**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| --- | --- | --- |
| In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Continue Cost Recovery Mechanism for Energy Efficiency Programs Through 2016. | )  )  )  )  ) | Case No. 14-1580-EL-RDR |

**REPLY BRIEF**

**BY**

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# I. INTRODUCTION

A key opportunity for consumer protection—that was negotiated in a November 2011 settlement—will be resolved in this case where millions of dollars in potential utility charges to customers are at stake for the year 2016. The Public Utilities Commission of Ohio (“PUCO”) will determine how little or how much customers might pay to Duke Energy Ohio (“Duke” or “Utility”) for energy efficiency in 2016. The PUCO has the opportunity to reign in Duke’s exorbitant incentive awards (“shared savings”) and set a more balanced framework for 2016 and beyond.

On August 21, 2015, a number of parties filed Briefs in accordance with the Attorney Examiner’s ruling at the hearing in this case despite failing to file testimony or cross-examine witnesses at the hearing, People Working Cooperatively, Inc. (“PWC”) is the only party that filed a Brief supporting Duke’s Application in this case. The Environmental Advocates declined to file a brief. The other seven parties[[1]](#footnote-1) who filed merit briefs in this case all opposed the continuation of the current shared savings incentive mechanism into 2016.

Duke failed to carry its burden of establishing that the shared savings mechanism should continue as it is currently formulated, and also failed to rebut the specific recommendations that were set forth by OCC and other parties. For the reasons set forth below, the PUCO should adopt OCC’s consumer protection recommendations for the shared savings incentive mechanism as set forth in its Initial Brief in this matter.

# II. ARGUMENT

## A. Duke failed to carry its burden of establishing that the shared savings incentive mechanism should continue to be funded by Duke’s customers

The burden is on Duke Energy Ohio (“Duke or “the utility”) to establish that it should be entitled to extend its shared savings incentive mechanism into 2016,[[2]](#footnote-2) which is conceded by the Utility.[[3]](#footnote-3) In its Initial Brief, Duke relies on “the Commission’s prior approval of its portfolio and its cost recovery mechanism through 2015,” as set forth in the Stipulations and Recommendations from the 11-4393-EL-RDR and 13-431-EL-POR cases.[[4]](#footnote-4)

Duke claims that “some parties are seeking to retract previous support and deny the Company an opportunity to provide cost-effective energy efficiency benefits to customers.”[[5]](#footnote-5) To the contrary, the parties to the Stipulation (including Duke) in both the 11-4393-EL-RDR and 13-431-EL-POR cases were quite clear and consistent in maintaining that “the incentive mechanism shall expire at the end of 2015.”[[6]](#footnote-6) And as OCC witness Wilson Gonzalez repeatedly expressed at the hearing, 2016 is “a clean page,” where we can address the shared savings mechanism based upon the experience gained over the past three years.[[7]](#footnote-7)

Duke’s reliance upon the previous stipulations is misplaced. Duke was well aware of the fact that the timing of the shared savings mechanism did not align[[8]](#footnote-8) with its portfolio of energy efficiency and peak demand reduction (“EE/PDR”) programs. After all, the PUCO admonished the Utility and made it clear that the Commission expected that Duke would ensure that the “duration of the portfolio of programs is aligned with the duration of Duke’s cost recovery mechanism.”[[9]](#footnote-9) Despite this warning, however, when Duke filed its upcoming portfolio plan in 2013, it still chose to enter into a Stipulation whereby the portfolio would continue through 2016 but the shared savings cost recovery mechanism would expire after 2015.[[10]](#footnote-10) It appears as though Duke expected that, despite language to the contrary, the shared savings mechanism would be summarily extended through 2016.

In addition to relying on Stipulations that clearly do not support Duke’s position, the Utility then points to Senate Bill 310 as the fault of its woes. Specifically, Duke claims that the “new law in 2014 that significantly changed energy efficiency, peak demand and renewable benchmarks,” making it “impossible for the Company to add new programs that were not already anticipated by the parties or agreed to in previous cases.”[[11]](#footnote-11) But as set forth in OCC’s Initial Brief, Duke was certainly aware of Senate Bill 310 when it was signed into law on June 20, 2015,[[12]](#footnote-12) and was likely aware of it at the time it was introduced to the Senate on April 28, 2014. But Duke chose not to amend its portfolio at any time before the laws associated with Senate Bill 310 became effective on September 12, 2014. Nor did Duke choose to file an amended plan under the new rules instituted by Senate Bill 310.

