

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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)	Case No. 14-841-EL-SSO
Plan, Accounting Modifications, and Tariffs for)	
Generation Service)	

In the Matter of the Application of Duke Energy)	
Ohio, Inc. for Authority to Amend its Certified)	
Supplier Tariff, P.U.C.O. No. 20)	Case No. 14-842-EL-ATA

**REPLY BRIEF
OF
THE CITY OF CINCINNATI**

I. ARGUMENT IN REPLY

Similar to its Initial Brief, the City of Cincinnati’s (“City” or “Cincinnati”) limits its reply to the topic of Rider PSR, and specifically the arguments raised by the Ohio Energy Group (“OEG”) that attempt to reconcile the operation of Rider PSR with the reality that wholesale sales of electricity are the exclusive domain of federal regulation and the FERC-approved PJM market structure and completely outside the jurisdictional reach of the Commission. OEG’s arguments are helpful in bringing focus to the substantive similarities between Rider PSR and the New Jersey and Maryland attempts to second-guess the federally regulated wholesale generation marketplace.

OEG distinguishes the Maryland and New Jersey commission activities that led to the holdings in the *Nazarian* and *Solomon*¹ decisions by claiming that those states were attempting to establish a supplemental wholesale rate, the supplemental wholesale rate representing what the local utility would pay to a third-party power plant owner to ensure that the power plant owner fully recovered its costs if PJM revenues were insufficient or what the local utility would receive if the power plant owner's PJM revenues were greater than its costs. OEG at p. 12. This is *exactly* what Rider PSR would accomplish, and as both federal court decisions made clear, it is the effect of the state interference with the federal wholesale marketplace that matters in determining the legality of the state actions.

OEG injects a red herring into the discussion by characterizing Duke's obligations under the ICPA as a "longstanding cost-of-service rate already filed with the FERC." *Id.* Regardless of whether the ICPA establishes a wholesale "rate," the payment obligations by Duke to OVEC under the ICPA are not directly relevant to the question of whether the Rider PSR subsidy to Duke is outside the jurisdiction of the Commission. The presence of OVEC as a "third party power plant owner" does not enter into the analysis. Rather, it is Duke's sale of its OVEC entitlement into the PJM marketplace that is the relevant wholesale transaction and the subsequent ratepayer funded "true-up" for any "shortfall" in the wholesale rate that constitutes the intrusion into the *field preempted* subject of wholesale generation rates. As the OEG correctly notes, it is Duke, rather than OVEC, that is selling power into the PJM markets. By doing so, Duke is entitled to no more or less than the compensation determined through the PJM market mechanisms. It is the PJM marketplace that determines the FERC-approved "cost" of that wholesale power, and any difference between the market determined ("economic") cost of

¹ See *PPL Energy Plus, LLC v. Nazarian*, 753 F.3d 467, 2014 U.S. App. LEXIS 10155 (4th Cir. 2014) ("*Nazarian*"), and *PPL Energy Plus, LLC, et al., v. Lee A. Solomon, et al.*, 766 F.3d 241, 2014 U.S. App. LEXUS 17557 (3rd Cir. 2014) ("*Solomon*").

the power and the embedded cost of the operation of the OVEC plants as reflected on OVEC's FERC Form 1 is irrelevant to the wholesale transaction.

The payment of the Rider PSR subsidy to Duke, as the wholesale market participant, renders Duke economically “indifferent” to the price that it receives through the PJM marketplace. This effect, the elimination of any market signal on the wholesale market participant, is the intrusion into the federal jurisdictional realm. PJM's price signals must determine who participates and who does not—not Rider PSR.

The only difference between Rider PSR and the “contracts for differences” found to be illegal in Maryland and New Jersey is that Duke would use the ratepayer subsidy to pay its ICPA obligations rather than making a payment to an independent third party. This difference does not change the applicability of the holdings of either the *Nazarian* or *Solomon*. Once it is established that Rider PSR would alter the outcome of the wholesale market mechanism for the entity selling power into the market (Duke), the inquiry ceases to be within the jurisdictional competence of the Commission.

In sum, Rider PSR changes the outcome of participation in the PJM marketplace for Duke—it does not matter what the motivation for that change may be, it is an intrusion into the authority of FERC and it is illegal.

II. CONCLUSION

The other intervening parties to this case, including the OEG and notably the Commission Staff, make many compelling policy arguments as to why Rider PSR should be rejected (or, in the case of OEG, substantially altered). Any one of these reasons would be sufficient justification for the Commission to reject Duke's proposal. However, because Rider

PSR is outside of the Commission's jurisdiction to consider, none of the other compelling policy arguments should really matter to the Commission's determination in this case.

For the reasons stated above, the City requests that this Commission adopt the position of the City on the issue set forth above, as well as those set forth in its Initial Brief.

Respectfully submitted on behalf of,
THE CITY OF CINCINNATI



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY BRIEF was served upon the following parties via electronic mail this 29th day of December 2014.



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Summary: Reply Brief of The City of Cincinnati electronically filed by Teresa Orahod on behalf of Thomas O'Brien