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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke)
 Energy Ohio for Approval of a Market)
 Rate Offer to Conduct A Competitive)
 Bidding Process for Standard Service)
 Offer Electric Generation Supply,)
 Accounting Modifications Associated)
 With Reconciliation Mechanism, and)
 Tariffs for Generation Service)

Case No. 10-2586-EL-SSO

REPLY BRIEF OF

RETAIL ENERGY SUPPLY ASSOCIATION

February 3, 2011

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I. INTRODUCTION

Retail Energy Supply Association ["RESA"] submits this reply brief pursuant to the procedural schedule established by the Attorney Examiners. RESA replies to the Staff's request to reject the application in its entirety for failure to propose a five year transition (blending) period from legacy generation to auction procured generation. Should the Commission find that a five year blending period is required it should issue an order requiring Duke to amend the application in order to come into compliance. An Opinion and Order of the Commission which rejects the Duke MRO application in its "entirety" without providing a detail list of the non-compliance with an opportunity for the Duke to either amend and comply or withdraw violates Section 4928.142, Revised Code. Further, rejection and re-filing, as opposed to amendment of the current MRO application, would only increase administrative costs for all stakeholders, cause needless delay and prolong rate uncertainty; none of which is in the public interest.

RESA also wishes to respond to the numerous comments concerning Rider BTR. The proposed tariff structure of Rider BTR, namely to have all the network transmission charges including the Regional Transmission Organization expansion and update fees based solely on the actual cost and billed as part of the utility wire charge directly to the retail customer is not opposed by any party. The disagreements arise over whether the MISO exit fees, M-TEPS and R-TEPS should be authorized now and if so at what level. Since at this time the actual amounts for these charges are unknown, the Commission should simply approve the use of the Rider and specifically order the issue of the amount of R-TEPS, M-TEPS and MISO exit fees to be set following an application by Duke and a hearing.

RESA also wishes to respond to the opponents of Rider UE-GEN. The Rider is for

collection of utility service costs and thus is not dependent on MRO authorization. Such a Rider is in existence now for all non-mercantile Duke Customers who take gas service, and has been for many years.

Finally, RESA wishes to respond to Duke's request to make Rider RECON non-by passable and to allow Rider SCR to become non by passable. The costs collected for both these riders are for generation expenses and as such should not be paid by those retail customers who do not purchase generation from Duke.

II. SHOULD THE COMMISSION DECIDE THAT THE DUKE MRO DOES NOT COMPLY WITH SECTION 4928.142, REVISED CODE OR THE RULES PROMULGATED TO IMPLEMENT THAT STATUTE IT MUST INFORM DUKE OF THE SHORTCOMINGS AND PERMIT DUKE TO MODIFY THE APPLICATION.

The in its Initial Brief, the Staff characterizes Duke's proposed three-year blending period as the "centerpiece,"¹ of the Application; and since the Staff finds the three-year blending period to violate Section 4928.142(B), Revised Code urges the Application be rejected in its "entirety".² While the three year blend is a unique request by Duke authorized under the Commission's discretionary powers under Section 4928.142 (E), Revised Code, it is not the centerpiece of the Application. Whether the transition from the higher cost legacy generation to the lower cost market procured generation is accomplished over 36 months or 60 months is relatively minor issue. The transition is a onetime event, and there is no evidence on this record that a five year blend as opposed to a three year blend is going to increase the cost to standard service offer customers. The large issue is the switch from legacy generation to market procured generation. Specifically, whether the proposed auction process is going to be open,

¹ Initial Brief of the Staff of the Public Utilities Commission p. 3.

² Initial Brief of the Staff of the Public Utilities Commission pp. 2-3.

fair, competitively transparent, and conducted by a qualified third party administrator. Thus, the Staff predicate that blending over 60 months as opposed to 36 months is so central to the Application that the Commission should the rest of the Application is factually and legally in error and should be rejected.

Even if the blending of legacy and auction energy was the centerpiece of the Application, the Staff's recommendation that Duke's MRO application should be rejected in "its entirety"³, is in conflict with the Commission's duties under Section 4928.142(B), Revised Code. The Code specifically states that if the Commission finds that the MRO Application is deficient as to "one or more" of the 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." Thus the statute clearly mandates the Commission to spell out the short comings of an MRO application and to permit the utility the opportunity to amend its application so as to come into compliance.

