BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	)	Case No. 14-841-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	)	Case No. 14-842-EL-ATA

INITIAL BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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December 15, 2014 **Attorneys for Industrial Energy Users-Ohio**

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I. INTRODUCTION

In its Application, Duke Energy Ohio, Inc. ("Duke") seeks authorization of an Electric Security Plan ("ESP" or "proposed ESP" as appropriate) for the period of June 1, 2015 to May 31, 2018.[1] The Application proposes to provide energy and capacity under the standard service offer ("SSO") through a competitive bidding process ("CBP").[2] It also proposes a new nonbypassable rider, the Price Stabilization Rider ("PSR"), which would recover generation-related costs associated with Duke's retained interest in generation plants operated by Ohio Valley Electric Corporation ("OVEC").[3]

[1] Duke Ex. 1 at 1. Duke also seeks authority to terminate the ESP one year early unilaterally. *Id.* at 16-17.

[2] *Id.* at 6-7.

[3] *Id.* at 13-14.

To secure approval of its Application, Duke argues that the proposed ESP is more favorable in the aggregate than a Market Rate Offer ("MRO"), as required by R.C. 4928.143(C)(1) ("ESP v. MRO Test"), because the ESP is quantitatively no worse than an MRO and has several non-quantitative benefits.[4]

Based on the record in this case, Industrial Energy Users-Ohio ("IEU-Ohio") recommends that the Public Utilities Commission of Ohio ("Commission") reject the PSR because authorization would be both illegal and unreasonable. Additionally, the Commission should not approve the proposed ESP as filed because it fails an objective, cost-based application of the ESP v. MRO Test.

II. THE COMMISSION SHOULD DENY AUTHORIZATION OF THE PSR

Duke has requested authorization of the PSR as a provision of its ESP. The proposed rider would be nonbypassable and adjusted quarterly.[5] The credit or charge would be based on an estimate of the difference between what Duke expects to realize through the liquidation of its "entitlement" to power from its 9% share of the OVEC generation units ("OVEC Entitlement") and the costs Duke is charged by OVEC.[6] The difference would be recovered through the PSR for the life of Duke's retention of the OVEC Entitlement, which could extend to 2040.[7] According to Duke, the PSR will act as a hedge because the costs OVEC charges Duke are relatively stable when

[4] *Id.* at 14-15.

[5] *Id.* at 11-12 & 16.

[6] *Id*. at 16.

[7] *Id.* at 11. The facilities are projected to remain in service through 2040. Tr. Vol. V at 1238.

compared to wholesale power prices and, as a result, the rider will move countercyclically, *i.e.*, in the opposite direction of wholesale prices.[8]

The OVEC Entitlement arises out of Duke's interest as a Sponsoring Company in two generation facilities that were constructed to provide electricity to the Department of Energy for uranium enrichment in the 1950s.[9]

In 2011, the Commission ordered Duke to divest its generation assets by December 31, 2014.[10] Although Duke claims that the Commission's order does not extend to the OVEC Entitlement,[11] Duke sought and received authority from the Federal Energy Regulatory Commission ("FERC") to transfer the OVEC Entitlement to a newly formed subsidiary, Duke Energy Piketon.[12] Subsequently, however, Duke reported that it did not intend to transfer the OVEC Entitlement to Duke Energy Piketon.[13] As a result, Duke remains obligated to pay its portion of the costs of operation of OVEC.

Duke's payment obligations to OVEC are governed by a contract approved by FERC called the Amended and Restated Inter-Company Power Agreement ("ICPA").[14] Under Article 5 of the ICPA, Duke is responsible for its portion of the fixed and variable

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[8] Duke Ex. 6 at 13-14.

[9] *Id*. at 10.

[10] *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service,* Case Nos. 11-3549-EL-SSO, *et al*., Opinion and Order at 29-32 (Nov. 22, 2011).

[11] Duke Ex. 6 at 11. Commission Staff ("Staff") does not agree. Staff Ex. 1 at 6.

[12] *Cinergy Corp., et al*., FERC Docket No. EC12-90, Application for Authorization for Disposition of Jurisdictional Facilities under Section 203 of the Federal Power Act (Apr. 2, 2012).

[13] *Id*., Letter to Secretary Kimberly D. Bose from Sheri Hylton May regarding Amended Notice of Consummation (May 9, 2014).

[14] IEU-Ohio Ex. 5.

costs of operating the OVEC generation facilities and a return on equity.[15] Under Article 7 of the ICPA, it must also pay its portion of "Other Charges" such as replacement costs of plant, facility costs such as spare parts costs, post-agreement retirement benefit costs, and shutdown costs.[16] Under Article 8 of the ICPA, Duke is obligated to pay a minimum amount consisting of its portion of all fixed (demand) costs, transmission charges, and Other Charges "whether or not any Available Power or Available Energy are supplied" by OVEC.[17]

The average cost of power provided by OVEC under the ICPA to the Sponsoring Companies is sensitive to the total generation output of the plants. "In 2012, OVEC's average power cost to the Sponsoring Companies was $62.86 per megawatt-hour ("MWh") compared with $50.86 per MWh in 2011."[18] The difference in the cost was a function primarily of lower energy sales. "Mild weather, a soft energy market and low-cost natural gas generation were responsible for lower energy sales in 2012."[19]

Although the average costs charged to all Sponsoring Companies was $62.86/MWh in 2012, Duke's average cost of generation assigned to it under the ICPA was substantially higher. Duke's average cost was $70.92 per MWh for 2012, and its average cost remained over $70.00 per MWh in 2013.[20]

[15] *Id*. at 7-11. The cost-plus contract permits OVEC to charge the Sponsoring Companies for variable costs of energy production, fixed costs (for example, debt costs and fixed operation and maintenance expenses), and transmission charges assessed by PJM Interconnection, L.L.C. ("PJM").

[16] *Id.* at 12-13.

[17] *Id.* at 14.

[18] IEU-Ohio Ex. 6 at 2.

[19] *Id.*

[20] IEU-Ohio Ex. 13.

The demand portion of the OVEC costs in particular is far from "stable." Due to Duke's reduction in the amount of energy service it scheduled with OVEC, its demand-related costs per MWh increased from $24.36 per MWh in 2009 to $41.62 per MWh in 2012, or 71%.[21]

Although authorization of the PSR would require all retail customers to pay for some portion of the costs of the OVEC Entitlement, Duke does not intend to use its OVEC Entitlement to provide physical generation supply to any retail customer.[22] Duke will be securing generation service for its SSO customers through a full requirements auction process that will ladder and stagger the auctions. (Duke also states that it will not bid its OVEC Entitlement into the SSO auctions.[23]) Customers may also secure generation service from competitive retail electric service ("CRES") providers, many of which are offering service under long term fixed price contracts.[24] As a result, the capacity and energy from OVEC will not be used to limit shopping by customers[25] or provide standby, backup, or supplemental power service, or default service.[26]

Although Duke justifies the PSR on the basis that it will provide all customers a "hedge" against generation-related price volatility, Duke did not offer any evidence of the cost of the rider or the effectiveness of the PSR in reducing volatility of customer bills. Filling this gap in Duke's direct case, however, intervenors identified that the hedge provided by the PSR will either be negligible or non-existent. If it is a hedge, the

[21] *Id.* (dividing Demand by MWH).

[22] Tr. Vol. II at 464-65.

[23] Duke Ex. 6 at 12.

[24] Tr. Vol. II at 472-73; Tr. Vol. X at 2697. *See, also*, the Commission's Apples to Apples Chart applicable to Duke, viewed at http://energychoice.ohio.gov/ApplesToApplesCategory.aspx?Category=Electric.

[25] Tr. Vol. II at 470.

[26] Tr. Vol. II at 470.

