

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**REPLY BRIEF  
SUBMITTED ON BEHALF OF THE STAFF OF  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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**February 3, 2011**

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**INTRODUCTION**

Duke's MRO Application is deficient in its entirety because Duke's three-year blending proposal is a monumental deficiency that affects most of the remaining and contingent parts of Duke's Application. Duke's downfall in this case is its misunderstanding of R.C. 4928.142(E) and how it relates to division (D) of that statute. Staff will show how Duke lost its way in interpreting this statute and why, as a result, its Application cannot be saved.

**I. Duke's MRO Blending Period is Contrary to Law.**

Duke argues "[n]othing in the statute mandates a minimum blending period of five years."<sup>1</sup> This statement is wrong if we are talking about Duke's Application. The first

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<sup>1</sup> Duke Merit Brief at 27.

paragraph in R.C. 4928.142(D), as applied to Duke's Application, mandates a minimum blending period of five years for a utility filing its first MRO application and owning generating facilities, as of July 31, 2008. R.C. 4928.142(E) subsequently provides the Commission the flexibility to change the percentages after the second year of the MRO, which Duke admits in its argument.<sup>2</sup>

Duke also argues that "[n]othing in the statute precludes 100 percent auction-based in year three."<sup>3</sup> This statement is also wrong if we are talking about Duke's Application. Applying R.C. 4928.142(E) to Duke is premature because Duke is not beginning year two of an MRO blending period now. Duke further argues "[n]othing in the statute precludes acceleration of the blend in year three or any other year."<sup>4</sup> This claim is wrong too if we are talking about Duke's Application. R.C. 4928.142(E) limits the time when the Commission can alter the five-year default blending period to the beginning of the second year, and later, but not to exceed ten years of a blending period already in progress. Duke has it all wrong. Accordingly, Duke's Application must fail.

In applying R.C. 4928.142(E), Duke argues in its initial brief that the Commission has the discretion to alter the default blending period in R.C. 4928.142(D) now.<sup>5</sup> As Staff anticipated in its initial post-hearing brief, Duke relies on the phrase "notwithstanding any other requirement of this section" for its argument that the Commission has the flexi-

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<sup>2</sup> Duke Merit Brief at 21-22.

<sup>3</sup> *Id.* at 27.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 22-29.

bility *now* to apply the abrupt or significant change standard in division (E) and shorten the five-year default blending period in R.C. 4928.142(D).<sup>6</sup> Apparently, FirstEnergy solutions (FES) relies on the same phrase for the same argument.<sup>7</sup> But Duke and FES simply misinterpret division (E), as Staff will show below.

It is Staff's interpretation that the Commission can alter and shorten the five-year default blending period of R.C. 4928.142(D), beginning in year two, or later, of an MRO already in progress and approved by the Commission.<sup>8</sup> The Commission has the discretion to do this if an abrupt or significant change in price is demonstrated at that time. But Staff's interpretation does not support Duke's interpretation that the Commission can shorten the default blending period for Duke now.

In its brief, Duke quotes the "notwithstanding" phrase in division (E) for its proposition that the Commission can alter division (D) now,<sup>9</sup> but Duke never explains how this phrase modifies the other exception to division (D) that precedes it in the same division, "[b]eginning in the second year of a blended price under division (D) of this section," to support its Application.

Duke's reference to the rules of statutory construction does not support its own interpretation of the relationship between the words "[b]eginning in the second year . . . and notwithstanding *any other requirement*," because Duke fails to give those

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<sup>6</sup> Duke Merit Brief at 22.

<sup>7</sup> FES Brief at 5.

<sup>8</sup> Tr. Vol. V at 1063-1065, 1116.

<sup>9</sup> Duke Merit Brief at 22.

words their usual, normal, or customary meaning. Because the scope of the subject matter in division (E) is limited to modifying the blending duration and percentages of division (D) in the future, the *any other requirement* must refer to the five year blending mandate, that, but for division (E), cannot be modified to less or more than five years. Division (E) gives the Commission the flexibility in the future to shorten the blending period in division (D) to two years or lengthen the blending period up to ten years. Obviously, if the duration changes, so do the percentages. This is the flexibility the legislature intended the Commission to have if it *first* determines that an abrupt or significant change in price has occurred between years two and ten of an MRO *already in progress*.

