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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 Process for a Standard Service Offer Electric Generation Supply, Accounting Modifications, and Tariffs for Generation Service.	)))))))	Case No. 10-2586-EL-SSO

MEMORANDUM CONTRA DUKE'S APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

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I. INTRODUCTION

On February 23, 2011, the Public Utilities Commission of Ohio ("PUCO" or "Commission") issued its Opinion and Order ("Order") in this case. In the Order, the Commission determined that the Application submitted by Duke Energy Ohio, Inc. ("Company" or "Duke") for approval of a market rate offer ("MRO")—to charge customers for generation service—did not comply with the requirements in R.C. 4928.142. The PUCO ordered that the case not proceed as filed.

On March 25, 2011, Duke filed an Application for Rehearing ("Duke AFR") of the Order. Duke claimed the PUCO erred in eight respects. Duke's first four assignments of error deal with the interpretation of R.C. 4928.142(D) and (E) that address the "blending period" that applies to approval of an initial MRO plan. The sixth assignment of error addresses the Commission's finding that the proposed rate design does not meet statutory requirements. The eighth assignment of error claims that the Commission's refusal to approve certain riders is contrary to law. Duke's first, second, third, fourth, sixth and eighth assignments should be denied for the reasons stated below.

Duke's fifth assignment of error attacks the Commission's determination that Duke's proposed competitive bidding process does not meet statutory requirements under R.C. 4928.142(A)(1). Duke complains in its seventh assignment of error about the Commission's "repeated criticism of Duke Energy Ohio's decision to file a MRO rather than an ESP [i.e. Electric Security Plan]. . . ."[1] The fifth and seventh assignments of error are not addressed in this pleading.

II. ARGUMENT

A. An Order Approving an Initial Application for a MRO May Only Approve a Blending Period of Five Years or Longer. (Responsive to Assignments of Error 1-4).

In its assignments of error 1-4, Duke claims that the language of R.C. 4928.142 permits the Company to propose a two-year blending period in its initial MRO application. Duke misinterprets the language of R.C. 4928.142. Contrary to Duke's position, that statute provides that an electric distribution utility must propose a five-year blending period that transitions from a standard service offer ("SSO") based upon an ESP to an SSO that entirely depends upon an auction process as provided by an MRO. As OCC argued in its Initial Brief,[2] the two-year blending period that Duke proposed in its initial Application was contrary to the requirements of R.C. 4928.142(D).

R.C. 4928.142(D) and (E) prescribe a very specific process that the electric distribution utility ("EDU") and the Commission must follows as the EDU transitions to a SSO price that depends entirely upon a competitive bidding process. R.C. 4928.142(D) provides:

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[1] Duke AFR at 3.

[2] OCC Initial Brief at 38-42.

> The first application filed under this section by an electric distribution utility that, as of July 31, 2008, directly owns, in whole or in part, operating electric generating facilities that had been used and useful in this state 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.* Consistent with those percentages, the commission shall determine the actual percentages for each year of years one through five.[3]

R.C. 4928.142(D) directs an EDU to propose in its first MRO application the specific blending proportions outlined in the statute. Once the utility proposes blending percentages consistent with the statute, the Commission may determine the actual blending percentages consistent with R.C. 4928.142(D) percentages. Then, R.C. 4928.142(E) provides how the Commission can revise the default proportions during the blending period:

> Beginning in the second year of the 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.

In the second year of the blended price, R.C. 4928.142(E) directs the Commission to compare the market price obtained through the competitive bid process to the SSO price during the first year of the blending period and decide whether the prices are similar enough not to create too much of a change by applying the statutorily prescribed default proportions. But the statute does not allow the Commission to alter the proportions *before* the Commission is able to compare the price that comes out of the competitive bid

[3] Emphasis added.

to the current SSO price. Thus, the Commission may only alter the proportions upon information that is not available at the time the initial application is filed.

In its first assignment of error, Duke criticizes the Commission's finding that "the words, 'not more than' in...Section 4928.142...apply to years two, three, four, and five of the blending period and not just to year two, as argued by Duke."[4] Under both Duke's and the Commission's interpretation of the "not more than" language in R.C. 4928.142(D), Duke's Application violated the requirements of the law. Under Duke's interpretation of the "not more than" language, Duke would still have to propose 30 percent blending in year three, 40 percent in year four, and 50 percent in year five of the blending period. But Duke proposed only a two-year blending period, with its MRO price reaching a 100 percent market-based price by year three. Even under Duke's interpretation, the Company's Application violates the law. The Commission should deny Duke's first assignment of error.

