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February 3, 2011

VIA FEDERAL EXPRESS
Ms. Renee Jenkins
Public Utilities Commission of Ohio
Docketing Division
180 E. Broad Street, 11th Floor
Columbus, OH 43215

Re: *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

Dear Ms. Jenkins:

Please find attached the original and twenty copies of the Reply Brief of the Greater Cincinnati Health Council, which was filed earlier today by fax. As indicated on the Certificate of Service, all parties have been served copies by e-mail.

Very truly yours,

Douglas E. Hart

Enclosures

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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, and Tariffs for Generation Service.	Case No. 10-2586-EL-SSO

REPLY BRIEF OF THE GREATER CINCINNATI HEALTH COUNCIL

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February 3, 2011

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I. Introduction

On January 27, 2002, the Greater Cincinnati Health Council ("GCHC") filed its Initial Brief in this matter, as did most other parties. On many issues, there is a remarkable consensus amongst many of the intervenors. The GCHC would like to address only a few of the issues in this case on reply. The failure to address any particular issue should not be interpreted as a concession by GCHC that Duke or any other party's position on an issue is correct.

Of primary concern is the blending plan proposed by Duke and its failure to comply with the statutory requirement that the initial blending plan have a minimum five year term at specified percentages. Of the parties that have taken a position on that issue, only Duke and FirstEnergy Solutions Corp. ("FE") provide arguments that the fixed statutory blending percentages may be altered now. The GCHC will address that issue in some detail.

Another issue upon which most parties are aligned is the bypassability of certain riders. Except for Duke, all parties agree that Riders RECON and SCR must be bypassable. Finally, the GCHC will address some aspects of the proposed auction parameters that were raised in initial briefs.

II. The Statutory Blending Percentages Set By R.C. § 4928.142(D) May Not Be Altered Before the Beginning of the Second Year of Blending Under An MRO.

All parties seem to agree that the first rule of statutory construction is to give words their plain meaning. While citing that basic rule to criticize other parties' arguments, Duke and FE ignore it when it does not suit the outcome they desire. Contrary to their assertion that § 4928.142(E) allows alteration of the statutory blending percentage now, the plain language says that such a decision can only be made beginning in the second year of a blended MRO plan, which in Duke's case would be June 1, 2013. The only allowable purpose for making an alteration to the blending schedule is to mitigate an abrupt or significant change to the blended

price that would otherwise occur. Neither Duke nor FE base their proposal to alter the blending percentages on the need to mitigate an abrupt or significant change in price.

A. Duke and FE's Interpretation of R.C. § 4928.142(E) To Allow Alteration of Future Blending Rates Now Is Without Basis.

1. The Plain Meaning of § 4928.142(E) Limits Any Alteration of the Blending Rates Until the Beginning of the Second Year of Blending Under an MRO.

As the GCHC explained in its Initial Brief, the phrase "beginning in the second year" is plain on its face that it sets a future point in time at which the Commission might alter future blending percentages. The definition of "beginning" is "the point at which something begins." The words "in the second year" unmistakably delay that process until blending under an MRO has been in place for at least one year. That is the most natural reading of the language. A contrary interpretation requires an unnatural and contorted reading.

2. Duke and FE's Construction of § 4928.142(E) Violates Rules of Grammar.

In addition to the plain meaning rule, statutes are to be interpreted according to the rules of grammar.[1] The rather lengthy first sentence of § 4928.142(E) is more easily understood by using brackets to separate the adverb and adverbial clauses from the subject, verb and direct object, as shown below.

> [Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section], **the commission may alter** [prospectively] **the proportions specified in that division** [to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration].

Adverbs and adverbial clauses indicate such things as manner, place, frequency, time or purpose. The bracketed clauses modify the basic sentence in several ways. The opening clause

[1] Revised Code § 1.42.

("[b]eginning in the second year . . .") designates the time when action may occur. "Prospectively" indicates the manner of the action. The last clause ("to mitigate . . .") indicates the purpose of the action.

The placement of an adverbial phrase within a sentence impacts its meaning. It is usually placed after the word it modifies. When it is placed at the beginning of a sentence, it modifies the sentence as a whole.[2] By placing the phrase "[b]eginning in the second year . . ." at the beginning of the sentence and separating it with a comma, the General Assembly indicated that it modifies the entire sentence.[3] That means the Commission can only take action to alter the blending rates beginning in the second year. Duke and FE would give the sentence an entirely different meaning by restricting the scope of the opening clause to when an alteration would *take effect*, not *when it could be made*. That interpretation cannot be reconciled with the placement of the clause in the statute. It modifies when the Commission may act, not just when the action is to take effect.