Staff argued in its initial brief that Duke is selective on what requirements of divisions (D) and (E) are modified by the “notwithstanding” phrase that Duke relies on to shorten the default blending period *now*.<sup>10</sup> If this phrase, according to Duke, can shorten the blending duration to less than five years *now*, it must also give the Commission the authority to extend it to ten years *now*. But this is not what the legislature intended for either scenario. Duke confirms Staff’s argument, made in Staff’s initial brief, that, according to Duke, the “notwithstanding” phrase in R.C. 4928.142(E) can be used to modify division (D) to shorten the blending duration now, but does not give the Commission any flexibility to alter the percentage in year one under division (D). Likewise,

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<sup>10</sup>

Staff Initial Post-Hearing Brief at 7.

according to Duke, the Commission has limited discretion to determine a percentage that is not more than twenty per cent in year two.<sup>11</sup>

While interpreting “prospectively” to mean the future, Duke argues “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.”<sup>12</sup> This does not make sense. Duke further argues that “the clear language of the statute allows the Commission to alter prospectively the blending percentages that are applicable in year three and beyond.”<sup>13</sup>

Duke’s arguments are inconsistent because they selectively choose what requirements the “notwithstanding” phrase modifies.

Finally, Duke queries, under what circumstances is the Commission permitted to alter the percentages?<sup>14</sup> Duke argues that “[n]either the statute nor any intervener in this proceeding defines an abrupt change or a significant change.”<sup>15</sup> But it is not the job of the legislature or an intervener to define when it may be necessary for the Commission, under R.C. 4928.142(E), “to mitigate any effect of an abrupt or significant change in general or with respect to any rate group or rate schedule but for such alteration.”<sup>16</sup> Instead, the legislature intended for the Commission to identify when it should utilize this stand-

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<sup>11</sup> Staff Initial Post-Hearing Brief at 22, 24-25.

<sup>12</sup> *Id.* at 25.

<sup>13</sup> *Id.* at 25-26.

<sup>14</sup> *Id.* at 27.

<sup>15</sup> *Id.*

<sup>16</sup> Ohio Rev. Code Ann. § 4928.142(E) (West 2010).

ard, given future unforeseen economic circumstances, not previously forecasted, that may develop and impact the utility's SSO price during the blending period. In short, the legislature does not define the standards it creates in statutes that it expects tribunals to interpret and give meaning.

Duke should know that it cannot insert words not used in the statute to construe its meaning, but Duke argues the legislature intended the purpose of the blending to be twofold: "[1] to protect ratepayers from abrupt rate changes and [2] to protect utilities' financial integrity."<sup>17</sup> In order to find this legislative intent in the statute, Duke must insert words into R.C. 4928.142 to support this meaning. Notwithstanding Duke's argument, the only record evidence relating to helping the utility in this case is Duke wanting a decision now on accelerating to market prices in less than five years to avoid further application of the Significantly Excessive Earnings Test and realizing a better value for its legacy generating assets in the same accelerated time.<sup>18</sup> Even assuming, *arguendo*, Duke's statement of the purpose of the statutory blending is true, Duke did not show its financial integrity was at risk to trigger the application of the standard now.

Duke also argues that "[t]he legislature based the requirement for a blending period on the assumption...that market prices and previous SSO prices would be substantially divergent."<sup>19</sup> Duke further argues that because it has predicted that the market price and its most recent SSO price will converge three years from now, this, according

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<sup>17</sup> Staff Initial Post-Hearing Brief at 29.

<sup>18</sup> Duke Ex. 11 at 15 and 17.

<sup>19</sup> *Id.* at 28.



to Duke, constitutes a significant change under division (E) to allow the Commission to alter the default blending period now.<sup>20</sup> Assuming, arguendo, Duke is right that when the market and SSO prices are either substantially divergent or convergent between years two and ten, the Commission has the flexibility to alter the five-year default blending period in division (D), this flexibility to alter is limited to the years between two and ten of a blending period already in progress. This is because things can change what we believe today and two or three years from now and that is why the legislature intended for this standard to be applied near the middle of a five-year default blending period already in progress.

Finally, Duke argues that “no party offered any evidence to suggest that market prices would exceed the most recent SSO price in 2015 and beyond.”<sup>21</sup> This, of course, includes Duke, the party having the burden in the case.

## **II. Ongoing Commission Oversight of the Competitive Bidding Process.**

If an MRO is approved, the Commission has ongoing oversight of Duke’s CBP. R.C. 4928.142(C) and O.A.C. 4901:1-35-11 provide for Duke’s MRO and CBP to be subject to ongoing Commission review including quarterly and annual reporting requirements.<sup>22</sup> Staff has continuing concerns with Duke’s position and understanding regarding the Commission’s ongoing review of the CBP. It is unclear from the MRO Application,

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<sup>20</sup> Duke Ex. 11 at 28.