In its second assignment of error, Duke argues that "[t]he Commission's determination that the price blending period must extend at least five years imposes unreasonable restrictions on paragraphs (D) and (E) of R.C. 4928.142, when read *in pari material* with one another."[5] Duke's argument--that the proper reading of R.C. 4928.142(D) requires skipping to another section of the Revised Code--ignores the canon of statutory interpretation that the plain meaning of words used in a statute should be used.[6] R.C. 4928.142(D) itself specifies that, "[c]onsistent with those percentages [in a

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[4] Duke AFR at 3.

[5] Id. at 5.

[6] Use of "plain language" is an accepted rule of interpretation. Voluminous case law supports this rule, as well as the Ohio Revised Code, regarding statutory interpretation. See R.C. 1.42.; see, e.g., *State ex. rel. Choices for South-Western City Schools. v. Anthony Jr.* (2005), 108 Ohio St.3d 1.

required filing by the EDU], the commission shall determine the actual percentages for each year of years one through five." The Commission's determination, in an initial MRO case that involves Duke, must provide percentages within the parameters set by statute for at least a five-year period. Duke's second assignment of error should be denied.

In its third assignment of error, Duke argues that "[t]he Commission's finding that it may not prospectively alter the blending percentages set forth in R.C. 4928.142(D) prior to year two, is an unreasonable interpretation of the statute."[7] The plain language of R.C. 4928.142(E) states that the Commission may alter the blending percentages, "[b]eginning in the second year." The Commission's interpretation that the statute imposes a temporal restriction on when the Commission may act is reasonable because the time period between the Commission's approval of an initial application and its alteration (if any) of blending percentages would be based upon information not available at the time the EDU submitted its initial application.

Duke relies heavily on the word "prospectively" in R.C. 4928.142(E) in the Company's argument regarding the third assignment of error. "Prospectively" is used in the statute to express the well-known principle against retroactive ratemaking. Its presence in R.C. 4928.142(E) does not support the alteration of the blending period. Duke's third assignment of error should be denied.

In its fourth assignment of error, Duke argues that "[t]he Commission's determination that it cannot pass upon the Application, as submitted, is unlawful and unreasonable because it effectively forces Duke Energy Ohio to file an application that

[7] Duke AFR at 5.

conforms to an improper statutory interpretation."[8] As stated above concerning Duke's first three assignments of error, the Company should follow the statutory prescriptions regarding the blending period. Duke's fourth assignment of error should be denied.[9]

B. Duke's Proposed Rate Design Is Inconsistent with Statutory Requirements (Responsive to Assignment of Error 6).

In Assignment of Error 6, Duke asserts that the Commission's holding--that the Company's proposed rate design does not advance the state policies articulated under R.C. 4928.02 or meet requirements under R.C. 4928.142--is against the manifest weight of the evidence.[10] Duke is incorrect. And the Duke AFR does not discuss the matter further in its combined argument in support of Duke's assignments of error five through seven.[11] Duke also asserts that the Commission's finding "imposes additional requirements that are unnecessary and not required under R.C. 4928.142."[12] In making this argument, Duke disregards the requirements imposed by the Commission's rules.

The Commission adopted rules, as directed by R.C. 4928.141, regarding filings under R.C. 4928.142 and R.C. 4928.143. Ohio Adm. Code 4901:1-35-03(2)(d) directs the electric distribution utility ("EDU") to provide in its application:

> Detailed descriptions of how the CBP plan ensures an open, fair and transparent competitive solicitation that is consistent with and

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[8] Id. at 7.

[9] Duke's argument that the Commission should have "issu[ed] specific direction to the Company about how to remedy perceived deficiencies in the Application" does not address the Company's third assignment of error regarding whether the Order forces Duke to file an application that does not conform to Ohio law. Duke AFR at 8. Duke's inapplicable argument is also incorrect.

[10] Duke AFR at 3.

[11] Id. at 9-17. Duke's failure to discuss exactly how the Commission's ruling is against the manifest weight of the evidence may constitute a violation of Ohio Adm. Code 4901:1-35(A), which provides "[a]n application for rehearing must be accompanied by a memorandum in support, *which sets forth an explanation of the basis for each ground for rehearing* identified in the application for rehearing and which shall be filed no later than the application for rehearing."