Finally, Duke claims that it should be permitted to extend its shared savings incentive mechanism because it is an effective incentive for the Utility, as indicated by the fact that Duke has been exceeding its projections in its annual energy efficiency rider by over 16%.[[13]](#footnote-13) PWC made a similar argument – that the shared savings incentive mechanism should be continued in 2016 because “the Company is achieving savings beyond what is required by law,” and that “these savings benefit all customers in Duke’s territory by enabling customers to reduce usage and providing system-wide benefits.”[[14]](#footnote-14) However, Duke is only exceeding the benchmarks on a cumulative basis by using banked savings (which should not be permitted),[[15]](#footnote-15) not on an annual basis.

Contrary to Duke’s assertions, shared savings is not designed to incent the Utility to exceed its ***projections***, which could be artificially lowered[[16]](#footnote-16) – the shared savings incentive mechanism is designed to encourage the Utility to exceed the ***annual benchmarks***. This is clear because incentive awards are calculated on an annual basis, not a cumulative basis. But Duke has not been exceeding its annual benchmarks. In fact, Duke has missed its annual benchmarks by substantial margins in the past two years. In 2013, Duke achieved only 125,666 mWh of reductions, which is less than 70% of the benchmark that required an annual reduction of 181,368 mWh.[[17]](#footnote-17) Then again, in 2014, Duke only achieved 144,060 mWh of reductions, which was less than 75% of the benchmark that required 192,113 mWh of reductions.[[18]](#footnote-18)

Incentive awards, like shared savings, should be provided to utilities for exemplary performance. Duke failed to carry its burden of establishing that the shared savings incentive mechanism should continue as it is currently designed.

## B. Customers’ payments for shared savings should be capped.

Under Duke’s proposal there is no limit to the amount that customers would pay for shared savings. Duke does very little to meet its burden of explaining why there should be no cap on the amount of shared savings. Instead, Duke focusses primarily on the fact that there is no need for a cap if the Utility is not permitted to use banked savings.[[19]](#footnote-19) Be that as it may, in the event the PUCO allows Duke to use banked savings for purposes for triggering the shared savings incentive mechanism, customers must be afforded some protection against the exorbitant shared savings incentives that Duke has been enjoying. As a result, a number of parties in this case (all parties who presented testimony except the Utility) have asserted that if Duke is permitted to extend its shared savings incentive for 2016, it should be subject to a hard dollar cap.[[20]](#footnote-20)

To protect consumers, OCC witness Wilson Gonzalez proposed a hard dollar cap of 5% of the EE/PDR portfolio program costs. Duke attempts to discredit OCC’s witness by raising a number of red herring arguments that Mr. Gonzalez’s suggested cap is different than the cap set forth in OCC’s Comments and that he was not “able to specifically state that he was testifying in this regard on behalf of the OCC” because he was unaware of OCC’s position.[[21]](#footnote-21) But Mr. Gonzalez clearly expressed that he was appearing on behalf of OCC and that he was aware of OCC’s position asserted in its Comments.[[22]](#footnote-22) Mr. Gonzalez further explained that OCC’s Comments were filed before he was retained as an expert witness and that he had an independent view of what was an appropriate hard dollar cap for Duke’s shared savings incentive “based on my assessment of the company’s history and assessment of the incentive mechanisms as they exist in Ohio.”[[23]](#footnote-23) By making these arguments, Duke is trying to hamstring OCC to a position that was asserted in Comments before evidence was presented (and prior to an evidentiary hearing being scheduled).

Based upon this expert testimony evidence presented in this case, OCC has amended its position, as it is free to do. Simply put, Duke made no legitimate attempt to critique the actual substance of Mr. Gonzalez’ testimony. OCC stresses that it has never wavered on its position that Duke should have a hard dollar monetary cap on its shared savings mechanism. The only modification OCC made to its position was its recommendation to decrease the hard dollar cap amount to coincide with the evidence presented in this case.

