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

REPLY BRIEF
BY
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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. PRICE STABILIZATION RIDER (OVEC) 2

A. Duke's proposed Price Stabilization Rider would harm customers and should be rejected.....2

1. Ohio Energy Group's proposal extending the PSR through calendar year 2024 would violate the law, is highly speculative, and would harm customers. 11

III. ESP V. MRO.....14

A. Duke's proposed ESP is not more favorable than an MRO under the PUCO's traditional application of the statutory test. It should be rejected or modified. 14

1. The test's first element: determination of the SSO generation price.....16

2. The test's second element: cost quantification of ESP provisions.....16

a. The PSR does not "relate to bypassability" 17

b. The PSR does not provide stability or certainty 17

3. The test's third element: consideration of qualitative benefits.....19

a. Qualitative benefits falling within R.C. 4928.143(B)(2).....20

i. The PSR should not be included in the ESP because it does not fall within R.C. 4928.143(B)(2)(d) and because it violates state policies set forth in R.C. 4928.02. 20

ii. The Distribution Capital Investment Rider should not be included in the ESP because it is available under an SSO in the form of an MRO. 22

b. Qualitative benefits falling under R.C. 4928.02. 24

IV. DISTRIBUTION RIDERS 27

A. Duke Failed To Demonstrate Any Need For The DCI Rider. 27

B. The Expectations Of Duke And Its Customers Are Not Aligned Regarding Service Reliability Expectations. 28

C. The Staff Does Not Support The DCI Rider. 32

D. The Staff Analysis Of Customer Expectations Is Flawed Because It Did Not Include The Cost Of Service Reliability. 32

E. If The PUCO Adopts The DCI Rider (Contrary To OCC's Recommendations Otherwise) It Should Reduce The Rate Of Return Funded By Customers To Reflect Duke's Accelerated Cost Recovery And Reduced Risks From The DCI Rider. 34

F. If Duke's Proposed Distribution Storm Rider Is Approved, The PUCO Must Provide Clear Guidelines Under Which The Rider May Be Invoked. 39

V. COST ALLOCATION AND RATE DESIGN 42

A. Duke's Proposal To Allocate Capacity Costs To Customer Classes Even Though Duke Is Not Billed SSO Supplier Charges By Customer Class, Is Contrary To Cost Causation Principles And Would Unfairly Charge Residential Customers More For Electricity. 42

B. The DCI Rider Should Be Allocated Based On Net Plant In Service Because This Is Consistent With Cost Causation Principles As Opposed To A "Simple," But Wrong, Allocation Endorsed By Duke And Other Parties. 43

C. If Approved In Any Respect, Rider PSR Should Be Allocated On A Non-Bypassable Basis As Duke Proposed. 45

D. The PUCO Should Reject OEG's Proposal To Continue The Subsidy To Duke's 4 Large Interruptible Customers At The Expense Of Other Customers. 46

VI. EARLY TERMINATION 50

A. Duke's Proposal To Unilaterally Terminate Its ESP A Year Early Should Not Be Allowed. 50

B. Duke's Proposal Unreasonably Shifts Market Risk To Wholesale Suppliers And Consumers And Could Translate Into Higher Prices For Customers. 50

C. Duke's Early Termination Proposal Is Overly Vague And Neither Duke's Application Nor Its Initial Brief Provide Any Statutory Authority In Support. 52

VII. SEET ROE THRESHOLD 53

A. Duke Fails To Provide Evidence Justifying A SEET ROE Threshold Of 15 Percent. 53

VIII. ENROLL FROM YOUR WALLET SHOULD NOT BE APPROVED 54

IX. THE MARKET ENERGY PLAN SHOULD NOT BE ADOPTED 55

X. CONCLUSION 56

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I. INTRODUCTION

The Office of the Ohio Consumers' Counsel ("OCC") on behalf of 615,738 residential consumers of Duke Energy Ohio Inc. ("Duke" or "Utility") has demonstrated that Duke's electric security plan ("ESP") proposal is a bad deal for customers. It is not just and reasonable and it should be rejected by the Public Utilities Commission of Ohio ("PUCO"). Nor is it lawful. Contrary to Duke's contentions, the ESP conflicts with many provisions of Senate Bill 3 and Senate Bill 221 that make up Chapter 4928 of the Revised Code. Duke's ESP includes a proposed self-serving unlawful subsidy for Duke's ownership interest in the Ohio Valley Electric Corporation ("OVEC") -- Duke's proposed Price Stabilization Rider ("PSR").