PSR, based on Duke's OVEC Entitlement, would hedge no more than 8.67% of Duke's total retail sales.[27] Further, the difference produced by the "hedge" would likely be a small net cost to consumers through at least 2024.[28] Thus, the PSR will likely increase customers' bills, will not provide a hedge, but will protect Duke from the price risk associated with its retention of its interest in the OVEC Entitlement.

The Commission should not authorize the PSR for several reasons. Initially, the rider is not authorized by a provision of R.C. 4928.143(B). Second, authorization of the PSR would violate state energy policy. Third, the PSR is barred by R.C. 4928.38 and the stipulation Duke entered to resolve its electric transition plan ("ETP") application in 2000. Fourth, the Commission cannot authorize an adjustment in the wholesale compensation of Duke under Ohio law. Fifth, authorization of the PSR is preempted by the Federal Power Act ("FPA"). Finally, authorization of the PSR would be unreasonable because Duke has failed to demonstrate that the hedge will work as advertised. Thus, there is no reason, as a matter of law, policy, or fact, for the Commission to authorize the PSR.

A. The PSR is not authorized by R.C. 4928.143(B)(1) or (2)

The Commission may authorize a term of the ESP only as provided by R.C. 4928.143(B).[29] As demonstrated by Duke's testimony and admissions on cross-examination, the PSR is not authorized by any provision of R.C. 4928.143(B)(1) or (2).

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[27] Tr. Vol. II at 461-62; Tr. Vol. III at 607-08. The 8.67% "hedge" is itself overstated since it assumes that Duke would take the full amount of its entitlement, that the OVEC facilities would be run at 100% for the full year, and that the full nameplate capacity of the plants would be available to the Sponsoring Companies. None of these assumptions reflects actual operations.

[28] OEG Ex. 1. OEG proposes to increase the cost of the hedge to customers by "levelizing" the damage caused by the rider and permitting Duke to recover a carrying charge. *Id*.

[29] *In re Columbus S. Power Co*., 128 Ohio St.3d 512 (2011).

1. The PSR is not authorized by R.C. 4928.143(B)(1)

R.C. 4928.143(B)(1) provides that an ESP must include "provisions relating to the supply and pricing of electric generation service." As conceded by Duke, the PSR will have no effect on the supply of electric generation service. Duke will secure a supply of electric generation service through the CBP for the ESP.[30] As further explained by Duke, it will not bid the OVEC generation assets into the CBP.[31] Thus, the PSR is not a provision related to the supply of electric generation service.

The PSR also is not a provision related to the pricing of retail electric generation service. As Mr. Wathen stated during his cross-examination, the PSR is unrelated to the generation service provided under the SSO (although it will alter the total retail price the customer pays whether the customer takes generation service under the SSO or is shopping).[32] This assertion is consistent with the fact that the PSR is proposed to be a nonbypassable rider. It will neither raise nor lower the price of generation service; rather it will operate in the same way as any other nonbypassable distribution or distribution-like rider, increasing total bills of both nonshopping and shopping customers. As proposed, therefore, the PSR does not relate to the pricing of electric generation service supplied under the ESP.

To authorize a rider under R.C. 4928.143(B)(1), the Commission must find that the cost to be recovered relates to the supply and pricing of electric generation service. Because the PSR would not relate to either the supply or pricing of generation service,

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[30] Duke Ex. 1 at 5-7.

[31] Duke Ex. 6 at 12.

[32] Tr. Vol. II at 464.

the Commission cannot authorize the PSR as a provision of an ESP under R.C. 4928.143(B)(1).

2. The PSR is not authorized by R.C. 4928.143(B)(2)

R.C. 4928.143(B)(2)(a) through (i) identify the provisions the Commission may authorize in an ESP. None authorizes the inclusion of a PSR.

R.C. 4928.143(B)(2)(a) provides for authorization of an automatic recovery mechanism for prudently incurred cost of fuel used to generate electricity supplied under the offer, the cost of purchased power supplied under the offer, the cost of emission allowances, and the cost of federally mandated carbon or energy taxes. The PSR does not concern any costs of the ESP covered by this provision; as Duke has made clear, the OVEC capacity and energy will not be used to serve the ESP.[33] Accordingly, the Commission cannot authorize the PSR under R.C. 4928.143(B)(2)(a).

R.C. 4928.143(B)(2)(b) and (c) provide for charges related to costs of construction work in progress commenced after January 1, 2009 or costs related to a generating facility which became newly used and useful after January 1, 2009 if other requirements are satisfied. The PSR would recover costs for generation facilities that have been in service since the 1950s.[34] Thus, the Commission cannot authorize the PSR under R.C. 4928.143(B)(2)(b) or (c).

R.C. 4928.143(B)(2)(d) provides for authorization of terms, conditions, or charges related to several items that have the effect of stabilizing or providing certainty regarding retail electric service. Other than being a charge, the PSR does not meet any of the requirements of this division.

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[33] Tr. Vol. II at 464-65.

[34] Duke Ex. 6 at 10.

Under R.C. 4928.143(B)(2)(d), the charge must be related to limitations on customer shopping, bypassability, standby, backup, or supplemental power service, default service, carrying costs, amortization periods, or accounting or deferrals. Duke states that the PSR would not have the effect of limiting customer shopping.[35] During cross-examination, Mr. Wathen also testified that Duke would not use the OVEC generation for standby, backup, supplemental, or default service.[36] Additionally, the PSR has no relationship to bypassability of generation-related costs (other than being nonbypassable), carrying costs, amortization periods, or accounting or deferrals. Therefore, the PSR is not related to any of the kinds of services or accounting issues that may be addressed through a charge authorized under R.C. 4928.143(B)(2)(d).

Further, the PSR is not proposed to stabilize retail electric service in either a physical or an economic sense. In a physical sense, the PSR will not expand the amount of generation service available to nonshopping customers. The power sold to nonshopping customers will be provided by successful CBP bidders.[37] The OVEC Entitlement will not be bid into the auctions used to serve nonshopping customers.[38] Further, the reliability of the electric grid is a function of PJM Interconnection, LLC (PJM).[39] Thus, the PSR will not have the effect of stabilizing or making more certain retail electric service in a physical sense.

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[35] Tr. Vol. II at 470.

[36] Tr. Vol. II at 470.

[37] Duke Ex. 3.

[38] Duke Ex. 6 at 12.

[39] *Carbon Pollution Emission Guidelines for Existing Stationary Sources Electric Utility Generation Units*, EPA-HQ-OAR-2013-0602, Comments Submitted on Behalf of the Public Utilities Commission of Ohio at 4 (Dec. 1, 2014) (viewed at http://dis.puc.state.oh.us/TiffToPDf/A1001001A14L01B63640H76295.pdf). As the Commission further noted, "[d]eregulated states like Ohio place their trust in RTOs to ensure there is resource adequacy to meet load forecasts in an economically sound manner." *Id*. at 14-15.

Likewise, it will not have the effect of stabilizing or making more certain retail electric service in an economic sense; if anything, it will make prices less stable and more uncertain. As proposed, the PSR will increase or decrease all customers' bills by some amount that is currently unknown.[40] The estimated charge will then change quarterly.[41] As the actual costs of the OVEC generation move up and down depending on multiple factors, which are not predictable (such as weather, forced outages, and general economic conditions) and energy and capacity markets respond,[42] the value of the PSR in any planning year is unknowable.

Thus, Duke has not demonstrated that the PSR can be authorized under R.C. 4928.143(B)(2)(d). It has not demonstrated that the charge addresses any of the subjects covered by this division or that the charge will stabilize or make more certain retail electric service.

R.C. 4928.143(B)(2)(e) authorizes automatic increases and decreases in any component of the SSO price. As described by Duke, the rider would not increase or decrease automatically any component of the SSO price. Thus, R.C. 4928.143(B)(2)(e) does not provide a basis to authorize the PSR.