FE argues: "Under Section 4928.142(E), the Commission may decide *now* to 'alter prospectively' the blending requirements in Division (D) '*[b]eginning in the second year.*"[4] But to make that argument, FE reordered the sentence and moved "beginning in the second year" away from the beginning of the sentence so that the clause would no longer modify the entire sentence. This change may appear subtle, but it is very significant grammatically. In addition,

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[2] *State v. Brunswick* (8th Dist. 1942), 71 Ohio App. 101, 47 N.E.2d 916.

[3] See Curme, *A Grammar of the English Language*, op. cit. 16 2 a ("We sometimes find the sentence adverb at the very beginning of the sentence, or after the verb at or near the end of the sentence; in the former case followed by a slight pause and in the latter case preceded by a pause, which in both cases marks the adverb or adverbial element as a sentence modifier."). Simple adverbs modify a single word or group. *Id.*, op. cit. 15 1 a. A sentence adverb modifies a sentence as a whole. *Id.*, op. cit. 15 1 b.

[4] FE Initial Brief, pp. 5-6 (emphasis added).

FE uses the word "now" to convey a present sense time element for the Commission's action. However, the word "now" does not appear anywhere in the actual statute.

3. FE's Interpretation Fails To Give Effect To All Words In The Statute.

FE offers no explanation why the word "prospectively" is necessary if "beginning the second year" does not limit when the Commission may alter the blending percentages. If the Commission could act now, but its actions would not be effective until "beginning in the second year," then such alterations would, by definition, be prospective in relation to the second year and "prospectively" would be redundant. An alteration that only "begins" in the second year could only be effective after that point in time. When the statute is properly interpreted by using the word "beginning" to define when the Commission may first act, the word "prospectively" is necessary to explain that such a future alteration could only be prospective and not retroactive. This interpretation makes use of all of the words in the statute, whereas FE's does not.

4. Duke's Position Is Inconsistent With the Legislative History.

Duke agrees that the General Assembly only gave the Commission initial discretion over the blending percentage for year two.[5] This interpretation is confirmed by the Bill Analysis issued by the Legislative Service Commission in connection with Am. Sub. H.B. 562:

> Am. Sub. H.B. 562 changes the percentages specified in statute. Under S.B. 221, the first year percentage is fixed at 10%, and the remaining percentages of 20%, 30%, 40%, and 50% in years two through five are minimum percentages. H.B. 562 makes the percentages in years one, three, four, and five a fixed 10%, 30%, 40%, and 50%, respectively, and the percentage for year two a maximum percentage.[6]

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[5] Duke Initial Brief, p. 25 (noting absence of word "and" and the phrase "not more than" with respect to years three, four and five).

[6] http://www.legislature.state.oh.us/analysis.cfm?ID=127_HB_562&ACT=As%20Enrolled&hf=analyses127/08-hb562-127.htm.

But Duke's concession on the above interpretation of § 4928.142(D) is inconsistent with its position on § 4928.142(E). It would make no sense for the General Assembly to give the Commission initial discretion only over year two in § 4928.142(D), then to reverse course and immediately give the Commission discretion over years three, four and five in § 4928.142(E). Alternative proposals to make the blending percentages in § 4928.142(D) minimums and maximums had both been rejected. The General Assembly settled on a plan that fixed the blending percentages for each year except year two. The restriction "[b]eginning in year two" on alterations in § 4928.142(E) dovetails precisely with § 4928.142(D) to give the Commission *future* discretion over years three and later, should the necessary conditions to make an alteration arise.

B. Duke and FE Ignore The Sole Purpose For Which The Commission May Alter the Blending Percentages Under § 4928.142(E).

After lecturing other parties that all of the words in a statute are to be given effect, Duke and FE proceed to ignore that admonition when it comes to the purpose of altering future blending rates. They advocate acceleration of blending because of current lower market prices. They also claim that blending will be unnecessary once market prices and Duke's legacy SSO price converge. Neither reason has anything to do with the permissible purpose of an alteration under the statute. The market price standing alone is irrelevant. The legacy ESP price standing alone, even with the adjustments permitted by § 4928.142(D), is irrelevant. The statute does not even speak to a change in the relationship between the market price and the legacy ESP price. The sole purpose for an alteration is to mitigate an "abrupt or significant" change in price that would result from the statutory blending percentages dictated by § 4928.142(D). But, as the GCHC demonstrated in its Initial Brief, even if Mr. Rose's price projections are accurate (and he was wrong in the last case), the changes to Duke's blended SSO price over the first three years of

an MRO using the statutory rates would not be abrupt or significant. The predicate condition to make an alteration of the blending percentages is missing.