If the Commission after review of the record in this proceeding finds that Duke's Application is not in-line with "one or more" of the statutory requirements, such as the blending provision, the Commission should reject only that portion of Duke's application and allow Duke to amend its application "in a timely manner" in accordance with Section 4928.142(B), Revised Code. Rejecting the application in its entirety not only runs contrary to the requirements of the statute, but will not provide Duke what may be needed guidance on how to remedy shortcomings in the Application. If permitted to amend the application in accordance with the Commission's revisions, Duke will have a reasonable time to fix the three-year blending period, if the

³ Initial Brief of the Staff of the Public Utilities Commission p. 3.

Commission finds that it falls short, and to adjust parts of the MRO that coincide with this blend including the pro forma and the cost forecasts.

Informing Duke of the shortcomings and permitting amendment is in the best interests of the public and judicial economy. Duke's current ESP expires at the end of this year, on December 31, 2011. Requiring Duke to re-file would result in another expensive and time-consuming process including re-filing the application, a notice period, intervention, and a hearing. A new hearing would simply revisit many of the same issues explored in depth during the current hearing. Further, it is quite possible that without an amendment process, Duke's subsequent filing will not remedy the Commission's critiques of the first MRO filing. Thus, judicial economy favors the amendment process.

III. THE COMMISSION SHOULD ACCEPT THE STRUCTURE OF RIDER BTR AS PRESENTED BY DUKE AND THE COMMISSION SHOULD REVIEW THE SPECIFIC COSTS THAT FLOW THROUGH RIDER BTR AT A LATER TIME.

a. The Commission should accept the structure of Rider BTR as presented by Duke.

The current structure of Rider BTR as approved provides for direct collection by Duke from all retail customers the Network Integrated Transmission Service (NITS), and the other associated transmission expansion and enhancement fees charged by tariff from the Regional Transmission Organization. This proposed method of streamlining and accounting for such fees will create efficiency in customer pricing and ensure that the transfer from MISO to PJM will impact each customer in a neutral manner.

No party has expressed any objections to the structure of Rider BTR, only the potential costs that transmission costs which are unjust may be passed through the Rider BTR.⁴ The Staff

⁴ Initial Brief of the Staff of the Public Utilities Commission pp. 22-25; Initial Brief of the Ohio

in its Initial Brief indicated that it is amenable to the proposed structure of Rider BTR.⁵ As indicated in the Testimony of RESA witness Ringenbach, the structure of Rider BTR as proposed encourages price transparency by charging all customers, whether shopping or non-shopping, NITS charges directly.⁶ The Rider BTR changes the status quo where the Competitive Retail Electric Service providers (CRES) pay the NIT charges and roll such transmission wire charges into the CRES generation fee. Thus, as pointed out by RESA Witness Ringenbach to charge their customers and then reimburse Duke for NITS charges, allowing for both the SSO and CRES price to reflect solely “generation” and not “generation and transmission.”⁷ In sum, the Commission should reject the recommendation of Staff to reject the Rider BTR as part of a complete rejection of the Application, and approve of the Rider BTR, but specifically set the amount of NITs, M-TEPS, R-TEPs and MISO exit fees for a separate hearing for the reasons set forth below.

b. The Commission has the authority to prescribe the costs that will flow through Rider BTR and should do so when such costs are known.

Duke is incorrect in stating that the Commission does not have authority to review the recovery of FERC-approved transmission costs. RESA recommends that the Commission approve Rider BTR with the current application and later consider the actual costs once they become available. Staff's concern and that of several other parties, with approving BTR in this proceeding is that it would “automatically permit Duke to fully recover all MISO exit fees, PJM

Consumers' Counsel pp. 21–35; Initial Brief of the Ohio Energy Group pp. 12–17; Initial Brief of the Ohio Manufacturing Association 6–8; Initial Brief of Eagle Energy pp. 3–4; Initial Brief of Cincinnati Health pp. 19–21; Initial Brief of the Ohio Partners for Affordable Energy pp. 11–13; Initial Brief of Industrial Energy Users-Ohio pp. 14–16.

⁵ Initial Brief of the Staff of the Public Utilities Commission p. 23.

⁶ RESA Ex. 1, 13.

⁷ RESA Ex. 1, 13; Duke Ex. 16, p. 23.

entrance fees, and RTEP expansion planning costs and other similar type costs without any Commission review of their appropriateness.”⁸ RESA does not recommend any particular ruling by the Commission in regards to those costs, but recommends that the Commission retain the authority to review such costs and should do so in a separate hearing.