Beyond the desperate attempts to discredit Mr. Gonzalez’s expert testimony, Duke asserts that cap on shared savings is “counter intuitive to customers interests” because shared savings is designed to “motivate the Company to maximize the net benefit achieved through its programs.”[[24]](#footnote-24) But Duke’s point in this regard is nonsensical as the Utility currently has an uncapped shared savings mechanism and it clearly has not been motivated to exceed the annual benchmarks without using past (banked) savings. It is counterintuitive to customers’ interests to have an uncapped shared savings mechanism.[[25]](#footnote-25)

PWC, the only party supporting Duke’s request for an uncapped shared saving mechanism, recommends that the PUCO refrain from instituting a hard dollar cap on Duke’s incentive mechanism in 2016 because “the SEET [Significantly Excessive Earnings Test] test has already been applied to the first two years of Duke’s receipt of the shared savings incentives,” and “did not reveal significantly excessive earnings.”[[26]](#footnote-26) But PWC’s argument is misguided for two reasons. First, Duke witness Timothy Duff testified that Duke is not recommending that the SEET be a cap for Duke.[[27]](#footnote-27) Second, the SEET is not an appropriate cap for a shared savings award.

The SEET is one of the primary consumer protection mechanisms built into the law. In Senate Bill 221 (“S.B. 221”) the General Assembly determined that the PUCO must protect Ohio customers by requiring electric distribution utilities to return ***significantly*** ***excessive*** earnings to customers. Unfortunately, however, excessive earnings may still be retained by the utility.[[28]](#footnote-28) The fact that Duke’s total earnings were not significantly excessive in 2012 and 2013 does not justify using the SEET as a cap for an energy efficiency shared savings mechanism, and does not support PWC’s argument that Duke’s mechanism should remain uncapped in 2016. An uncapped shared savings award could still yield excessive charges to customers for energy efficiency even if Duke’s total earnings are not significantly excessive. Moreover, as witness Duff acknowledged, the SEET examines a utility’s entire earnings and not just a portion of those earnings.[[29]](#footnote-29) To this end, OCC witness Gonzalez testified that the projected and actual incentive levels that Duke seeks to collect from customers, are exorbitant relative to the program size, and relative to other Ohio utilities.[[30]](#footnote-30) Mr. Gonzalez also concluded that Duke’s incentives significantly exceed utility energy efficiency incentive awards nationwide as a percentage of program cost and should be capped accordingly.[[31]](#footnote-31)

## C. Duke should not be permitted to use banked savings in order to trigger its shared savings incentive mechanism.

Using banked savings for purposes of triggering the shared savings incentive mechanism is not conducive to ensuring that the shared savings mechanism is a true incentive that is synonymous with a “reward” for overachieving beyond the annual benchmarks. Duke insists that it should be able to use banked savings in order to trigger the shared savings incentive mechanism, a tactic that it attempted to employ for its 2013 rider update. To support this argument, Duke insinuates that Ohio law permits the use of banked savings for shared savings by arguing that “R.C. 4928.662 specifically allows for banking.”[[32]](#footnote-32) While this is true, R.C. 4928.662, as amended by Senate Bill 310, only allows for using banked EE/PDR impacts for purposes of complying with the mandates set forth in R.C. 4928.62, not for purposes of triggering the shared savings incentive mechanism.[[33]](#footnote-33) And no party in this action is contesting that Duke is permitted to use banked savings of purposes of “compliance.”

Nevertheless, to support its argument in favor of using banked savings to trigger the shared savings incentive, Duke seems to focus exclusively on the fact that it has complied with the cumulative benchmarks.[[34]](#footnote-34) To that effect, Duke argues that disallowing the Utility to use banked savings actually creates a perverse incentive with respect to EE/PDR achievements.[[35]](#footnote-35) But Duke’s insistence on using banked savings for purposes of calculating the shared savings incentive truly perverts the system.