1. Duke's Position On the Reason To Alter Blending Percentages Ignores the Plain Meaning of the Statute.

Despite admonishing not to add words to the statute that are not there, Duke inserts a whole new concept that is not there. Duke posits that an "abrupt or significant change" refers not only to the actual price, but also to "circumstances relating to the price." This is a concept that Duke invents, as there are no words in § 4928.142(E) to indicate a concern over anything other than the price that results from the blending process. Duke reaches its conclusion from the hypothesis that "abrupt" and "significant" must mean different things. But, instead of defining both of those terms in relation to prices, Duke jumps to the unfounded conclusion that "abrupt" must relate to the price, while "significant" must include "considerations other than a pure price comparison."[7] Duke offers no statutory foundation for this detour. "Abrupt" and "significant" may have different meanings, but the words must still be interpreted in the context of the resulting SSO price, which is the only way in which they are used in the statute.

"Abrupt" is defined as "characterized by or involving action or change without preparation or warning," "unexpected," "lacking smoothness or continuity," or "involving a sudden steep rise or drop."[8] "Significant" means "having or likely to have influence or effect," "important" or "of a noticeably or measurably large amount."[9] Thus, "abrupt" addresses the forseeability of a change, while "significant" addresses the magnitude.

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[7] Duke Initial Brief, p. 27.

[8] www.merriam-webster.com.

[9] *Id.*

When the first version of § 4928.142(E) was introduced into Sub. S.B. 221 in the House Public Utilities Committee, it only included the word "abrupt."[10] The words "or significant" were added by the full House[11] and remained in all subsequent versions of the bill.[12] The full House must have felt that "abrupt" was not broad enough to cover all price changes that concerned it. For example, a change in price might not be unexpected and, therefore, not be "abrupt," but it could be large and, therefore, "significant." Adding the word "significant" enabled the Commission to make alterations for large changes in the SSO price that were foreseen and, therefore, not "abrupt." It does not call for the Commission to look at anything other than the change in the blended price that would otherwise result from the blending proportions that had previously been approved.

2. Duke's Interpretation of "Abrupt or Significant" Is Not Founded on Legislative Intent.

Nothing in the statute suggests that the General Assembly considered anything other than a change in the price that would result from applying the standard blending formula as the basis

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[10] http://www.legislature.state.oh.us/bills.cfm?ID=127_SB_221_RH.

[11] http://www.legislature.state.oh.us/bills.cfm?ID=127_SB_221_PH.

[12] Comparison of § 4928.142(E) as reported by the House Public Utilities Committee and the version passed by the House shows that it was amended as follows:

(E) Beginning in the second year of a blended price under division (D) of this section and notwithstanding any other requirement of this section, the commission may alter prospectively the proportions specified in that division to mitigate any effect of an abrupt or significant change in the electric distribution utility's standard service offer price that would otherwise result in general or with respect to any rate group or rate schedule but for such alteration. Any such alteration shall be made not more often than annually, and the commission shall not, by altering those proportions and in any event, including because of the length of time, as authorized under division (C) of this section, taken to approve the market rate offer, cause the duration of the blending period to exceed ten years as counted from the effective date of the approved market rate offer. Additionally, any such alteration shall be limited to an alteration affecting the prospective proportions used during the blending period and shall not affect any blending proportion previously approved and applied by the commission under this division.

Id.

for altering the blending rates. Duke makes no pretense that its proposed adjustment to the blending percentages would cause a significantly different price outcome – it attempts to justify its proposal *because* of the lack of difference in resulting prices. Duke not only goes beyond the plain meaning of the words that *are* in the statute, it leaps past legislative history, common law, and administrative construction, claiming they are "no help in this situation."[13] Duke simply asserts that the statute was enacted under the assumption that market prices and previous SSO prices were substantially divergent. With no evidence or confirming statutory language, Duke asserts that the General Assembly intended for blending to end when prices are not divergent. But all of this ignores the plain language and legislative history.