[12] Duke AFR at 3.

> advances the policy of this state as delineated in divisions (A) to (N) of section 4928.02 of the Revised Code.

R.C. 4928.02(B) directs the Commission to:

> Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions and quality options they elect to meet their respective needs.

The Commission stated that Duke's rate design did not meet the state policy set forth in R.C. 4928.02(B).[13]

Specifically, the Commission pointed out that Duke's proposed rate design does not meet the policy under 4928.02 because it does not "provide customers who were traditionally served on a demand rate schedule an option to meet their needs without creating a significant rate increase."[14] Duke did not include demand charges in its retail rates, and its proposed retail rates would thus lead to much higher rates for some customers.[15] Duke also did not provide a detailed description as to how its rate design advances the policy of this state. Rather, Duke argued that because the CRES providers do not typically express demand charges in their offers, Duke should not in its standard service offer rate.[16] Duke confuses the manner in which it might contract with suppliers as the result of an auction process with the proper *design of retail rates* for the Company's customers. Duke did not satisfy the requirements under Ohio's statutes and rules, and its sixth assignment of error should be denied.

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[13] Order at 56. *See also Elyria Foundry Company et al., v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007 Ohio 4164, ¶¶ 58, 70 (requiring the Commission to adhere to state policy in accordance with R.C. 4928.02).

[14] Id.

[15] Id. at 53-55 (summary of Kroger, OCC, Greater Cincinnati Health Council and Eagle Energy arguments).

[16] Id. at 55-56.

C. Duke's Proposed Riders are Inconsistent with Statutory Requirements (Responsive to Assignment of Error 8).

1. Rider RECON must be bypassable to meet the state policy under R.C. 4928.02(H).

Duke sought recovery of generation charges through "an unavoidable reconciliation rider for the over-or under-recovery of ESP-era riders."[17] The Commission lawfully found that the recovery of Rider RECON from all customers, both shopping and non-shopping, was unreasonable based on the fact that it would very possibly lead to the subsidization of generation charges by customers not taking generation from Duke.[18] R.C. 4928.02(H) states that it is the policy of this state to:

> Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa.

The Order supports R.C. 4928.02(H) by opposing the imposition of non-bypassable charges that would interfere with effective competition. Non-bypassable charges would interfere with competition because the customers of a Duke competitor would still have to pay Duke for certain charges even after leaving Duke's service, making it difficult for competitors to attract customers.

Duke insists that the Commission's position is unreasonable because Rider RECON would only be in effect for one year.[19] Based upon the fact that the majority of the charges that would be included in Rider RECON were purchased power and fuel costs, the Commission reasonably determined that Rider RECON be bypassable, if finally

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[17] Application at 17 (November 15, 2010).

[18] Order at 57.

[19] Duke AFR at 17.

subject to a Commission decision. A year of inappropriate charges could contribute to destroying the competitive environment for generation service.

2. Rider SCR need not accrue carrying charges to meet R.C. 4928.142(C)(3), and should be bypassable to advance state policy under R.C. 4928.02(H).

Duke complains about the Commission's treatment of Rider SCR.[20] Rider SCR was proposed to reconcile the amounts Duke would pay to bidders who win a portion of the auctioned load and the amounts Duke actually collects from customers. Rider SCR was also proposed to recover the administrative costs of the competitive bid.[21] The Company had proposed that Rider SCR be non-bypassable if the deferral balances exceed five percent of the actual cost of supplying generation service to customers under the SSO.[22] Duke says "a reasonable argument can be advanced that [its proposal] creates a greater overall benefit for shopping,"[23] but provides no further support for this statement. Accordingly, the Commission should uphold its finding that making Rider SCR non-bypassable would create an anticompetitive subsidy that is contrary to state policy under R.C. 4928.02(H).[24]

Duke also complained that the Commission denied Duke the accrual of carrying charges under Rider SCR.[25] The Commission reasoned that allowing Duke to accrue carrying charges under Rider SCR would give Duke the wrong incentives.[26] The

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[20] Id. at 18.

[21] Order at 61.

[22] Id.

[23] Duke AFR at 18.

[24] Order at 61.

[25] Duke AFR at 18.

[26] Order at 63.