Duke did well in the early years of EE/PDR, allowing it to easily bank savings that were in excess of the mandates in the years immediately following the passage of Senate Bill 221. But Duke concedes that “energy efficiency impacts and potential are finite in nature” such that “the ability to repeat savings from those measures is exhausted and it became necessary to offer new and different options.”[[36]](#footnote-36) So Duke is attempting to used banked savings from previous years (where the Utility was subject to lower benchmarks) to trigger the shared savings mechanism in later years where the EE/PDR is more difficult to achieve and the benchmarks are higher. The use of banked savings would allow Duke to achieve a higher shared savings incentive by relying on old measures rather than designing new and innovative ways to achieve EE/PDR. As a result, Duke would not be incentivized to achieve as much total EE/PDR as it would have to achieve in order to acquire the top-tier of shared savings without the use of bank which is the antithesis of the shared savings incentive mechanism. This is precisely why there is a cumulative ***and***an annual benchmark.

In a last ditch effort to justify its use of banked savings the Utility explains that it will not be able to earn any shared savings incentive if it is not permitted to use banked savings.[[37]](#footnote-37) But as previously discussed,[[38]](#footnote-38) this is a result of poor planning on Duke’s behalf. Duke designed a portfolio based on the assumption that it would be permitted to use banked savings[[39]](#footnote-39) despite the fact that such language was not expressly conveyed in the Stipulation and Recommendation or the Opinions and Orders approving those Stipulations. And, despite the Utility’s insistence that it cannot earn an incentive without the use of banked savings, PUCO Staff witness Greg Scheck testified that the Utility could “still exceed its benchmark if [it] perform[s] really well.”[[40]](#footnote-40) Duke should not be granted the ability to use banked savings in order to achieve a higher incentive than the Utility would otherwise earn.

## D. Duke fails to raise legitimate concerns regarding consumer protections recommended by OCC.

To protect consumers, OCC recommended that an annual, hard-dollar cap on shared savings of no more than five percent of actual prudent program spending, be imposed to protect consumers.[[41]](#footnote-41) And, any incentive awarded to the Utility should also use the Total Resource Cost Test (“TRC”) net benefits rather than the Utility Cost Test (“UCT”) net benefits;[[42]](#footnote-42) use net, rather than gross program savings;[[43]](#footnote-43) and should be calculated on a pretax basis.[[44]](#footnote-44) OCC also recommended that the PUCO prohibit Duke from using banked savings from previous years to attain higher incentive levels that will make customers pay more in 2016.[[45]](#footnote-45)

Duke attempts to discredit OCC witness Gonzalez recommendations related to calculating the shared savings incentive mechanism by asserting that some of his positions are “unsupported by the record,”[[46]](#footnote-46) and “inconsistent with cost recovery mechanisms employed by other Ohio utilities.” [[47]](#footnote-47) Specifically, Duke points out that no other Ohio utilities use the Total Resource Cost test to measure cost effectiveness, calculate their incentive on a pre-tax basis, or use net savings rather than gross savings for calculating its net benefits.[[48]](#footnote-48)

Mr. Gonzalez was aware that these protections do not currently exist.[[49]](#footnote-49) But Mr. Gonzalez has consistently asserted the need for such consumer protections,[[50]](#footnote-50) which is reaffirmed by what we have learned from the past three years of shared savings incentives in Ohio.[[51]](#footnote-51) In fact, Mr. Gonzalez explained that he believes that these same consumer protections should also be applied to the other Ohio utilities.[[52]](#footnote-52) Due to the fact that Duke’s shared savings incentive mechanism is expiring at the end of this year (unlike the other Ohio utilities); however, Mr. Gonzalez clearly stated that “my testimony is very specific to 2016,” because “we are starting with a clean page.”[[53]](#footnote-53)

Finally, Duke tries to discredit Mr. Gonzalez’s reference that Duke’s shared savings incentive requests have been exorbitant when compared to other Ohio utilities’ shared savings incentive requests. But Duke failed to mention that FirstEnergy and Dayton Power and Light did not have an incentive in their first portfolios; thus, for obvious reasons, Duke’s shared savings is exorbitant compared to those utilities.[[54]](#footnote-54) To support its position, Duke performs an incredibly basic analysis by comparing AEP’s shared savings incentive with Duke’s in relation to the total respective customers of each utility.[[55]](#footnote-55) Mr. Gonzalez’s point, however, was that Duke’s shared savings incentive requests are exorbitant compared to ***the cost of portfolio programs***. For instance, while AEP has earned $23.3 million in shared savings for its first portfolio (2009-2011), which is only 21% of its entire portfolio that costed $112.7 million.[[56]](#footnote-56) And for it second portfolio (2012-2014), AEP requested $94 million in shared savings, which was 39% of its total program costs of $240 million.[[57]](#footnote-57) The AEP-Ohio average shared savings award over their first two portfolios is 30% of program spending. Duke’s shared savings award from 2012 through 2014, averaged an exorbitant 47% of program spending.[[58]](#footnote-58)

# III. CONCLUSION

Duke’s uncapped shared savings mechanism should end because it is costing customers needlessly. Likewise, Duke’s use of past (banked) savings to trigger an incentive award should also end. Duke did not meet its burden of proof to establish that the incentive mechanism, as currently designed, should be extended through 2016.