Even under Duke's theory of the "circumstances" under which the General Assembly enacted S.B. 221, there is nothing to indicate that the General Assembly intended for blending to end as soon as market and legacy prices cross. Market prices have been volatile in the past and may continue to be volatile in the future. (Tr. I, pp. 67-68). There is no assurance that prices will remain converged. Duke's own price expert, Judah Rose acknowledged that. (Tr. I, p. 125). The General Assembly accounted for future volatility when it enacted the blending requirements. There is no indication that it intended to eliminate the consumer protection afforded by blending for *all* time just because there may be *some* time where blending is not necessary for consumer protection.[14]

Duke's criticism of other parties for not providing evidence that market prices would be higher than its ESP price in 2015 and beyond is unfounded; Duke's own expert witness did not

[13] Duke Initial Brief, p. 28.

[14] Duke makes the astounding assertion on page 29 of its Initial Brief that "SB 221 was not designed as consumer protection legislation but, rather, as an alteration in the way in which the electric industry functions, with protections included for both ratepayers and utilities." What purpose other than consumer protection would be served by altering blending rates to mitigate the effect of a price change?

make any such projections, because it is impossible to do so with any accuracy. Nevertheless, he was of the belief that market prices would continue to increase after 2014. (Tr. I, p. 140). The inability to predict prices that far into the future is why that the Commission should not end blending prematurely. The Commission should wait until better (and relevant) information is available before making any decision to alter blending percentages. Section 4928.142(E) affords the Commission an annual opportunity to do that, so there is no reason to irrevocably forfeit that opportunity today.

3. Duke's Proposal To Modify the Blending Rates Now Would Not Mitigate The "Change" Duke Relies Upon to Alter Blending Rates.

If "significant change" was intended to refer to anything other than the price itself, Duke offers no explanation how the elimination of blending would "mitigate" that change. Duke has invented a concept to lead to the result it wants – early 100% market pricing– but cannot rationalize that with the remainder of the sentence addressing mitigation. If the "significant change" meant by the statute includes the convergence of the market and legacy ESP prices, to "mitigate" that change the Commission would have to somehow use a change in blending rates to *reverse* the convergence of prices. That makes no sense. The elimination of blending would have no effect on whether market prices and Duke's legacy ESP price stay converged. Therefore, the alteration would not serve the statutory purpose of mitigating the change.

4. There Is No Factual Basis For FE's Proposal To Go To 100% Market Pricing In Year Two.

FE advocates an even more aggressive acceleration to market than does Duke. FE urges the Commission to allow Duke to go to a 100% market price *in* year 2 of an MRO. For the reasons stated above, the Commission may not approve a blending percentage for year two today any greater than twenty percent, as is mandated in § 4928.142(D). Beginning in year two, the Commission might theoretically consider a prospective alteration of the blending percentage.

But, even if the Commission could consider altering future blending rates now, the evidence does not support an increase in the blending percentage.

Duke has submitted an opinion that its blended price would be 7.19 cents per kWh in year one and 7.14 cents per kWh in year two. That represents a downward change of 2% in year one and 0.7%[15] in year two. A change of -0.7% is hardly abrupt or significant. In any event, the only way to *mitigate* the change would be to make the *change* (not the price) smaller. And the only alteration that would make the *change* in the resulting SSO rate smaller would be to *reduce* the blending percentage in year two.

FE's proposal of a 100% market rate in year two would exacerbate the change, not mitigate it. To keep the blended price the same in year two as year one (7.19 cents per kWh) the blending percentage would have to be reduced to fifteen percent.[16] Therefore, even if FE was correct that the Commission may alter future blending percentages now to avoid abrupt or significant change to the blended price from year one to year two, the Commission would have to reduce the year two blending percentage to do that. Ironically, the Commission could do that now without invoking § 4928.142(E) because § 4928.142(D) expressly authorizes the Commission to set the year two blending percentage anywhere between zero and twenty percent.

III. Riders RECON and SCR Must Be Bypassable

Everyone except Duke recognizes that Rider RECON would create an inappropriate subsidy between distribution service and generation service. Duke's Initial Brief describes this rider "as a vehicle for the collection or refund of the collective balance of any over- or under-

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[15]There was a typographical error in the GCHC's initial brief, where this percentage was mistakenly stated as 0.1%, instead of the correct amount, 0.7%. [(7.14-7.19)/7.19 = -0.7%] Nevertheless, such a small change is still neither abrupt, because it is foreseen now, nor significant, because it is small in magnitude.