R.C. 4928.143(B)(2)(f) provides for provisions related to the securitization of a phase-in and recovery of the electric distribution utility's ("EDU") cost of securitization. Duke states that the PSR is unrelated to a securitization.[43]

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[40] Duke itself did not provide an estimate of the cost of the PSR. It did make an estimate available in discovery. As noted by OEG, the estimate is that the PSR will be a net charge through 2024. OEG Ex. 1 at Ex. AST 3.

[41] Duke Ex. 6 at 16.

[42] IEU-Ohio Ex. 6 at 2

[43] Tr. Vol. II at 465.

R.C. 4928.143(B)(2)(g) provides for provisions relating to transmission, ancillary, congestion, or any related service required for the SSO. As previously noted, the charge or credit provided by the PSR is unrelated to the services required by the SSO. Thus, the PSR will not be "required" for the SSO. Further, the charge or credit to customer bills resulting from the PSR is unrelated to transmission, ancillary, congestion, or a related service;[44] instead, the charge or credit is the difference between what Duke is billed by OVEC and what Duke recovers when it liquidates the capacity and energy associated with the OVEC Entitlement into the PJM markets. Accordingly, R.C. 4928.143(B)(2)(g) does not provide a basis to authorize the PSR.

R.C. 4928.143(B)(2)(h) authorizes provisions related to the EDU's distribution service. By its terms, the PSR is unrelated to the EDU's distribution service. Accordingly, the PSR is not a provision that the Commission may authorize under R.C. 4928.143(B)(2)(h).

R.C. 4928.143(B)(2)(i) provides for provisions under which the EDU may implement economic development, job retention, and energy efficiency programs. There is no expectation that the OVEC plants will close, with or without approval of the PSR.[45] Thus, the rider is unrelated to economic development or job retention. Likewise, the rider does not recover costs associated with Duke's compliance with mandated energy portfolio requirements. (Under the ESP, customers would continue to pay the Alternative Energy Rider and the Energy Efficiency and Peak Demand Reduction Rider to recover the costs of implementing Duke's programs to comply with state-mandated alternative energy, peak demand reduction, and energy efficiency

[44] Tr. Vol. II at 465-66.

[45] Tr. Vol. I at 63.

requirements.[46]) Accordingly, R.C. 4928.143(B)(2)(i) does not provide the Commission a basis to authorize the PSR.

As this discussion demonstrates, the PSR is not a provision authorized under R.C. 4928.143(B). Because it is not authorized by a specific provision, the Commission may not lawfully authorize the rider.[47]

B. Authorization of the PSR would violate state policies

The Commission must ensure that the ESP it approves for Duke complies with R.C. 4928.02(H), which provides that it is the policy of the 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 a product or service other than retail electric service or vice versa. Additionally, R.C. 4928.02(H) prohibits the recovery of any generation-related costs through distribution or transmission rates.

Authorization of the PSR would result in an anticompetitive subsidy to or from a noncompetitive retail electric service from or to a service other than retail electric service. As proposed, the PSR would require all retail distribution customers to incur a charge or credit designed to collect the difference between Duke's costs and wholesale revenue related to the OVEC Entitlement. When the difference is a charge, Duke would recover the costs of the OVEC Entitlement that exceed the market prices for the entitlement, a subsidy to Duke. When the difference is a credit (as unlikely as that may be), Duke's retail distribution customers would receive a subsidy of any wholesale

[46] Duke Ex. 18 at Attachment JEZ-4, page 3.

[47] *In re Columbus S. Power Co.*, 128 Ohio St.3d 512 (2011).

revenue from the OVEC Entitlement that exceeds Duke's costs. In either case, the result is not lawful.

A rejection of the request to authorize the PSR would be consistent with the Commission's application of R.C. 4928.02(H) when it dismissed the application of Ohio Power Company ("AEP-Ohio") to recover plant closure costs for the Sporn 5 Unit. To collect the closure costs, AEP-Ohio sought a nonbypassable charge.[48] In its Finding and Order dismissing the application, the Commission concluded that no provision of R.C. 4928.143 authorized a rider to recover the plant closure costs and further held that "[a]pproval of such a charge would effectively allow [AEP-Ohio] to recover competitive, generation-related costs through its noncompetitive, distribution rates, in contravention of [R.C. 4928.02(H)]."[49]

Authorization of the PSR would trigger a violation similar to that presented by AEP-Ohio's application to recover the closure costs of Sporn 5 through a nonbypassable rider. The PSR would authorize Duke to recover the difference of the generation-related costs that OVEC charges Duke under the ICPA (even though those costs do not provide generation service to the customers of Duke) and the wholesale capacity and energy revenues that Duke receives from PJM. The recovery of the charge through a nonbypassable rider would result in a charge that is the same as a distribution charge; it would be applicable to all customers just as a distribution charge is. As the Commission concluded in the decision regarding Sporn 5 closure costs, R.C.

[48] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 1-2 (Jan. 11, 2012).

[49] *Id.* at 19.

4928.02(H) prohibits the recovery of generation-related costs through a nonbypassable charge.[50]

Further, the Commission has a clear directive from the General Assembly that customers should decide the level of market risk they are willing to absorb. It is the policy of the State 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.[51]

In particular, the one-size-fits-all (and applicable-to-all) solution offered by Duke to address price stability is inconsistent with state energy policy. Customers have many options available to them. On the one hand, they can select a competitive offer that contains either fixed or variable terms.[52] On the other hand, they can remain on the SSO and take advantage of the smoothing effects of the laddering and staggering of the SSO auctions on the price of generation service.[53] Because the PSR is nonbypassable, it forces customers to take a "hedge" they may neither want nor need.

The PSR also is anticompetitive. Because the PSR would guarantee that Duke would never be at risk for prices that are lower than the costs charged it by OVEC, Duke would be immune from market price risk.[54] In contrast, competitors cannot resort to the

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[50] The Staff reaches a similar conclusion. *See* Staff Ex. 1 at 10-11.

[51] R.C. 4928.02(A) & (B).

[52] For purposes of this hearing, administrative notice was taken of the Apples to Apples Charts available on the Commission website.

[53] Duke Ex. 3 at 8.

[54] RESA Ex. 3 at 13.

protection Duke is seeking.[55] Thus, the PSR would place unregulated generation providers at a competitive disadvantage.

Further, the Commission's legitimate interest in system reliability, the challenges presented by adverse weather events, and new carbon regulations do not provide any justification for the authorization of the PSR as a means of improving the reliability or reducing the volatility of generation service prices. As Duke admits, the PJM markets operate as they should; as generation is needed due to retirements, there is a response in the form of new generation entering the markets.[56] In fact, PJM has more generation in the *construction* queue than the amount expected to retire.[57] If there is a concern that the generation will not serve the balance of the RTO region that includes Ohio, that concern also is being addressed by new generation resources sited in Ohio.[58] To the extent that reliability was recently at risk due to January 2014 weather events, PJM "survived the storm" and is addressing the effects of adverse weather conditions on system reliability and volatility of prices.[59] Thus, reliability concerns do not support authorization of the PSR.

C. Authorization of the PSR would violate the prohibition of recovery of transition revenue or its equivalent contained in R.C. 4928.38 and Duke's ETP Stipulation

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[55] Tr. Vol. II at 428-29.

[56] Tr. Vol. XVI at 4286-88.

[57] Tr. Vol. I at 78-81; IEU-Ohio Ex. 3 & 4.

[58] Tr. Vol. X at 2697. *See, In the Matter of the Application of NTE Ohio, LLC for a Certificate of Environmental Compatibility and Public Need to Construct an Electric Generation Facility in Middletown, Ohio*, Case No. 14-534-EL-BGN, Opinion, Order, and Certificate (Nov. 24, 2014) (500 MW facility to be interconnected through Duke transmission).