Commission is concerned that Duke would not make great enough efforts to accurately bill customers or to keep the administrative costs of the competitive bid low if it could recover carrying charges on Rider SCR.[27] Duke's insistence that it has sufficient incentives to bill accurately and keep administrative costs down[28] is not supported by the record.

Finally, Duke's implication that the Commission is violating R.C. 4928.142(C) by altering Rider SCR is unfounded.[29] R.C. 4928.142(C)(3) allows for Duke's reconciliation and recovery of costs relating "to the competitive bidding process or to procuring generation service to provide the standard service offer." The statute does not require that such costs should be non-bypassable.

3. Riders GEN, FPP and EIR are not all necessary to meet the requirements of R.C. 4928.142.

Duke argues that the Commission unreasonably "determined that Riders GEN, FPP, and EIR could not be approved as proposed."[30] Duke's objection is based solely on the Commission's approval of similar riders in the FirstEnergy ESP case.[31] The Order, however, stated that the Commission required clarification regarding how Rider GEN would be applied "throughout the blending period."[32] The Commission's discussion of these three riders is filled with references to charges that are influenced by legacy generation rates and the interaction between the rates and Duke's two-year blending

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[27] Id.

[28] Duke AFR at 19.

[29] Id.

[30] Id.

[31] Id.

[32] Order at 66.

proposal.[33] These references only apply to a proposal governed by R.C. 4928.142(D) and (E), and not to cases involving FirstEnergy EDUs since the FirstEnergy EDUs did not, "as of July 31, 2008, directly own[ ] . . . operating electric generating facilities. . . ."[34] Duke's total reliance upon cases that involved FirstEnergy is misplaced.

4. The Commission's determination that Rider BTR could not be approved as proposed in the application was lawful and should be upheld.

Duke is seeking federal approval to withdraw from the Midwest Independent Transmission System Operator, Inc. ("Midwest ISO") and to join PJM Interconnection, L.L.C. ("PJM"). Duke should not be allowed to recover from customers any costs of a move from the Midwest ISO to PJM, unless it can demonstrate that its decision to switch was prudent.

R.C. 4928.05 grants the PUCO the authority to provide for recovery, "through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs . . . imposed on or charged to the utility by the federal energy regulatory commission or a regional transmission organization, independent transmission operator, or similar organization approved by the federal energy regulatory commission." Under R.C. 4928.05, the Commission has the authority to supervise and regulate non-competitive retail electric service, including transmission service, "to the extent that authority is not preempted by federal law." As discussed in depth in OCC's Brief, the Commission is not preempted by federal law from reviewing the prudence of

[33] Id. at 64-66.

[34] R.C. 4928.142(D).

the costs resulting from Duke's decision to withdraw from the Midwest ISO and to join PJM.[35]

Further, the Commission's regulations for transmission cost recovery riders provide that the Commission may order that consultants be hired, with the costs billed to the electric utility and recoverable through the rider, to conduct *prudence* and/or financial reviews of the costs incurred and recovered through the transmission cost recovery rider.[36] Duke should not be allowed to recover from customers any costs of a move from the Midwest ISO to PJM, unless it can demonstrate that its decision to switch was prudent.

As provided in the Order,[37] a prudence review should be made if Duke submits a proper application to recover the costs associated with its move from the Midwest ISO to PJM.

III. CONCLUSION

The Commission should reject Duke's first, second, third, fourth, sixth, and eighth assignments of error. Duke's fifth and seventh assignments of error are not addressed in this pleading. Duke's statutory interpretations, as expressed in these arguments, should be rejected. The evidence on the record supports the Commission's conclusion that Duke's proposed rate design does not meet the state's policies under R.C. 4928.02. The Commission's refusal to accept riders proposed by Duke is reasonable and lawful

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[35] OCC Initial Brief at 24-28 (January 27, 2011).

[36] Ohio Adm. Code 4901:1-36-03(C).

[37] Order at 75.

according to the Commission's responsibilities under R.C. 4928.142. For these reasons, the Commission should deny Duke's rehearing on these assignments.

Respectfully submitted,

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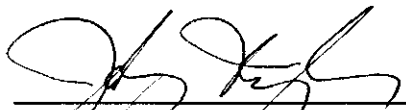

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Contra Duke's Application for Rehearing* was served electronically on the persons stated below on this 4th day of April 2011.

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