[16] (85% x 7.34) + (15% x 6.34) = 7.19.

recovery of costs or refunds of current riders that are being eliminated or zeroed."[17] The only justification Duke provides for making this non-bypassable is that "this is a true up from the current ESP, [so] it is reasonable for all customers to share in the cost or refund."[18] That is the very reason why it must be bypassable. The existing riders that would be trued up using Rider RECON are themselves bypassable today. It makes no sense for shopping customers, who are not subject to the underlying cost recovery mechanism to have any responsibility for the reconciliation mechanism. Duke appears to be the only party to this case that does not appreciate that.

Likewise, Rider SCR must be bypassable. Again, Duke is the only party that advocates otherwise. There is no doubt that the costs to be reconciled using Rider SCR deal exclusively with SSO generation costs. These costs include a reconciliation between what SSO customers pay for generation service and what Duke pays successful auction bidders, as well as administrative costs of the auction process. Even Duke states that "it generally relate[s] only to non-switched customers."[19]

Duke offers three rationales for making the rider conditionally non-bypassable, none of which overrides the statutory command against cross-subsidy. First, it claims a theoretical risk that due to switching, all of the costs could be foisted onto the last remaining customer. Duke has not shown that there is any appreciable risk of this ever happening. As suggested by Staff, if circumstances change, Duke should be able to address the problem or it can make an application to the Commission for relief. Second, Duke notes that the SSO supply covers its provider of last resort load. But Duke's load-following auction plan would shift the risk of switching onto

[17] Duke Initial Brief, pp. 32-33.

[18] *Id.*, p. 33.

[19] Duke Initial Brief, p. 33.

bidders, who must be prepared to serve anywhere between zero and one hundred percent of Duke's wired load. This is more of a commentary on Duke's product definition than a justification for making the rider non-bypassable. It has no bearing on whether shopping customers should subsidize generation service – shoppers do not bear those costs today. Third, Duke cites the approval of a circuit breaker for FirstEnergy in Case No. 10-388-EL-SSO. But that case was a stipulated ESP and has no precedential value. The parties to that case agreed to waive their statutory protection and accept those terms – in this case Duke is attempting to force that result through litigation.

IV. The Commission Must Be Cautious In Setting Auction Parameters.

The Commission Staff has advocated that the Commission impose a load cap, in an unspecified amount, so as to encourage diversity of generation suppliers. While diversity of suppliers is a laudable goal, the GCHC is concerned that, given the nascent state of competition in the Duke service area, that a load cap may have the inadvertent effect of causing higher clearing prices. Because of the nature of the auction process proposed by Duke, the auction will stop once all tranches are not filled by bidders at the same price. A load cap may prevent a bidder from participating to the extent that it otherwise would and cause the auction to stop prematurely because of the inability to fill all available tranches. That could have the unfortunate effect of preventing prices from being as low as possible, which should be the primary goal of the competitive bidding process.

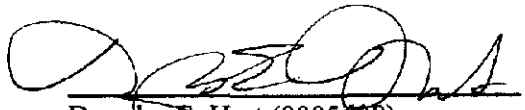
Similarly, Constellation has criticized the use of a reserve price in the auction. A reserve price could cause the auction to fail if sufficient bidders are unwilling to meet that price. It is unclear how Duke would establish a reserve price or how it would propose to secure its generation supply if an auction failed to meet the reserve price. If Duke is permitted to establish a reserve price, it should be required to supply all necessary generation at that price if the auction

does not clear at or below the reserve price. Of course, no one involved with bidding the Duke generation assets in an auction could have any role in setting the reserve price and should have absolutely no knowledge of where it is set, so as to prevent manipulation of the auction.

V. CONCLUSION

The Commission should reject Duke's MRO plan as being inconsistent with the statute and Commission rules, as advocated in the GCHC's Initial Brief and in this Reply Brief.

Respectfully submitted,



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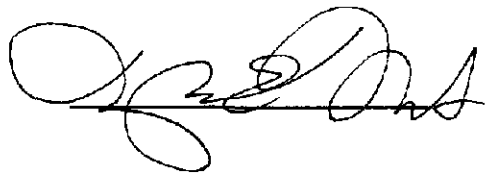
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Initial Brief of the Greater Cincinnati Health Council has been served to the parties listed below by electronic delivery this 3rd day of February 2011.



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