Duke witness Wathen cites a statement of Staff in its Post-Hearing Brief from Case No. 10-388-EL-SSO as authority that the Commission will not have authority to review FERC-approved transmission costs to be collected through Rider BTR.⁹ This Post-Hearing Brief and the Commission’s Order in Case No. 10-388-EL-SSO which it accompanies, do not have precedential authority and the Commission is not bound to abide by either in the current MRO Application.¹⁰

The Commission speaks through its orders.¹¹ In the Order of Case No. 10-388-EL-SSO, in which Staff’s Post-Hearing Brief cited by Mr. Wathen refers to, the Commission accepts the stipulation of the parties. However, the Order makes clear that the stipulation has no precedential value.¹² Further, the Post-Hearing Brief of Staff in that case is certainly not precedential nor is its interpretation of Section 4928.05, Revised Code. The Commission speaks through its orders, not the Staff’s briefs. Further, Section 4928.05, Revised Code grants the Commission the authority to review transmission costs, and as described below, the Commission

⁸ Initial Brief of the Staff of the Public Utilities Commission p. 23; *see also* Initial Briefs of Ohio Consumers’ Counsel pp. 21–35, Ohio Energy Group pp. 12–17, Ohio Manufacturers’ Association pp. 6-8, Cincinnati Health pp. 19–21, Ohio Partners for Affordable Energy pp.11–13, Industrial Energy Users-Ohio pp.14–16.

⁹ Duke Ex. 16, 24–25.

¹⁰ *See* FirstEnergy Solutions Ex. 5.

¹¹ *Murray v. Ohio Bell Tel. Co.*, 117 N.E.2d 495, at *48-49 (Ohio Com.Pl. 1954); *see also* O.R.C. §§ 5903.09, 4903.15.

¹² Case No. 10-833-EL-SSO at p. 34 (“This Stipulation is submitted for the purposes of this proceeding only, and is not deemed binding in any other proceeding, and except as otherwise provided herein, nor is it to be offered or relied upon in any other proceeding, except as necessary to enforce the terms of this Stipulation.”).

is not preempted by Federal Law from reviewing the FERC-approved costs associated with Rider BTR.¹³

The Commission is not bound to accept the FERC's rate approval because the widely accepted *Pike County* doctrine applies.¹⁴ This doctrine allows the Commission to review FERC approved costs when the utility has a choice of rates between two or more sources.¹⁵ The Commission may determine whether the utility's rate choice from one source was prudent over another source.¹⁶ In relation to Duke's MRO Application, this will allow the Commission to determine what costs Duke may funnel through Rider BTR, and determine whether Duke made a prudent choice to move to PJM and accept the FERC-approved rates under this new RTO as opposed to the FERC-approved rates under MISO.

Thus, the Commission should approve the structure of Rider BTR as proposed by Duke. The Commission should reserve the right to review the costs once they are approved by the FERC. When the costs are available, the Commission can then decide whether to include such costs in Rider BTR and will not have to consider the structure in which the costs are charged since the rider will already be approved. The structure of Rider BTR should be determined at the current MRO Application hearing in order to promote efficiency.

IV. THE COMMISSION SHOULD APPROVE RIDER UE-GEN AS PROPOSED BY RESA IN THIS APPLICATION.

Staff, in its initial brief and testimony, finds that Rider UE-GEN should not be considered

¹³ See Initial Brief of Ohio Consumers' Counsel p. 24.

¹⁴ See Initial Brief of Ohio Energy Group pp.14–17; Initial Brief of Ohio Consumers' Counsel pp. 25–28 citing *Pike County Light & Power Co. v. Penn. Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983), *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n*, 837 F.2d 600 (3d Cir. 1988). *Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 29, 35 (1st Cir. 1998).

¹⁵ Initial Brief of Ohio Energy Group p. 15 citing *Pike County Light & Power Co. v. Penn. Pub. Util. Comm'n*, 465 A.2d 735, 738 (Pa. Commw. Ct. 1983)

in this MRO Application, relying on Ms. Turkenton's interpretation of Section 4928.142(D), Revised Code.¹⁷ This is a misinterpretation of the statute. The Commission should follow the suggestions of RESA and Dominion Retail in their Initial Briefs and properly apply the statute to allow Rider UE-GEN to be approved along with the MRO Application.

RESA proposes that Rider UE-GEN be adopted in this MRO as a non-bypassable rider for all customers based on the fact that Duke will purchase CRES receivables at a 0% discount rate. Adopting the proposed Rider UE-GEN will allow Duke to use consolidated billing for all consumers. This creates efficiency and convenience for both CRES and CRES customers.¹⁸ Not only will the Commission's adoption of Rider UE-GEN consolidate bills for customers, but this will create consolidated credit requirements for all customers, eliminating the need for extra credit screening by CRES for switching customers.¹⁹ This will allow more customers, particularly lower-income customers, to qualify for customer choice programs.