<sup>21</sup> *Id.*

<sup>22</sup> Staff Initial Post-Hearing Brief at 12-13.

the record, and Duke's initial brief whether Duke intends for its CBP to be subject to ongoing Commission regulatory oversight. The Commission should not approve the Company's MRO application without requiring compliance with the Commission rules regarding ongoing oversight of Duke's CBP.

If an MRO is approved, Staff is also concerned that the selection and function of the auction manager is non-competitive. Duke proposes to use Charles River Associates (CRA) solely as its auction manager. In Duke's proposed MRO construct, it is possible that a single auction manager, CRA in this case, could have control over the CBP forever. The proposed MRO lacks the option to change or choose a different auction manager. Unlike a short-term ESP, this is a concern for an MRO. A short-term ESP would provide the option to choose a different auction manager once the clearly defined ESP time-period expires.

### **III. Proposed Riders.**

#### **A. Rider RECON**

Proposed Rider RECON should be fully bypassable until collected from customers.<sup>23</sup> In its brief, Duke improperly argues that proposed Rider RECON should be non-bypassable. As mentioned in Staff's initial brief, proposed Rider RECON combines Riders PTC-FPP and SRA-SRT from Duke's current ESP, which are both generation-related

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<sup>23</sup>

Duke Merit Brief at 32-33.

riders.<sup>24</sup> Duke's generation-related costs should not be attributed to customers not taking generation service from Duke.<sup>25</sup>

Furthermore, in Duke's current ESP, Rider PTC-FPP is completely bypassable and Rider SRA-SRT is conditionally bypassable.<sup>26</sup> The rates in Rider PTC-FPP are several magnitudes higher than those in Rider SRA-SRT.<sup>27</sup> Under- or over-recovery balances must be attributed to Rider PTC-FPP as it tends to fluctuate more than Rider SRA-SRT from quarter to quarter.<sup>28</sup> Thus, proposed Rider RECON should be fully bypassable to mirror Rider PTC-FPP's bypassability in the current ESP.

Proposed Rider RECON must also be subject to Staff review and Commission approval regarding the reasonableness of the costs for inclusion in proposed Rider RECON.<sup>29</sup>

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<sup>24</sup> FES Ex. 3 (Direct Testimony of Louis D'Alessandris) at 3.

<sup>25</sup> *Id.*

<sup>26</sup> Wal-Mart Ex. 1 (Direct Testimony of Steve W. Chriss) at 9.

<sup>27</sup> FES Ex. 3 at 4, footnote 6.

<sup>28</sup> Staff Initial Brief at 18.

<sup>29</sup> *Id.*

## **B. Rider SCR**

Rider SCR should be fully bypassable under the MRO to all shopping customers.<sup>30</sup>

Duke argues in its brief and testimony that Rider SCR be provisionally non-bypassable.<sup>31</sup>

Duke states that:

Rider SCR is designed to allow Duke Energy Ohio to recover from non-switched customers exactly the cost of acquiring that portion of their SSO load that is served by the winning bidders. The rider would allow reconciliation of the revenue and the cost, where the auction price billed to customers is slightly different from the rate paid to the winning bidders. Although Rider SCR is intended only to true up these differences, and also to recover the cost of the CBP plan consultant, making it generally relate only to non-switched customers, it is proposed as provisionally non-bypassable. The possibility for it to become non-bypassable avoids the theoretical risk that only one remaining non-switched customer would pay all of these costs. Therefore, Duke Energy Ohio proposed that Rider SCR would become non-bypassable during any period when the net credits/charges are over five percent of the total generation costs being supplied under the MRO.<sup>32</sup>

The Staff is concerned that this proposed circuit-breaker concept, if an MRO is approved, shifts risks from Duke to customers who choose another supplier.<sup>33</sup>

Duke argues that the condition is required to “mitigate the potential for having the proverbial last non-switched customer have to pay for all of the cost avoided by custom-

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<sup>30</sup> Staff Initial Post-Hearing Brief at 19.

<sup>31</sup> Duke Merit Brief at 33.