The parties to the 11-4393-EL-RDR and 13-431-EL-POR Stipulations clearly carved out the right to reevaluate Duke’s shared savings mechanism to determine whether it should continue into 2016, and if so, under what parameters. The consensus is clear – consumer protections are needed. The PUCO should reject the Utility’s request to continue to charge customers for an uncapped shared savings mechanism, while using banked savings to calculate an incentive award.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Reply Brief was served on the persons stated below via electronic transmission, this 8th day of September 2015.

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1. OCC, Ohio Energy Group, Ohio Manufacturers’ Association, PUCO Staff, The Kroger Company, Industrial Energy Users of Ohio, and the Ohio Partners for Affordable Energy. [↑](#footnote-ref-1)
2. *See* Ohio Admin. Code 4901:1-39-04(E) and R.C. 4928.143(C)(1) . [↑](#footnote-ref-2)
3. Initial Post Hearing Brief of Duke Energy Ohio, Inc. at 2 (August 21, 2015) (“Duke Brief”) [↑](#footnote-ref-3)
4. Duke Brief at 3. [↑](#footnote-ref-4)
5. Duke Brief at 3. [↑](#footnote-ref-5)
6. Case No. 11-4393-EL-RDR, Stipulation and Recommendation at 5 (November 18, 2011); Case No. 13-431-EL-POR, Stipulation and Recommendation at 5 (September 9, 2013). [↑](#footnote-ref-6)
7. Case No. 14-1580-EL-RDR, Hearing Transcript at 119-120. [↑](#footnote-ref-7)
8. Meaning Duke’s energy efficiency programs were approved for a different period of time than the Utility’s cost recovery mechanism. [↑](#footnote-ref-8)
9. 11-4393-EL-RDR, Opinion and Order at 18 (August 15, 2012). [↑](#footnote-ref-9)
10. 13-431-EL-POR, Amended Stipulation and Recommendation at 5 (September 9, 2013). [↑](#footnote-ref-10)
11. Duke Brief at 3, 6. [↑](#footnote-ref-11)
12. Post-Hearing Brief By The Office of the Ohio Consumers’ Counsel at 25 (August 21, 2015). [↑](#footnote-ref-12)
13. Duke Brief at 7. [↑](#footnote-ref-13)
14. Initial Brief of People Working Cooperatively, Inc. at 4 (August 21, 2015). [↑](#footnote-ref-14)
15. *See infra*, at 9. [↑](#footnote-ref-15)
16. In each annual energy efficiency rider filing Duke projects that it will only earn 11% of shared savings, but ultimately ends up earning 20.37% every time. [↑](#footnote-ref-16)
17. *In the Matter of the Application of Duke Energy Ohio, Inc., for Recovery of Program Costs, Lost Distribution Revenue and Performance Incentives Related to its Energy Efficiency and Demand Response Programs (“Duke 2013 True-Up”)*, Case No. 14-457-EL-RDR, Direct Testimony of James E. Ziolkowski, at Attachment JEZ-1 (March 28, 2014). [↑](#footnote-ref-17)
18. *In the Matter of the Application of Duke Energy Ohio, Inc., for Recovery of Program Costs, Lost Distribution Revenue and Performance Incentives Related to its Energy Efficiency and Demand Response Programs (“Duke 2014 True-Up”)*, Case No. 15-534-EL-RDR, Direct Testimony of James E. Ziolkowski at Attachment JEZ-1 (March 30, 2015). [↑](#footnote-ref-18)
19. Duke Brief at 7. [↑](#footnote-ref-19)