[59] Although Mr. Henning was unaware of many of the structures in PJM to support reliability and current efforts to address problems identified this past winter season, he was generally aware that PJM is undertaking steps to address price volatility. Tr. Vol. I at 61-63 & 81-82.

Under the requirements of R.C. 4928.32 to 4928.40, an EDU had a single opportunity to collect transition revenue from customers if it could demonstrate it had transition costs. Further, the EDU had a limited period during which it could collect transition revenue. In 2000, Duke sought but gave up any claims it may have had to secure generation-related transition revenue through its settlement of its ETP. Nonetheless, Duke is seeking to recover additional transition revenue through the PSR when the revenues it recovers from PJM are less than the amounts it pays OVEC. Because Duke has not presented a claim for transition revenue that complies with the statutory requirements, the time for such a claim has expired, and Duke has stipulated that it will not seek generation-related transition revenue, the Commission cannot lawfully authorize the PSR.

R.C. 4928.32 to 4928.40 provided an EDU with a single opportunity to secure transition revenue. Within 90 days of adoption of Amended Substitute Senate Bill 3 ("SB 3"), an EDU was required to file an ETP.[60] As part of that plan, it could request transition revenue.[61] Before authorizing collection of any transition revenue, the Commission had to find that the EDU had transition costs. The EDU was required to prove that the claimed transition costs were "prudently incurred," "legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in this state," and "unrecoverable in a competitive market," and that the EDU "would otherwise be entitled an opportunity to recover the costs."[62]

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[60] R.C. 4928.31(A).

[61] *Id.*

[62] R.C. 4928.39.

If the Commission determined that the EDU had a legitimate claim to transition revenue, it could authorize the collection of transition revenue for a finite period. For certain transition cost recovery, the period was defined by the Market Development Period ("MDP") that could not extend beyond 2005.[63] For transition costs identified as regulatory assets, the collection period could not extend beyond 2010.[64] (Additionally, R.C. 4928.141, enacted as part of Amended Substitute Senate Bill 221 ("SB 221"), precluded any further recovery of transition costs "effective on and after the date that the allowance is scheduled to end under the utility's rate plan."[65]) The Commission cannot lawfully "authorize the receipt of transition revenues or any equivalent revenues by an electric utility except as expressly authorized in sections 4928.31 to 4928.40 of the Revised Code."[66] "With the termination of that approved revenue source, the utility [was to] be fully on its own in the competitive market."[67]

The Cincinnati Gas and Electric Company, Duke's predecessor, sought to recover transition revenue under SB 3 when it filed its ETP in 1999.[68] The application was resolved by a stipulation ("ETP Stipulation"), and the "transition plan stipulation provide[d] CG&E with no GTC recovery and place[d] the electricity market price risk entirely on CG&E."[69]

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[63] *Id*.

[64] *Id.*

[65] R.C. 4928.141.

[66] R.C. 4928.38.

[67] *Id*.

[68] *In the Matter of the Application of The Cincinnati Gas and Electric Company for Approval if its Electric Transition Plan and for Authorization to Collect Transition Revenues*, Case Nos. 99-1658-EL-ETP, *et al*., Application at 14-17 (Dec. 28, 1999).

[69] *Id*., Opinion and Order at 23 (Aug. 31, 2000).

If the Commission authorizes the PSR, Duke would collect additional transition revenue or its equivalent when the PSR is a charge to customers. The charge to customers would be based on the difference between what Duke receives from PJM for wholesale power and capacity and the amounts billed to it by OVEC under the ICPA.[70] The PJM revenues are determined by the market-based prices established by the PJM tariffs. When the OVEC Entitlement costs exceed the market-based revenue, the difference is "the costs … unrecoverable in a competitive market."[71] Duke would then recover these stranded costs through the PSR. The PSR, thus, would permit Duke to recover transition revenue or its equivalent.

R.C. 4928.38 bars the Commission from authorizing transition revenue or its equivalent in two respects. First, the Commission may authorize the recovery of transition revenue only if Duke complies with R.C. 4928.31 to 4928.40. In particular, R.C. 4928.39 and 4928.40 provide detailed requirements for the authorization of transition revenue, none of which Duke sought to satisfy in its Application and related testimony. Second, the time by which the authorization of transition revenue or its equivalent may be authorized and collected has expired. The MDP ended no later than December 31, 2005. The period for recovery of regulatory assets ended no later than December 31, 2010. Thus, a claim for transition revenue is time-barred.

Likewise, the Duke ETP Stipulation bars recovery of generation-related transition revenue. Duke specifically agreed to forgo any further recovery of generation-related transition revenue when it entered the ETP Stipulation. Its Application in this case,

[70] Duke Ex. 6 at 16.

[71] R.C. 4928.39(C).

however, seeks to recover above-market generation-related costs of OVEC through the PSR. That request is barred by Duke's Commission-approved ETP Stipulation.

D. Authorization of the PSR would exceed the Commission's jurisdiction under state law because it increases Duke's compensation for wholesale electric services

If the PSR is approved, Duke will liquidate the OVEC Entitlement into the PJM wholesale markets. The authorization of the PSR would then permit Duke to adjust its total compensation from the OVEC Entitlement through either a charge or credit. Because the PSR would adjust the compensation Duke receives for wholesale electric service, the Commission has no authority to authorize the PSR under state law.

The Commission's jurisdiction to regulate a public utility that is an EDU, such as Duke, is governed by Chapters 4905, 4909, and 4928, Revised Code. R.C. 4905.02 provides that a "'public utility' includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code." R.C. 4905.03 then provides a list of the types of public utilities subject to the Commission's jurisdiction that includes an electric light company:

> As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:
>
> ...
>
> (C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service *for electricity delivered to consumers in this state*, but excluding a regional transmission organization approved by the federal energy regulatory commission. (Emphasis added.)

The same definition of electric utilities subject to Commission jurisdiction is contained in Chapter 4928.[72] This definition specifically limits the Commission's jurisdiction over electric light companies, including EDUs, to instances in which a retail service is being provided, *i.e.* electricity is being supplied "to consumers." R.C. 4905.03(C) also exempts regional transmission organizations ("RTOs"), such as PJM, from the definition of an electric light company. By definition, therefore, the jurisdiction of the Commission does not extend to wholesale electric services.

The PSR would operate to adjust Duke's compensation for wholesale electric services by increasing or decreasing the compensation it receives from PJM to match the costs Duke is charged by OVEC. Because Ohio law limits the Commission's jurisdiction to set charges for a service of an electric light company to electricity being supplied to consumers in Ohio, the Commission's jurisdiction does not extend to establishing a charge or credit to adjust Duke's compensation for wholesale electric services. Accordingly, and in addition to the constitutional bar that prevents the Commission from authorizing the PSR discussed in the next section, the Commission is without authority under Ohio law to authorize the PSR.

E. Authorization of the PSR is preempted by the Federal Power Act

Even if the Commission were authorized to adjust Duke's compensation for a wholesale service by Ohio law, Commission action increasing Duke's total compensation for a wholesale electric service is preempted by the FPA.

> Under the Supremacy Clause of the United States Constitution, state legislation and regulating authority may be preempted: (1) if Congress, in enacting a federal statute, has expressed a clear intent to preempt state

[72] *See*, *e.g.*, R.C. 4928.01(A)(6) & (7) & 4928.05(A) (defining the Commission's jurisdiction to supervise and regulate competitive and noncompetitive retail electric service supplied by an electric utility).