Approving Rider UE-GEN as proposed by RESA will also solve inconsistency in the payment priority rules.²⁰ If Duke purchases receivables from CRES at a 0% discount rate and passes those uncollectible expenses evenly amongst all customers, there will no longer be a need for payment priority rules.²¹ FirstEnergy Solutions has indicated that this solution is acceptable and Duke has also indicated they would be agreeable to this arrangement.²²

As Dominion Retail's Initial Brief notes, that there is no logical reason to explain the distinction

¹⁶ *Id.*

¹⁷ Initial Brief of the Staff of the Public Utilities Commission p. 18. *See also* Initial Brief of Ohio Energy Group p. 17 and Initial Brief of Ohio Partners for Affordable Energy p. 9.

¹⁸ Initial Brief of Dominion Retail p. 3.

¹⁹ Initial Brief of RESA pp. 13–14.

²⁰ Initial Brief of FirstEnergy Solutions pp. 19–21.

²¹ Initial Brief of RESA p. 15.

²² Initial Brief of FirstEnergy Solutions pp 19–21; Tr. III, 711.

between gas and electric uncollectible expense riders. Thus, the electric requirements should be the same as the gas requirements and allow for a non-bypassable uncollectible expense rider for generation, thereby allowing Duke to purchase CRES receivables at a 0% discount rate.

V. **%. THE COMMISSION SHOULD REDUCE UNCERTAINTY IN CONSUMER RATES BY ADOPTING STAFF'S BYPASSABILITY SUGGESTION FOR RIDER SCR, OR, IN THE ALTERNATIVE, RAISING THE TRIGGER PERCENTAGE TO 10**

Staff witness Turkenton's suggestion that Rider SCR be bypassable, allowing Duke the opportunity to apply for a variance of bypassability, though different than the position RESA has taken in the testimony of its witness and position in its Initial Brief is acceptable to RESA. Duke is the only party to this MRO Application requesting Rider SCR act as a non-bypassable rider at any threshold.²³ As noted by the parties in opposition, Rider SCR collects mainly costs associated with generation and as such should only be paid by the customers that are responsible for those costs.²⁴ Requiring shopping customers to pay for costs associated with non-shopping customers' generation will lead to a situation of "cross-subsidization of regulated and non-regulated services."²⁵

RESA supports the bypassability of Rider SCR because allowing Duke the ability to switch between bypassability and non-bypassability at a low threshold of 5% will create uncertainty in rates for customers.²⁶ If the Commission feels there should be a trigger, then RESA reasserts its trial position that the trigger percentage should be raised to 10% to prevent uncertainty in customer rates caused by excessive and unpredictable switching between

²³ Initial Brief of the Staff of the Public Utilities Commission pp. 19–20. *See also* Initial Briefs of Dominion Retail pp. 16–18; Ohio Partners for Affordable Energy p. 10; Cincinnati Health pp. 16–19; and Industrial Energy Users-Ohio pp. 16–17 (supporting full bypassability of Rider SCR).

²⁴ *Id.*

²⁵ Initial Brief of Cincinnati Health p. 17.

²⁶ Initial Brief of RESA pp. 9–10.

bypassability and non-bypassability.²⁷

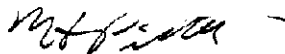
VI. THE COMMISSION SHOULD MAKE RIDER RECON A BYPASSABLE RATE BECAUSE THIS REFLECTS COSTS ASSOCIATED WITH SERVICE TO NON-SHOPPING CUSTOMERS.

Duke is the only party that favors a non-bypassable Rider RECON, and it has failed to present a factual case that the cost components of Rider RECON are anything other than generation expenses. Duke's witness Wathen testified that each cost component of Rider RECON is a generation cost.²⁸ Further, the testimonies of Mr. Fein, Ms. Ringenbach and Ms. Turkenton state that Rider RECON consists of only generation costs.²⁹ Rider RECON as proposed will charge generation costs to shopping customers despite the fact that these costs are not incurred on their behalf. Thus, the Commission should require Duke to amend its MRO Application so that Rider RECON is bypassable for shopping customers.

VII. CONCLUSION

Wherefore, for the reasons presented above RESA requests the Commission to approve the Application in the matter at bar with the suggested amendments listed in its Initial Brief.

Respectfully Submitted,



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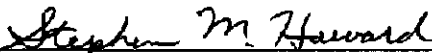
²⁷ *Id.*

²⁸ Tr. III, 601-05.

²⁹ Constellation Ex. 1, pp. 44-45; RESA Ex. 1, pp.7-8; Staff Ex. 1, pp. 2-5.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing documents was served this 3rd day of February, 2011 by electronic mail, upon the persons listed below.



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