulation.

- c. The Commission should provide for open discussions and annual workshops on bid improvements and should review and approve bid changes recommended by the group.**

Constellation also urges the Commission to conduct a collaborative stakeholder process:

In the spirit of trying to achieve a transparent competitive solicitation and have a clear auction product definition, both of which are required by Section 4928.142, Revised Code, the

¹⁶ Constellation Brief at 7-9.

¹⁷ Tr. Vol. I at 174-179.

Commission should require Duke to engage in an open collaborative stakeholder process.¹⁸

The Commission should require such a process because stakeholders have much at stake and Duke should not have excessive control over the CBP. As Constellation notes, if the CBP is evolved over time with input from all perspectives, it is more likely to become increasingly effective.¹⁹ On the other hand, if only Duke and the auction manager has input into the CBP, the CBP will increasingly serve only Duke's needs.

Accordingly, the Commission or Duke should maintain an annual stakeholder process that will allow all interested parties input into the modifications of the CBP. The Commission should maintain authority to review and approve any and all future modifications. Active participation by customers who have an enormous stake in the effective functioning of the CBP is critical.

2. The Commission should not waive its authority to review the recoverability of the costs resulting from Duke's business decision to join PJM nor should it determine the recoverability of such costs in this proceeding.

In the initial Briefs, multiple parties echo OCC's concern that approval of the Company's proposed tariff sheets for Riders BTR and RTO could constitute a waiver of the PUCO's authority to review the prudence of transmission-related costs.²⁰ The Commission should preserve its authority by ordering Duke to revise its proposed tariff sheets to require Duke to obtain PUCO approval for cost recovery.

¹⁸ Constellation Brief at 14.

¹⁹ Constellation Brief at 15.

²⁰ Greater Cincinnati Health Council Brief at 20; Ohio Manufacturer's Association Brief at 6-7; Ohio Energy Group Brief at 12-13; Industrial Energy Users-Ohio Brief at 6-8.

Further, the Commission should accept the recommendations of multiple parties in this docket and should explicitly state that the Commission is reserving its authority to determine the recoverability of costs resulting from Duke's decision to withdraw from MISO and join PJM for a future proceeding.²¹ Although Duke specifically notes that it "has not requested approval of actual recovery amounts in this proceeding,"²² the Commission should address the issue in this case. Duke appears not to believe that Commission approval is necessary because Duke has removed wording in its tariff that Duke's collection of its transmission costs are subject to Commission approval. Accordingly, the Commission should modify the tariff in this case and should clarify that it retains its authority to review the recoverability of these costs in a future case. If the Commission says nothing at all about the recovery of these costs in this proceeding and approves the current tariff, the PUCO's action could be interpreted as approving the recoverability of the RTO transfer costs even before the specific amounts of those costs are known. The Commission must exercise the authority it has provided itself under Ohio Adm. Code 4901:1-36 and the Courts have provided the Commission under *Pike County*.²³

Additionally, although some parties have raised concerns regarding the bypassability of such costs,²⁴ that issue should also be addressed by the Commission in a separate proceeding focused on the recoverability of such costs. In order to better address that issue and many others that have not been sufficiently addressed in this hearing, the

²¹ Staff at 23-25; Constellation at 14; Greater Cincinnati Health Council at 20-21; Retail Energy Suppliers Association at 16-17; Ohio Manufacturer's Association at 8; Ohio Energy Group at 16-17.

²² Duke Brief at 32.

²³ *Pike County Light & Power Co. v. Penn. Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983).

²⁴ Eagle Energy at 4.

Commission should address the recoverability of the types of costs resulting from Duke's decision to join PJM in a separate proceeding.

If the Commission does determine the recoverability of such costs in this proceeding, the Commission should find that such costs are not recoverable since Duke has not provided sufficient evidence that the costs have resulted in benefits to consumers.²⁵ In fact, approval of such costs may constitute a subsidy of Duke's unregulated generation business by distribution customers of Duke Energy Ohio.²⁶ Further, Duke Energy Kentucky, Inc. has already committed not to pass such costs through to Kentucky customers so there is evidence to suggest that the recovery of these costs is not critical to Duke's continued operations and that asking customers to absorb these large costs is unreasonable.²⁷ Because there is not evidence sufficient to demonstrate benefits of Duke's decision to join PJM in the record, the Commission should find that the costs resulting from Duke's unilateral business decision are not recoverable from customers.