> law; (2) if it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has left no room for the states to supplement the federal law; or (3) if compliance with both state and federal law is impossible or when compliance with state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal policies embodied in the laws at issue.[73]

Two federal district court decisions demonstrate that attempts by states to increase the compensation of a generation owner for wholesale capacity and energy services are preempted because they invade a field of regulation within the exclusive authority of FERC. In the first decision, *PPL EnergyPlus, LLC v. Nazarian*,[74] a federal district court in Maryland reviewed an order of the Maryland Public Service Commission ("Maryland Commission") that increased compensation for the provision of wholesale electric services of an entity that was seeking to construct a generation plant ("Generation Owner"). In the challenged order, the Maryland Commission directed the incumbent local electric utilities to enter into contracts with the Generation Owner. The contracts would have required the local electric utilities to pay the Generation Owner the difference between what the Generation Owner received for market-based sales of capacity and energy to PJM and a contract price established by the Maryland Commission based on the cost of construction and operation of the plant for twenty years. The local electric utilities would then recover any loss or gain under the contracts ordered by the Maryland Commission from Maryland ratepayers.[75] The federal court concluded that the Maryland Commission's order fixed the monetary value of wholesale

[73] *Marketing Research Services, Inc. v. Pub. Util. Comm'n of Ohio*, 34 Ohio St.3d 52, 55 (1987).

[74] 974 F. Supp.2d 790 (D. Md. 2013), *aff'd*, 753 F.3d 467 (4th Cir. 2014).

[75] *Id.* at 830-33.

generation-related capacity and energy services provided by the Generation Owner.[76] Based on the Court's determination that FERC has exclusive authority in that field and has fixed the price for wholesale energy and capacity sales in the PJM markets as the market-based price produced by the auction processes approved by FERC and utilized by PJM, the Court declared the action of the Maryland Commission to be preempted.[77] In the opinion affirming the decision of the district court, the Fourth Circuit Court of Appeals agreed that the Maryland Commission was preempted because the field of wholesale energy prices was exclusively within the jurisdiction of FERC.[78]

In *PPL EnergyPlus, LLC v. Hanna,*[79] a federal district court in New Jersey reached the same result, concluding that state legislation that attempted to encourage the construction of new generation plants by guaranteeing a price of capacity to the builder was preempted. In the New Jersey case, the state legislature passed legislation "to provide a transaction structure that would result in new power plants being constructed in the PJM territory that benefit New Jersey."[80] The law authorized the New Jersey Board of Public Utilities ("Board") to issue a capacity agreement and directed the state's four EDUs to enter into contracts with generators to pay any difference between the FERC-approved Reliability Pricing Model-Based Price ("RPM") and the development costs of the generators that the Board approved.[81] Like the Maryland federal court, the New Jersey federal court found that the New Jersey legislation was preempted because

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[76] *Id.* at 833.

[77] *Id.* at 840.

[78] *PPL EnergyPlus, LLC v. Nazarian,* 753 F.3d 467 (4th Cir. 2014).

[79] 977 F. Supp.2d 372, 393, (D. N.J. 2013), *aff'd sub nom*., *PPL EnergyPlus LLC v. Solomon*, 766 F.3d, 241, 253 (3d Cir. 2014).

[80] *Id.* at 393.

[81] *Id.* at 393-94.

the FPA occupied the field of wholesale electricity sales, including the price at which electricity is sold at wholesale.[82] Based on its finding that the state law was preempted, the federal court declared the statute under which the Board had authorized above-market payments to the generator "null and void."[83]

The District Court also held that the Long-Term Capacity Pilot Program ("LCAPP") was preempted under conflict preemption doctrine. Under conflict preemption doctrine, a state law is preempted if it stands as an obstacle to the accomplishment of the purposes and objectives of Congress.[84] If there is a conflict, the state law must yield regardless of the purpose the state seeks to pursue.[85] The District Court held that LCAPP posed an obstacle to FERC's implementation of RPM because LCAPP undermined competitors' reliance on the price signals provided by RPM. "The effects … demonstrate that the [Commission-approved contract's] imposition of a government imposed price creates an obstacle to [FERC's] preferred method for the wholesale sale of electricity in interstate commerce."[86]

The Third Circuit Court of Appeals affirmed the New Jersey district court's decision holding that "the Federal Power Act, as administered by FERC, preempts and, therefore, invalidates, state intrusions into the field" of wholesale electricity pricing.[87] The Third Circuit noted that FERC had set the wholesale capacity price in PJM through

[82] *Id.* at 406-10.

[83] *Id.* at 412.

[84] *Id.* at 410.

[85] *Id*.

[86] *Id.* at 411.

[87] *PPL EnergyPlus LLC v. Solomon*, 766 F.3d, 241, 253 (3d Cir. 2014).

the RPM auction process.[88] "At the same time," however, the New Jersey law provided certain generators "an additional amount" of compensation in excess of the wholesale market price.[89] "Because FERC has exercised control over the field of interstate capacity prices, and because FERC's control is exclusive, New Jersey's efforts to regulate the same subject matter cannot stand."[90]

1. Authorization of the PSR is preempted because it would invade a field within the exclusive jurisdiction of FERC

Because Duke is liquidating the OVEC Entitlement into the PJM markets, Duke recovers FERC-approved wholesale capacity and energy revenues from PJM. If the PSR is authorized, however, Duke is guaranteed to recover the costs of the OVEC Entitlement under the ICPA.[91] Like the mechanisms the federal courts in Maryland and New Jersey held were preempted, the PSR would make up the difference between the revenue that Duke projects it will receive based on FERC-approved tariffs and the amounts it is billed by OVEC. (Also, like the Maryland Commission, the Commission would be authorizing Duke to shift the revenue responsibility of the shortfall to customers from Duke's sole shareholder.) Thus, the PSR would increase the compensation for wholesale generation-related capacity and energy services Duke receives in excess of the amounts authorized by PJM's FERC-approved tariffs. Because wholesale electricity compensation is within the exclusive jurisdiction of FERC, however, the Commission is preempted from authorizing the PSR.

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[88] *Id.* at 252.

[89] *Id.*

[90] *Id.* at 253.

[91] Duke Ex. 6 at 11-12.

2. Authorization of the PSR is preempted because it would stand as an obstacle to the accomplishment of Congressional objectives

Authorization of the PSR also is preempted because it undermines the price signals provided by PJM relied upon by competitors. As the Commission recently noted, "the state generally relies on the wholesale electric market to meet the state's energy and capacity needs. Wholesale electric markets are open and accessible to approved parties that can offer, purchase, or resell electricity as a commodity. Due to the open nature of wholesale electric markets, participating parties range from independent power producers and utility generation affiliates to competitive marketers or suppliers. In a deregulated state, energy prices are set not by regulated rates of return but by competition and market forces."[92] Under the PJM capacity market structure, the purpose of uniform location price signals is to provide transparent market signals to support infrastructure investment.[93] Inefficient sellers are driven from the market due to the uniform clearing prices in the capacity market. If the owner does not expect to recover the facility's costs of production in the wholesale market, it will close or mothball the facility, responding rationally to the economic signal that the unit is not competitive.[94] The owner, however, will bid the unit into the PJM auction with a zero bid so that it clears the PJM wholesale market to assure that the plant receives some

[92] *Carbon Pollution Emission Guidelines for Existing Stationary Sources Electric Utility Generation Units*, EPA-HQ-OAR-2013-0602, Comments Submitted on Behalf of the Public Utilities Commission of Ohio at 3 (Dec. 1, 2014) (viewed at http://dis.puc.state.oh.us/TiffToPDf/A1001001A14L01B63640H76295.pdf).

[93] Tr. Vol. XVI at 4276-77.

[94] Tr. Vol. XVI at 4365.

capacity-related revenue if it is guaranteed total cost recovery through a mechanism such as the PSR.[95]

Like the LCAPP found to conflict with the FPA by the New Jersey District Court, the PSR would frustrate the price signals in the FERC-authorized PJM capacity market by permitting an uneconomic facility to bid into the market when the rational economic response would be close or mothball the unit. Because the PSR would frustrate the price signals the PJM tariffs are intended to promote and thereby conflict with the purposes of Congress expressed through the FERC-approved tariffs of PJM, authorization of the PSR is preempted.