<sup>32</sup> *Id.*

<sup>33</sup> Staff Initial Post-Hearing Brief at 19.

ers who have already switched.”<sup>34</sup> Staff recognizes the theoretical risk where the last non-switched customer would have to pay for the all of the costs remaining in Rider SCR.<sup>35</sup> However, Staff expects that Duke could foresee this risk and be able to assess the risks ahead of time.<sup>36</sup> If this spiral situation occurs or Duke procures 100% of its SSO by auction, Duke should make a separate application to the Commission to address this unlikely scenario.<sup>37</sup>

Duke also argues that the Commission’s recent approval of conditional bypassability for FirstEnergy (FE), in Case No. 10-388-EL-SSO, is justification for approval of Duke’s proposed conditional bypassability of Rider SCR in this case. This argument is unwarranted. The Commission’s approval of FE’s conditional bypassability was part of a stipulated settlement where the many interests of numerous parties were considered “as a package.” In stipulated cases, the Commission must consider the diverse interests represented by the signatory parties. The Commission must also ensure that those parties negotiated and bargained for the provisions of the Stipulation. The Commission’s approval of FE conditional bypassability is distinguishable from Duke’s proposed MRO because the FE approval was part of negotiated settlement. If Duke’s MRO is approved, Rider SCR should be fully bypassable.

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<sup>34</sup> Duke Ex. 16 (Direct Testimony of William Don Wathen Jr.) at 19; Duke Merit Brief at 33.

<sup>35</sup> Staff Initial Post-Hearing Brief at 19 (Footnote 51).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

Another Duke rationale for non-bypassability of Rider SCR is that the SSO supply to be auctioned covers the provider-of-last-resort load.<sup>38</sup> Duke argues:

Auction participants are bidding on 100 percent of a fraction (tranche) of the retail load. The amount of load the winning bidders will actually serve is a function of switching, but they must factor into their bids the potential for serving 100 percent of the tranche. The resulting price of the bid is available to all customers, regardless of switching.

This argument is unfounded. These costs are generation-related costs that should not be attributed to customers not taking generation service from Duke. Again, if Duke's MRO is approved, Rider SCR should be fully bypassable.

Duke has also proposed to include in proposed Rider SCR "all costs incurred by the electric distribution utility as a result of or related to the competitive bidding process or to procuring generation service to provide the standard service offer, including the costs of energy and capacity and the costs of all other products and services procured as a result of the competitive bidding process."<sup>39</sup> Since many of these costs are unknown at this time, Staff does not support undefined costs or any authorization that could amount to a blank check.<sup>40</sup> The Commission should direct Duke to consult with Staff regarding the appropriateness of costs that Duke intends to collect from customers in proposed Rider SCR.<sup>41</sup>

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<sup>38</sup> Duke Merit Brief at 34.

<sup>39</sup> *Id.* at 33.

<sup>40</sup> Staff Initial Post-Hearing Brief at 20; Staff Ex. 1 at 9.

<sup>41</sup> *Id.*

### **C. Rider BTR**

Duke argues that Rider BTR will collect *all* transmission costs including Network Integrated Transmission Service (NITS), ancillary and congestion costs, plus MISO exit fees and PJM entrance fees, RTEP costs, and MTEP costs.<sup>42</sup> This statement is incorrect. If an MRO is approved by the Commission, Rider RTO should collect the ancillary type costs (market-based costs), not Rider BTR.<sup>43</sup>

The Commission should not pre-approve any other future costs in proposed Rider BTR. As discussed in Staff's initial brief, the FERC has not yet approved in tariffs any charges relating to MISO exit fees, PJM entrance fees, and RTEP costs for Duke. Deciding the appropriateness, at this time, of future MISO exit fees, PJM entrance fees, and RTEP expansion planning fees is premature and unwarranted. Those decisions should be the subject of future Commission proceeding and not part of this MRO proceeding. Once Duke obtains specific approval from FERC on the costs associated with any exit fees or MTEP costs imposed by MISO on Duke, Duke should, at that time, seek Commission approval for a mechanism in which to recover those costs. The MRO has an accelerated statutory time frame for a Commission decision. The issues surrounding proposed Rider BTR's transmission cost recovery are complex and require a full evaluation by the Commission in a separate future proceeding.

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<sup>42</sup> Duke Merit Brief at 32.

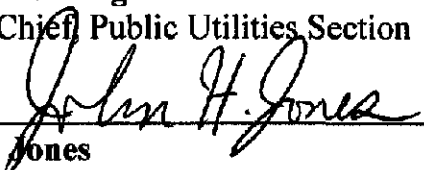
<sup>43</sup> Staff Initial Post-Hearing Brief at 16.

## **CONCLUSION**

Accordingly, the Commission should deny Duke's MRO Application for being deficient in its entirety.

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## PROOF OF SERVICE

I hereby certify that a true copy of the foregoing **Reply Brief** submitted on behalf of the Staff of the Public Utilities Commission of Ohio, was served by electronic mail, upon the following parties of record, this 3<sup>rd</sup> day of February, 2011.

  
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