3. The Commission should order Duke to remedy its MRO plan by including in the plan the five-year blending period and the proportions required under R.C. 4928.142(D).

The most fundamental and first step in Ohio statutory interpretation is set forth under R.C. 1.42. R.C. 1.42 directs the reader accordingly, "Words and phrases are to be read in context and construed according to rules of grammar and common usage." And when the words and phrases of a statute are not ambiguous no other steps are needed. In

²⁵ Ohio Energy Group at 13-14; Ohio Partners for Affordable Energy at 12; Ohio Manufacturer's Association at 7-8; IEU-Ohio Brief at 14.

²⁶ IEU-Ohio Brief at 14-16.

²⁷ OMA Brief at 7.

Duke's extensive and painful interpretation of the blending provisions of R.C.

4928.142(D) and (E) Duke carefully avoids citing to R.C. 1.42.²⁸ Duke's failure to cite to R.C. 1.42 is understandable because if the blending provisions are read "in context and construed according to rules of grammar and common usage" the words of R.C. 4928.142(D) and (E) unambiguously do not support Duke's request for a three year blending period with the proportions Duke wants.

Duke justifies its proposed blending period by **not** reading the words in context but by defining individual words out of context.²⁹ Duke's interpretation of the terms "significant change" is particularly bizarre. Duke apparently reads that term to mean that the converging of the market price and the electric security plan price or circumstances in which the market price is lower than the electric security plan price constitutes the kind of "significant change" the statute intends.³⁰

Even according to Duke witness Rose, the market price has been lower than the electric security plan price since 2009.³¹ In addition, the converging of the market price and the electric security plan price cannot be expected to be a change, certainly not a significant change, because the electric security plan ("ESP") price was designed to incorporate changes in the market price over time. The ESP provides for automatic recovery of costs such as fuel and purchased power that are based upon the market price under R.C. 4918.143(B)(1)(a) and "automatic increases or decreases in any component of

²⁸ Duke Brief at 23-30.

²⁹ See eg., Duke Brief at 26 and 27.

³⁰ Duke Brief at 28-29.

³¹ Duke Exh. 4 at 5 (Rose Testimony).

the standard service offer price” under R.C. 4928.143(B)(2)(e). Duke’s interpretation is inexplicable.

In fact, the focus of Duke’s interpretation efforts appears to be a “slight of hand” approach with the objective of focusing its audience only on its discussion of particular words. With that approach, the audience may neglect to notice large portions of the statute that are clearly unambiguous and straightforward such as this provision within R.C. 4928.142(D):

The first application filed under this section by an electric distribution utility * * * 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 as follows: ten per cent of the load in year one, not more than twenty per cent in year two, thirty per cent in year three, forty per cent in year four and fifty per cent in year five.

In other words, the statute unambiguously ordered Duke to propose a five year blending period with specific proportions to be bid in its first MRO application. Duke did not do this. Accordingly, the Commission should order Duke to revise its proposal to comply with the statute.

In addition, Duke apparently hopes that its audience will not notice another unambiguous directive within R.C. 4928.142(D) that, “Consistent with those percentages, **the commission** shall determine the actual percentages for each year of years one through five.” (Emphasis added.) Not only does Duke hope that parties will accept its own blatant refusal to meet the requirements of the law but it also urges the Commission to do so by altering the length of the blending period before the blending period begins.

Under R.C. 4928.142(E) the Commission may alter only one element in the blending process and that is the proportions, “the commission may alter prospectively the

proportions specified in that division.” And if in altering the proportions the blending period is extended, the Commission shall not cause “the duration of the blending period to exceed ten years.”

FirstEnergy provides an equally illogical reading of the statute that allows for an even shorter blending period.³² The only other parties that support the three year blending period³³ made no attempt to support Duke’s interpretation. Most of the parties in the case who discussed the provisions of R.C. 4928.142(D) found them to unambiguously forbid Duke from proposing a blending period that deviates from the five year period and the proportion set forth in the statute.³⁴ And most of the parties to the case who discussed the provisions of R.C. 4928.142(E) found them to unambiguously permit only the Commission to alter the proportions in an incremental and gradual process taking into consideration changes in the market during the blending period. Duke and FirstEnergy were the only parties who discussed the interpretation of R.C. 4928.142(E), who found the statute to allow the Commission to approve Duke’s altering of the proportions before the blending period even starts.³⁵

³² FirstEnergy Brief at 5-6.