F. Duke has failed to demonstrate that the PSR is reasonable

Duke claims that the PSR will work as proposed based on an "intuition" that the PSR will hedge customer's costs against the volatility of market prices, that the PSR is competitively neutral, and that there is some reliability benefit associated with the hedge.[96] The record, however, demonstrates that the PSR will have little or no positive benefit for customers and will likely be a cost. Further, the PSR would not be competitively neutral or provide any reliability benefit customers do not already have. Authorization of the PSR also would set back the Commission's efforts to implement retail competition through divestiture of generation assets. Accordingly, the Commission should not authorize the rider.

1. Duke has not demonstrated that the PSR will serve as a hedge

Initially, Duke argues that the PSR will operate as a hedge, but it has not provided any evidence that the PSR provides a quantifiable benefit to customers as a

[95] Tr. Vol. XVI at 4365-66.

[96] Duke Ex. 6 at 13-15.

term of the ESP. In its Application, for example, Duke has not attempted to demonstrate the cost of the PSR or its effects on bills. Thus, Duke offered no quantifiable basis for the Commission to conclude that the PSR will operate as a hedge.

Duke assumes the hedge will work because OVEC's costs are stable, but the record demonstrates otherwise. OVEC's average cost of generation moved from $52 to $62 from 2011 to 2012, and Duke's average cost likewise increased considerably.[97] The demand portion of Duke's average cost of electricity from OVEC rose by 71% between 2009 and 2012.[98] Based on the record, the Commission does not have a basis to find that Duke's OVEC-related generation costs are "stable."

The inability of OVEC to estimate its costs of production also raises questions about the credibility of Duke's claim that the OVEC costs are stable. In a filing to FERC at the time OVEC sought approval of amendments to the ICPA, OVEC anticipated that its average costs would be substantially lower than what it actually incurred, even though OVEC incorporated the effects of a planned outage to complete environmental upgrades.[99] When it had the actual results of the affected years, OVEC pointed to several other factors including a soft energy market for the increased average costs due to reduced sales that its modeling apparently did not capture.[100] Based on this history, the Commission has no basis to find that the estimates Duke provided in discovery are reliable.

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97 *Compare* IEU-Ohio Ex. 5 at 2, IEU-Ohio Ex. 7 at 2, *and* IEU-Ohio Ex. 13.

98 IEU-Ohio Ex. 13.

99 Tr. Vol. V at 1356-57 (2012 cost estimated at $41.38/MWh; 2013 cost estimated at $42.45/MWh); Duke Ex. 14, Schedule 1 at page 2.

100 IEU-Ohio Ex. 6 at 2; IEU-Ohio Ex. 7 at 2.

Duke's intuition that the PSR will result in a hedge also ignores that the PSR introduces a new risk for customers that does not exist currently. Duke has not included the cost of its OVEC Entitlement in past SSO rates, but seeks to include the difference between the costs it is charged by OVEC and what Duke recovers in the wholesale PJM markets.[101] On the cost side of the equation, OVEC expects to collect its costs under the ICPA, even when those costs are far in excess of its estimates or when those costs are the result of mistakes OVEC has made.[102] If the Commission approves the PSR, not only will customers face the risk of new costs, but also the risk that OVEC and Duke apparently have no present ability to estimate accurately the price risk that they are attempting to shift to customers.

Further, Duke cannot point to any near term benefit customers will realize if the PSR is authorized.[103] The estimates (to the extent they can be relied upon to make a reasoned decision) point in only one direction: at least until 2024, customers will likely incur a cost if the PSR is authorized.[104]

Moreover, the PSR will inject additional volatility into customer bills. Under the proposed ESP, the customer bill would reflect up to sixteen riders, most of which the Commission permits Duke to update annually or more frequently.[105] If approved, the

[101] Tr. Vol. III at 690 (Duke has not included OVEC-related costs in retail rates); Duke Ex. 6 at 11-12 (difference in OVEC related cost and PJM revenue recovered through PSR).

[102] IEU-Ohio Ex. 6 at 13 (Sponsoring Parties expected to pay liquidated damages incurred by OVEC for coal transportation contract breach).

[103] Mr. Taylor correctly notes that estimates going out more than a few years are not reliable. OEG Ex. 1 at 18-19. Staff noted that predictions more than three years out are suspect. Tr. Vol. XII at 3404.

[104] OEG Ex. 1 at 20-21. OEG proposes to increase the cost of the hedge to customers by "levelizing" the damage caused by the rider and permitting Duke to recover a carrying charge. *Id*.

[105] Duke Ex. 18 at Attachment JEZ-4.

PSR would add a new moving part, updated quarterly,[106] into the already overly complicated, rider-laden bills that Duke will issue.

Further, substantial evidence demonstrated that the “hedge” Duke claims the PSR will provide will either be negligible or non-existent. If it is a hedge, the OVEC Entitlement would hedge no more than 8.67% of Duke’s total retail sales.

Authorization of the PSR would also require all customers to pay for a hedge they do not need. Although the PSR is framed to address the volatility of wholesale energy prices, customers are not exposed to the volatility of the daily energy markets.[107] For non-shopping customers, for example, Duke will be providing generation service through a full requirements auction process that will ladder and stagger the auctions used to secure generation service. The ladder and staggering will further smooth the volatility of the forward generation prices resulting from the auctions.[108] Alternatively, customers may secure generation service from CRES providers, many of which are offering service under long term fixed contracts.[109] Thus, customers already have options to hedge price risk; they do not need one imposed on them by Duke or the Commission.

2. The PSR is not competitively neutral

As a second “benefit” of the PSR, Duke argues incorrectly that the PSR is “competitively neutral.”[110] Unlike CRES providers, however, Duke will be assured that

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[106] Duke Ex. 6 at 16.

[107] Tr. Vol. XII at 3446.

[108] Duke Ex. 3 at 8; Staff Ex. 3 passim; Tr. Vol. XII at 3445.

[109] Tr. Vol. II at 472-73. *See, also*, the Commission’s Apples to Apples Chart applicable to Duke viewed at http://energychoice.ohio.gov/ApplesToApplesCategory.aspx?Category=Electric.

[110] Duke Ex. 6 at 15.

the price risk of the OVEC Entitlement is shifted to its SSO customers.[111] Further, the PSR would alter the decision to continue operation of an uneconomic plant.[112] Therefore, Duke's assertion that the PSR is competitively neutral is not true.

3. The PSR does not provide increased reliability of generation-related service to Duke's retail customers

Duke has stated publicly that it will continue to provide safe and reliable electric service even after it retires and sells its generation assets.[113] Nonetheless, Duke asserts that there is a benefit to the PSR because "the OVEC generating stations reflect 'steel in the ground.'"[114] Authorization of the PSR, however, will not affect whether OVEC generation stays on line. Additionally, Duke is not looking to the OVEC Entitlement as a basis for providing generation service to customers; as Duke stated repeatedly, the OVEC Entitlement is not going to be used to serve SSO load.[115] Thus, the suggestion that Duke customers will receive some unique benefit if they are required to cover Duke's above-market costs because OVEC represents "steel in the ground" is not supported by the record.

G. Duke can avoid the market risk of the OVEC Entitlement by assigning its interest to a third party

Duke argues that it is under an obligation to continue to pay OVEC-related costs as if there was no other option available to it and it demands that this obligation should be transferred to a third party, *i.e*. retail customers. As demonstrated above, there is no legal authority to support Duke's request to shift the market risk of the OVEC

[111] RESA Ex. 3 at 10-12.