20. Initial Post-hearing Brief of The Kroger Company at 6-7 (August 21, 2015); Brief of The Ohio Energy Group at 5 (August 21, 2015); Initial Brief of Ohio Manufacturer’s Association at 6-7 (August 21, 2015); Post Hearing Brief Submitted on Behalf of the Staff of the Public Utilities Commission of Ohio at 6-7 (August 21, 2015). Some parties also asserted that there should be an outright denial of Duke’s request to have a shared savings mechanism in 2016. *See e.g.*, Initial Brief of Industrial Energy Users-Ohio at 4-6 (August 21, 2015); Initial Post-hearing Brief of The Kroger Company at 6-7; Brief of the Ohio Energy Group at 1-4; Initial Brief of Ohio Manufacturer’s Association at 2. [↑](#footnote-ref-20)
21. Duke Brief at 9. [↑](#footnote-ref-21)
22. Hearing Transcript at 121. [↑](#footnote-ref-22)
23. Hearing Transcript at 121. [↑](#footnote-ref-23)
24. Duke Brief at 7. [↑](#footnote-ref-24)
25. And DPL and the FirstEnergy Companies exceeded their annual benchmarks without an incentive in their first portfolio’s and DPL, AEP, and the FirstEnergy Companies continue to exceed the annual benchmarks with capped shared savings mechanisms. Transcript at 133-134. [↑](#footnote-ref-25)
26. PWC brief at 4. [↑](#footnote-ref-26)
27. Trial Transcript at 48. [↑](#footnote-ref-27)
28. *See* R.C. 4928.143(F). [↑](#footnote-ref-28)
29. Trial Transcript at 48. [↑](#footnote-ref-29)
30. Gonzalez Direct at 14. [↑](#footnote-ref-30)
31. Id. [↑](#footnote-ref-31)
32. Duke Brief at 5. [↑](#footnote-ref-32)
33. R.C. 4928.662(G); *see also*, OCC Brief at 19. [↑](#footnote-ref-33)
34. Duke Brief at 3, 5. [↑](#footnote-ref-34)
35. Duke Brief at 5. [↑](#footnote-ref-35)
36. Duke Brief at 2. [↑](#footnote-ref-36)
37. Duke Brief at 5. [↑](#footnote-ref-37)
38. *See*, *supra*. [↑](#footnote-ref-38)
39. Duke Brief at 2-3. [↑](#footnote-ref-39)
40. Hearing Transcript at 193. [↑](#footnote-ref-40)
41. Gonzalez Direct at 17. [↑](#footnote-ref-41)
42. Gonzalez Direct at 21. [↑](#footnote-ref-42)
43. Gonzalez Direct at 21. [↑](#footnote-ref-43)
44. Gonzalez Direct at 21. [↑](#footnote-ref-44)
45. Gonzalez Direct at 27. [↑](#footnote-ref-45)
46. The fact that Mr. Gonzalez’s testimony is actually part of the record demonstrates the absurdity of Duke’s illogical argument. [↑](#footnote-ref-46)
47. Duke Brief at 9. [↑](#footnote-ref-47)
48. Duke Brief at 9-10. [↑](#footnote-ref-48)
49. Hearing Transcript at 127, 137, 141. [↑](#footnote-ref-49)
50. Case No. 12-2190-El-POR, Direct Testimony of Wilson Gonzalez at 9-17; Case No 13-833-EL-POR, Direct Testimony of Wilson Gonzalez at 7 FN 2. [↑](#footnote-ref-50)
51. *See*, Hearing Transcript at 119, 126. [↑](#footnote-ref-51)
52. Case No. 14-1580-EL-RDR, Transcript at 120. [↑](#footnote-ref-52)
53. Hearing Transcript at 119. [↑](#footnote-ref-53)
54. Hearing Transcript at 129. [↑](#footnote-ref-54)
55. Duke Brief at 6-7; *see also*, Hearing Transcript at 127-128. [↑](#footnote-ref-55)
56. AEP-Ohio Application to Update EE/PDR Rider in Case No. 14-873-EL-RDR, Schedule 1a of Attachment 1. [↑](#footnote-ref-56)
57. Id., Schedule 1 of Attachment 1. [↑](#footnote-ref-57)
58. Case No. 12-2190-El-POR, Direct Testimony of Wilson Gonzalez at 13. [↑](#footnote-ref-58)