³³ Wal-Mart Brief at 2; and RESA Brief at 18.

³⁴ Kroger Brief at 4-8; OPAE Brief at 2-6; GCHC Brief at 6-12; OMA Brief at 2-5; OEG Brief at 2-7 and Staff Brief at 3-7.

³⁵ Kroger Brief at 4-8, OPAE Brief at 2-6, GCHC Brief at 6-12, OMA Brief at 2-5, and Staff Brief at 3-7.

4. The Commission should provide that Rider RECON and Rider SCR be by-passable.

The Staff,³⁶ Constellation,³⁷ RESA,³⁸ Wal-Mart,³⁹ GCHC,⁴⁰ FirstEnergy⁴¹ and OPAE⁴² appropriately state that Rider RECON should be by-passable. Rider RECON collects only generation costs such as fuel and capacity costs, which should not be charged to shopping customers. Allowing Duke to recover generation charges from shopping customers is contrary to R.C. 4928.02(H) because it would allow Duke to recover generation costs through distribution service.

Additionally, the Staff⁴³ Constellation,⁴⁴ IEU,⁴⁵ RESA,⁴⁶ Wal-Mart,⁴⁷ GCHC,⁴⁸ and OPAE⁴⁹ appropriately state that Rider SCR should be by-passable. Rider SCR collects generation costs also that are not lawfully recovered through shopping customers under R.C. 4928.02(H) and, accordingly should be collected only through non-shopping customers.

³⁶ Staff Brief at 17-18.

³⁷ Constellation Brief at 15-16.

³⁸ RESA Brief at 8.

³⁹ Wal-Mart Brief at 5-7.

⁴⁰ GCHC Brief at 17.

⁴¹ FirstEnergy Brief at 14.

⁴² OPAE Brief at 8-9.

⁴³ Staff Brief at 19.

⁴⁴ Constellation Brief at 17-19.

⁴⁵ IEU Brief at 16-17.

⁴⁶ RESA at 9-10.

⁴⁷ Wal-Mart Brief at 7-9.

⁴⁸ GCHC Brief at 17-19.

⁴⁹ OPAE Brief at 10.

5. The Commission should modify Duke's MRO to ensure that demand charges are reflected as a component in retail rate design.

The Commission should order Duke to include demand charges in its retail rates in order to facilitate lower bids in the CBP. As Duke notes, capacity-related costs associated with the CBP will be converted to energy charges for the different rate classes if its application for a MRO is approved by the Commission.⁵⁰ Essentially this means that demand charges that are currently in Duke's rates will be removed. Duke supports this rate design on the basis that it has been approved in a prior Commission proceeding.⁵¹ Duke fails to note, however, that in the prior case cited to by the Company, the Commission also indicated some uncertainty with rate design aspects of the Stipulation and built in some flexibility in considering modifications.⁵² Another important distinction between the alleged precedent, cited by Duke, is that the rate design was arranged through a Stipulation, which the Commission does not consider to have precedential value.

Kroger's witness in this proceeding found that the rate design proposed by Duke was flawed due to the "cost-shifting" that would occur.⁵³ Duke claims that Mr. Higgins "admitted" that his suggestion regarding demand charges was not a sufficient reason for

⁵⁰ Duke Brief at 31.

⁵¹ Id. Duke cites generally to *In re the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company For authority to Establish a Standard Service Offer Pursuant to R. C. § 4928.143 in the form of an Electric Security Plan*, Case No. 10-388-EL-SSO ("10-388 Case") (Opinion and Order, August 25, 2010).

⁵² 10-388 Case Opinion and Order at 35. "The Commission further notes that the Combined Stipulation provides that the Commission may, with the Companies' concurrence, institute a changed revenue neutral distribution rate design. The Commission clarifies that, while it will actively engage the Companies prior to consideration of a rate design modification, rate design, within the stipulated parameters of revenue neutrality, remains within the discretion of the Commission."

⁵³ Kroger Exh. 1 at 4 (Higgins testimony).

the Commission to reject Duke's MRO Application.⁵⁴ But Duke's characterization of the testimony of Mr. Higgins is taken out of context and mischaracterized. Instead, Mr. Higgins stated, in support of the return of demand charges to the retail rates of the MRO, that "[i]f the Commission were to approve the MRO, this is a modification [the inclusion of demand charges] that I'm recommending."⁵⁵

As OCC has argued, rate design should "send the correct price signals to customer concerning the varying costs of electricity."⁵⁶ The lack of demand charges will result in inefficient demand for and use of generation resources.