[112] Tr. Vol. XVI at 4365-66.

[113] *See, e.g.*, Tr. Vol. I at 69.

[114] Duke Ex. 6 at 15.

[115] *See, e.g.,* Duke Ex. 6 at 12.

Entitlement to retail customers. In addition to being unlawful, the shift in market risk is also unreasonable because Duke has other options available to it to assign the OVEC Entitlement to a third party.

Under Section 9.182 of the ICPA, Duke may assign the OVEC Entitlement to a Permitted Assignee.[116] A Permitted Assignee includes another Sponsoring Party or its affiliate with credit ratings that are investment grade.[117] Duke's Kentucky and Indiana operating affiliates have the required credit ratings.[118] Thus, Duke could assign its interest to another operating company.

Under Section 9.183 of the ICPA, Duke also could assign its OVEC Entitlement to a third party with an investment grade credit rating and without further action on the part of the Sponsoring Companies so long as Duke provides the Sponsoring Companies a right of first refusal and secures approval of counsel for OVEC.[119] Thus, Duke could also assign the OVEC Entitlement to a third party.

Because Duke is not required to retain the interest and has a practical and current means of divesting the interest, there is no reason to assign the wholesale price risk of the OVEC Entitlement to Duke's retail customers.

H. The Commission should modify the proposed ESP by removing the PSR

As discussed above, authorization of the PSR is unlawful for several reasons. Initially, no provision of R.C. 4928.143(B) provides for authorization of the PSR. Additionally, the rider is prohibited because its authorization would result in an unlawful

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[116] IEU-Ohio Ex. 5 at 20-21.

[117] *Id.* at 4.

[118] Tr. Vol. II at 497-99.

[119] IEU-Ohio Ex. 5 at 21-23.

subsidy and the collection of transition revenue (when the value of the PSR results in a charge). The authorization of the PSR also is outside the jurisdiction of the Commission; the Commission is jurisdictionally barred by both state and federal law from increasing or decreasing the compensation of Duke for a wholesale generation-related service.

Additionally, accepting the claims Duke has made to support the likely effects of the PSR would be an act of faith, not a decision based on any solid evidence in the record of this case. The authorization of the PSR also would be a retreat from the Commission's recent effort to require Duke to divest its generation assets and is unnecessary as Duke may assign the OVEC Entitlement to a third party. Accordingly, the Commission should amend the ESP to remove the PSR.

III. THE PROPOSED ESP IS NOT MORE FAVORABLE IN THE AGGREGATE THAN AN MRO

Under R.C. 4928.143(C)(1), the Commission may approve or modify and approve an ESP only if it finds "that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code."[120] The proposed ESP fails this test. As a result, the Commission must either reject or modify the proposed ESP.

A. The Commission must account for the known costs of the PSR in the ESP v. MRO Test

[120] R.C. 4928.143(C).

In prior cases in which EDUs have sought approval of an ESP, the Commission has stated that the known costs of riders that could be approved in an ESP but not an MRO must be accounted for on the ESP side of the ESP v. MRO Test. In an AEP-Ohio ESP case, for example, AEP-Ohio sought and received authorization to include a Generation Resource Rider with a known cost of $8 million over the term of the ESP. Additionally, the Commission modified the ESP so that it included a Retail Stability Rider that cost approximately $388 million over the term of the ESP. The Commission apparently concluded that it could not lawfully approve either rider as a term of an MRO. Offsetting the known costs of the riders by the $9.8 million benefit that the Commission estimated resulted from the blending of the base generation, fuel, and auction prices the Commission approved, the Commission concluded that the ESP was $386 million worse than an MRO.[121]

Like the Generation Resource Rider and Retail Stability Rider in AEP-Ohio's ESP, the PSR may not be authorized under an MRO.[122] Accordingly, the costs of the PSR must be included on the ESP side of the ESP v. MRO test.

B. The proposed ESP is quantitatively at least $22 million worse than an MRO

According to Duke, there is no difference between the cost of generation service procured under an ESP or an MRO because it would be secured through auctions.[123]

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[121] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code*, *in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al*., Opinion and Order at 75 (Aug. 8, 2012). As noted in IEU-Ohio's appeal, the Commission's calculation of the costs of the ESP II substantially understates its costs. *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Sup. Ct. Case No. 2013-0521, First Merit Brief of Appellant Industrial Energy Users-Ohio at 11-23 (Aug. 12, 2013).

[122] R.C. 4928.142.

Even though it was able to provide an estimated cost of the PSR in responses to discovery, Duke has failed to account for the known costs of the PSR of $22 million in its application of the ESP v. MRO Test.[124] Because the cost of the PSR is a known cost of the proposed ESP, however, it must be included in the quantification of the costs. Further, because a PSR cannot be approved as a term of an MRO,[125] the PSR would increase only the ESP side of the ESP v. MRO Test. Thus, when the Commission compares the proposed ESP to an MRO, the proposed ESP fails the test because it is at least $22 million worse than an MRO.

Staff testimony confirms that the proposed ESP is quantitatively worse than an MRO. The Staff applied the ESP v. MRO Test with the modifications it recommended.[126] One of the modifications recommended by the Staff is that the Commission deny authorization of the PSR as a term of the ESP.[127] As correctly noted by Staff in response to cross-examination, the proposed ESP with the PSR is quantitatively worse than an MRO.[128]

C. Non-quantitative "benefits" do not provide the Commission a lawful and reasonable basis to approve the proposed ESP

Because Duke ignores the quantifiable cost of the PSR in its application of the ESP v. MRO Test, it incorrectly concludes that "the proposed ESP and MRO are

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[123] Duke Ex. 6 at 25.

[124] *Id*. at 24-25 (Duke indicates that the quantitative costs of an ESP and MRO are the same).

[125] There is no provision in Section 4928.142 that would authorize the Commission to approve a PSR as a term of an MRO.

[126] Staff Ex. 2 at 3. The Staff also states that there may be some savings associated with Rider DCI and Staff has not quantified that alleged savings. *See, id*. at 5. The savings are speculative at best since there are substantial costs of prosecuting this ESP case and any future filings that also are not factored into the cost of Rider DCI.

[127] Staff Ex. 1, *passim*.

[128] Tr. Vol. XIII at 3780.

necessarily equal quantitatively."[129] Duke then identifies four "qualitative" or non-quantified benefits associated with the proposed ESP that Duke claims provide advantages over the results that could be expected under an MRO.[130] According to Duke, the ESP offers the benefits of a market-based rate design, a leveling of the playing field between SSO auction winners and CRES providers, improved safety and reliability of the distribution system through Rider DCI, and more stable generation prices if the Commission approves the PSR.[131] Duke, however, has failed to demonstrate how these non-quantifiable benefits can be weighed against the quantified costs of the ESP relative to the MRO or that the alleged benefits are either unique to the ESP or, in the case of the PSR, even whether there is any benefit.

1. The Commission may not lawfully weigh the non-quantifiable benefits against the quantifiable cost of the proposed ESP

In analyzing whether the proposed ESP satisfies the ESP v. MRO Test, the Commission must engage in reasoned decision making. In a contested case, R.C. 4903.09 requires the Commission to issue "findings of fact and [a] written opinion [] setting forth the reasons prompting the decision [] arrived at, based on said findings of fact." As the Ohio Supreme Court ("Court") has stated, the Commission, in assessing the record, must explain its rationale, respond to contrary positions, and support its decision with appropriate evidence.[132] "The commission cannot decide cases on

[129] Duke Ex. 6 at 26.

[130] *Id*. at 26-27.

[131] *Id.*

[132] *In re Application of Columbus Southern Power Co.,* 128 Ohio St.3d 512, 519 (2011).

subjective belief, wishful thinking, or folk wisdom."[133] Thus, R.C. 4903.09 imposes on the Commission a requirement to apply an objective standard to the ESP v. MRO Test.

Although the Commission has "weighed" non-quantifiable benefits against the quantifiable costs of an ESP,[134] there must be some reasonable metric or other basis on which this weighing is done. Duke does not provide the Commission any basis by which it can "weigh" the non-quantifiable benefits against the costs that the proposed ESP will impose on both shopping and nonshopping customers. Reliance on these non-quantifiable benefits, therefore, would require the Commission to base its decision on subjective and unsupported beliefs and guesses provided by Duke. R.C. 4903.09 requires more than Duke's "trust me" approach.

2. If the Commission may lawfully consider non-quantifiable benefits and costs of an ESP in applying the ESP v. MRO Test, Duke has failed to demonstrate that the proposed ESP provides any non-quantifiable benefits to customers that "outweigh" its substantial quantitative costs when compared to an MRO

a. Changes in rate design and the leveling of the playing field between SSO auction winners and CRES providers do not provide a unique non-quantitative benefit of the ESP over an MRO

Duke argues that the proposed ESP offers two non-quantifiable benefits because it proposes an altered rate design and levels the playing field between SSO auction winners and CRES providers.[135] Initially, Duke does not provide any details of these alleged benefits. Thus, Duke has failed to carry its burden of proof to demonstrate what

[133] *Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 61 Ohio St.3d 396, 406 (1991) (*quoting Columbus v. Pub. Util. Comm'n of Ohio*, 58 Ohio St.2d 103, 104 (1979) (Brown, J., dissenting)).

[134] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case Nos. 11-346-EL-SSO, *et al*., Opinion and Order at 77 (Aug. 8, 2012).

[135] Duke Ex. 6 at 26-27.

benefits it is relying on to support this allegation.[136] Additionally, neither can be considered a benefit of the ESP that makes it more favorable in the aggregate than an MRO.

To the extent that Duke is generically pointing to changes in rate design as a benefit of the ESP, it is not a benefit that is unique to the proposed ESP.[137] If Duke were to file an MRO, it would also be required to file a proposed rate design.[138] In that filing, Duke could initiate changes that are identical to those in the proposed ESP. Because the same result could be accomplished under an MRO, the proposed ESP is not more favorable in the aggregate because Duke is recommending certain rate design changes and the elimination of certain riders.

Likewise, Duke's suggestion that its proposed ESP provides a benefit because it will level the playing field between its SSO and CRES providers is legally flawed. It is the state energy policy to ensure nondiscriminatory, reasonably priced, unbundled, and comparable retail electric service that provide consumers with price, terms, conditions, and quality options, diversity of electricity supplies and suppliers, and to ensure effective competition.[139] If Duke's ESP is an admission that current provision of retail electric services do not comply with those requirements, then it cannot claim that bringing its ESP into compliance with existing state energy policy is a benefit; doing what it is legally required to do is not a non-quantitative benefit for customers.

[136] R.C. 4928.143(C)(1).

[137] An OCC witness provided testimony suggesting some of the rate design and rider changes Duke may be relying on, and then explains none of the proposed rate design changes provides a unique benefit to the ESP and actually may be net costs to customers. OCC Ex. 48 at 14-18.

[138] Rule 4901:1-35-03(B)(2), OAC.

[139] R.C. 4928.02.

b. Rider DCI does not provide the ESP with a non-quantitative benefit that is unique to an ESP

Duke states that Rider DCI provides a non-quantifiable benefit because it "provides an opportunity to improve the safety and reliability of the system in an economical and efficient manner."[140] The benefits of Rider DCI, however, can be realized through a base distribution case and thus are equally available under an MRO.[141] Because the benefits of the rider can be realized under either an ESP or an MRO, there is no unique benefit in the ESP associated with the rider when compared to an MRO. As the Commission has previously determined, "these costs should be considered substantially equal and removed from the ESP v. MRO analysis."[142]

Staff further seeks to justify the benefit of avoiding rate cases on an alleged quantitative basis.[143] Duke, however, has not pledged to not file a rate case during the term of the proposed ESP,[144] and Staff has made no attempt to document the avoided costs.

Additionally, the accelerated recovery of distribution system improvement costs imposes a real, quantitative, cost on customers, another cost the Staff does not address in its recommendation.[145]

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[140] Duke Ex. 6 at 27.

[141] Tr. Vol. XIII at 3772.

[142] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 12-1230-EL-SSO, Opinion and Order at 56 (July 18, 2012).

[143] Staff Ex. 2 at 5.

[144] Tr. Vol. XIII at 3784.

[145] OCC Ex. 48 at 12; Tr. Vol. XIII at 3774.

In summary, authorization of the DCI does not provide any benefit that is unique to the ESP and will impose a quantitative cost. Thus, the Commission cannot reduce the real cost of the ESP to customers relative to an MRO by assigning a "qualitative" benefit to Rider DCI.

c. The PSR is a quantitative cost of the ESP and authorization would be unlawful and unreasonable

Duke further claims that the PSR is a non-quantifiable benefit of the proposed ESP because it provides a "means to stabilize competitive generation prices for shopping and non-shopping customers."[146] The PSR, however, will impose a new cost on customers through a nonbypassable rider and inject additional price volatility. Accordingly, the Commission cannot find that the PSR is a non-quantitative benefit of the proposed ESP.

As discussed above, the PSR likely will result in an additional charge on all customers during the term of the proposed ESP of $22 million. Further, as discussed previously, the design of the PSR (which includes an over/under adjustment provision) and the structure of the other riders making up the rates of shopping and nonshopping customers (which include annual or more frequent adjustments) make it unlikely that the "hedge" will be of any benefit to customers. Based on the record in this case demonstrating that the PSR likely will increase customer rates or at best do nothing to hedge customer bills, the Commission cannot reasonably conclude that the rider provides a non-quantifiable benefit to customers.

More practically, however, the PSR would likely inject additional volatility into prices for both shopping and nonshopping customers. Shopping customers, including

[146] Duke Ex. 6 at 27.

residential customers, can secure long-term contracts of up to three years at a fixed rate.[147] Nonshopping customers would benefit from the stability provided by the laddering and staggering of the CBP.[148] Authorization of the PSR, however, would increase price risk for both shopping and nonshopping customers.[149]

Further, the PSR is anticompetitive. If the PSR is approved, Duke faces no market price risk for its OVEC Entitlement.[150] In contrast, competitors that face price risk hourly do not have a regulatory backstop such as the PSR.

The PSR thus fails to provide a non-quantifiable benefit in several ways. It would likely increase the customer's bill while frustrating competition and increasing price risk for those customers that are seeking to reduce volatility through either CRES contracts or the SSO. Rather than providing a non-quantifiable benefit, the PSR would be harmful to customers and customer choice.

d. Before approving the proposed ESP, the Commission must modify it to remove the unlawful and unreasonable PSR

Under R.C. 4928.143(C)(1), the Commission must either reject or modify and approve the proposed ESP because it is less favorable in the aggregate than an MRO. It is quantitatively less favorable than an MRO by $22 million, and Duke has failed to demonstrate that the ESP provides any non-quantifiable benefit that offsets the substantial costs by which the ESP fails the ESP v. MRO Test. If the Commission does not reject the proposed ESP, it should remove the unlawful and unreasonable PSR.

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[147] Tr. Vol. X at 2697.

[148] Staff Ex. 3, *passim*.

[149] See discussion above.

[150] See discussion above.

IV. CONCLUSION

Based on policy outcomes the Commission is to ensure, the law the Commission is to apply, and the record in this case, the Commission should not authorize the PSR. Additionally, the Commission should not approve the proposed ESP without modifications because it fails an objective, cost-based application of the ESP v. MRO Test.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Initial Brief of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 15th day of December 2014, *via* electronic transmission.

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