In addition to the cost-shifting and inefficient use of generation resources, the lack of a demand component in the design of the retail generation tariffs will be recognized by bidders as risky, and will result in higher bids. Demand components should be re-introduced into the proposed retail generation rate design (i.e. similar to generation tariffs before the changes brought by Case No. 08-935-EL-SSO) before any bidding takes place in order to more fully reflect the cost of generation in rates.⁵⁷

⁵⁴ Id. Duke cited to Tr. Vol. V at 916 (Higgins).

⁵⁵ Tr. Vol. V at 916 (Higgins).

⁵⁶ OCC Brief at 35.

⁵⁷ In re FirstEnergy's 2008 ESP Proceeding, Case No. 08-935-EL-SSO, Opinion and Order, page 23(December 19, 2008). The Commission further found that "...FirstEnergy should work with Staff, and other stakeholders, to develop a means of transitioning FirstEnergy's generation rate schedules to a more appropriate rate structure which takes into consideration of time varying generation costs of serving different customers and classifications of customers with homogenous loads and/or generation cost profiles, considers customer load factor, incorporates seasonal generation cost differentials, and, where adequate metering is available, provides customers with time-differentiated and dynamic pricing options."

6. The Commission should require adjustable riders that may be continued through the blending period to be audited for prudence.

The Commission should require Duke to provide for an audit of the FPP, the EIR, and the AERR riders if the Commission approves them in this application as the Staff⁵⁸ and OPAE⁵⁹ and OCC urges. The Staff notes that Duke's application does not provide for such a review and a prudence review is required under R.C. 4928.142(D)(1), (D)(2) and (D)(3).⁶⁰

7. The Commission should require Duke to enter into long-term contracts to purchase the renewable energy sources required under R.C. 4928.64.

Both OEC and OAE asked the Commission to require Duke to enter into long-term contracts to purchase solar renewable energy credits ("SRECs").⁶¹ Duke did not meet its solar renewable energy benchmark relying on short-term contracts. Accordingly, Duke will not be likely to meet its next solar renewable energy benchmark if it does not enter into longer-term contracts.

Apparently Duke does not plan to build its own solar facilities.⁶² And Duke witness Ritch admitted that solar developers are more likely to make investments if they have entered into a long-term contract that will enable them to recoup their investment.⁶³

Duke even admits in its testimony in this case that it will continue to have problems meeting its solar benchmarks if it continues to rely only on short-term

⁵⁸ Staff Brief at 21-22.

⁵⁹ OPAE at 11.

⁶⁰ Staff Brief at 21-22.

⁶¹ OEC Brief and OAE Brief.

⁶² Tr. Vol. II at 277 (Ritch Cross).

⁶³ Id. at 275.

contracts.⁶⁴ Moreover, Duke is the only electric distribution utility that is unwilling to take additional steps in meeting its solar renewable energy credit benchmarks.⁶⁵

For these reasons, the Commission should order Duke to purchase solar RECs through long-term contracts. And with respect to meeting its solar REC obligations, Duke should continue its finally implemented customer REC purchase program.

8. The Commission should provide for the purchase of receivables.

The Staff states that the Commission should not provide for Rider UE-GEN, which is intended to recover the costs associated with uncollectible expenses, in this case because R.C. 4928.142 does not permit the recovery of such costs in an MRO.⁶⁶ If the Commission agrees that Rider UE-GEN is not appropriately included in an MRO case, the Commission should approve such a rider in an alternative proceeding. The purchase of competitive retail electric supplier receivables by a distribution utility is important for retail electric competition. It will ensure the Commission that retail electric suppliers will not red-line certain neighborhoods and refuse to make generation offers to lower income customers. For this reason, an uncollectible rider is important for competition and should be established.

III. CONCLUSION

For the reasons stated above the Commission should accept Duke's MRO Application because it will provide more competitive pricing with certain modifications:

⁶⁴ Duke Exh. 9 at 9 ("Ritch Testimony").

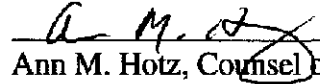
⁶⁵ OEC Brief at 7.

⁶⁶ Staff Brief at 18-19

- Change the CBP by requiring load caps after Duke begins to bid out a majority of its SSO load;
- Change the CBP by removing the reserve price and directing the auction manager to close down the auction in case of discrete events that have extraordinary influence on short-term prices;
- Order that modifications to the CBP be made through a collaborative or workshop that provides for input by all interested stakeholders with subsequent Commission review and approval;
- Order Duke to reinstate tariff language that recognizes the Commission's authority to review transmission costs before they are collected from retail customers;
- Order Duke to file for the recoverability of transmission costs resulting from Duke's decision to withdraw from MISO and join PJM in a separate proceeding;
- Order Duke to maintain a five year blending period and to file financial projections for years four and five;
- Order Duke to make all generation related riders by-passable;
- Order Duke to provide for a demand charge in the rate design;
- Order Duke to have independent audits of all adjustable riders;
- Order Duke to purchase solar RECs through long-term contracts and its customer REC purchase program; and
- Order Duke to purchase receivables from CRES providers either through this case or in an independent proceeding.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Ann M. Hotz, Counsel of Record

Jody M. Kyler

Richard C. Reese

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street, Suite 1800

Columbus, Ohio 43215-3485

(614) 466-8574 (T)

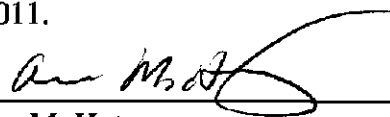
hotz@occ.state.oh.us

kyler@occ.state.oh.us

reese@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply Brief* was provided to the persons listed below via electronic service this 3rd day of February 2011.


Ann M. Hotz
Assistant Consumers' Counsel

SERVICE LIST

Amy Spiller
Elizabeth Watts
Duke Energy Ohio Inc.
221 E. Fourth St., 25 AT II
Cincinnati, OH 45202
Amy.Spiller@duke-energy.com
Elizabeth.Watts@duke-energy.com

Steven Beeler
John Jones
Public Utilities Commission of Ohio
180 E. Broad St., 6th St.
Columbus, OH 43215
Steven.beeler@puc.state.oh.us
John.jones@puc.state.oh.us

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

Samuel C Randazzo
McNees Wallace & Nurick LLC
Fifth Third Center
21 East State Street, Suite 1700
Columbus, OH 43215-4228
sam@mwnclmh.com

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

John W. Bentine
Mark S. Yurick
Chester Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, OH 43215
jbentine@cwslaw.com
myurick@cwslaw.com

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

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

Grant W. Garber
Jones Day
P.O. Box 165017
Columbus, OH 43216-5017
gwggarber@jonesday.com

Douglas E. Hart
441 Vine St., Suite 4192
Cincinnati, OH 45202
dhart@douglasshart.com

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

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour And Pease LLP
52 East Gay St., P. O. Box 1008
Columbus, OH 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

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

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
tobrien@bricker.com

Douglas E. Hart
441 Vine Street, Suite 4192
Cincinnati, OH 45202
dhart@douglasshart.com

Mary Christensen
Christensen & Christensen LLP
8760 Orion Place, Suite 300
Columbus OH 43240
mchristensen@columbuslaw.org

Terrence O'Donnell
Matthew W. Warnock
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
todonnell@bricker.com
mwarnock@bricker.com

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

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

Lisa McAlister
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215-4291
lmcalister@bricker.com

Anne M. Vogel
AEP Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
amvogel@aep.com

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

Amy.Spiller@duke-energy.com
Elizabeth.Watts@duke-energy.com
Steven.beeler@puc.state.oh.us
John.jones@puc.state.oh.us
dboehm@BKLawfirm.com
mkurtz@BKLawfirm.com
sam@mwncmh.com
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org
jbentine@cwslaw.com
myurick@cwslaw.com
mwhite@cwslaw.com
will@theoec.org
nolan@theoec.org
trent@theoec.org
haydenm@firstenergycorp.com

dakutik@jonesday.com
gwgarber@jonesday.com
dhart@douglasshart.com
Cynthia.Brady@constellation.com
mhpetricoff@vorys.com
smhoward@vorys.com
mdortch@kravitzllc.com
tobrien@bricker.com
dhart@douglasshart.com
mchristensen@columbuslaw.org
todonnell@bricker.com
mwarnock@bricker.com
rdc_law@swbell.net
kosterkamp@ralaw.com
lmcalister@bricker.com
amvogel@aep.com
mjsatterwhite@aep.com