The ESP also proposes to spend $104 million over three years on a heightened budget for so-called distribution capital infrastructure ("DCI") Rider. These proposals

ensure accelerated revenues for Duke, are more properly considered in a base rate proceeding. The ESP does not effectively address stability and predictability through the PSR. Instead, stability and predictability of retail electric service are already adequately addressed by the SSO auction structure and the operation of the PJM market. Alternatively, if the PUCO does not reject the proposed ESP, it must modify Duke's proposed ESP so that its Standard Service Offer is a Market Rate Offer without the numerous, costly riders that serve no sound purpose -- other than to enrich Duke.

The PUCO should also reject proposals set forth by other parties to modify the ESP. The other proposals the PUCO should reject include OEG's proposal for a long-term Price Stabilization Rider and RESA's proposal for a Market Energy Plan and the "Enroll from your Wallet" proposal that would undermine customers' efforts to make thoughtful choices about their energy suppliers.

Finally, the PUCO should reject Duke's proposed 15% SEET threshold, which is unsupported by the evidence. It should either defer determination of the SEET until Duke's annual SEET proceeding or adopt a more reasonable threshold of 12%.

II. PRICE STABILIZATION RIDER (OVEC)

A. Duke's proposed Price Stabilization Rider would harm customers and should be rejected.

In this proceeding there was extensive testimony and record discussion of Duke's proposed Price Stabilization Rider. It was opposed by almost every intervenor, including the PUCO Staff. Surprisingly, Duke devoted only 7 pages of its Initial Brief to defend the PSR. But it is not surprising when the paucity of evidence put forward by Duke on this

issue is considered.[1] As discussed in OCC's Initial Brief, Duke made little effort to meet its burden of proof on this issue. Duke's brief reflects its negligible concern with the need to proffer evidence to support its position -- a position that requires customers to unlawfully subsidize Duke's interest in OVEC.

Although Duke argues that "[s]tate regulatory policy is not one-dimensional and should not be determined from a philosophical debate,"[2] Duke's argument emphasizes the a philosophical debate rather than a discussion of the law and the applicable facts. Duke discusses the PUCO's "mission statement" (although not offered into evidence in this proceeding) and identifies the PUCO's role to be as "a steward for ratepayers."[3] Duke then discusses the anticipated retirement of 27,000 MW of generation in PJM by 2019 and that 76 percent of these retirements will be coal plants, thus "undeniably reduc[ing] fuel diversity."[4]

Duke's apparent point is that reduction in fuel diversity caused by a significant amount of coal unit retirements may have ramifications for overall energy prices. Duke seems to be suggesting that the PUCO can and should do something about it. Duke concludes that the PSR is that something. Unfortunately, Duke's main premise, which is that closing 27,000 MW of coal-fired generation in PJM will reduce fuel diversity, is wrong. Since PJM is predominantly coal-fired based, closing some coal plants and replacing them with gas-fired generation actually increases fuel diversity. Duke starts with an incorrect premise and its analysis falls apart from there.

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[1] OCC Initial Brief at 5-42.

[2] Duke Initial Brief at 19.

[3] Duke Initial Brief at 20.

[4] Duke Initial Brief at 21.

Duke's arguments regarding the impact of coal unit retirements are pure speculation -- just like most of its case on this issue. And this general speculation regarding events in the larger economy and PJM as a whole, are not tied to the specifics of Duke's PSR. Duke says this is "simple math." But Duke did not share this simple math with any of the other parties. As discussed in OCC's Initial Brief, the only simple math that Duke did perform (shown in OCC Exhibit 4/4A), is based on numerous speculative assumptions with much unsupported information.[5]

Indeed, Duke's claim that wholesale capacity prices are likely to increase if PJM's proposed "capacity performance initiative" is implemented, is an unquantified "belief" that prices will come closer to net cost of new entry ("CONE") as a result of PJM's proposed tariff changes.[6] It is only through such speculative claims -- without any logical connection to the proposed PSR -- that Duke seeks to create an illusion that there is merit to the PSR. Further, without any citation to the record, Duke claims PJM's initiative is "likely to impact wholesale capacity prices within and subsequent to the term of the Company's proposed ESP."[7] These claims are unsupported by record evidence.

Duke, in its brief, also points to the "polar vortex and other extreme cold periods in January 2014" as "driving undeniable change in the wholesale market."[8] While weather events certainly drive change in the wholesale market, especially in the short-term, there is no evidence that the PSR is an effective hedge against weather risk or that retail customers need such a hedge. Indeed, the fact that SSO auctions set the prices for

[5] OCC Initial Brief at 29-42.

[6] Tr. VI at 1694- 1695.

[7] Duke Initial Brief at 22.

[8] Duke Initial Brief at 21.

Duke's SSO customers means that Duke's customers' prices were not affected by such volatility. Moreover, the mere fact that energy and capacity markets in this economy "have been volatile" means little for purposes of resolving whether the PSR will reduce that volatility in the future. In contrast, OCC[9] -- and other intervenors -- provide a reasonable discussion of the causes of that volatility and discuss whether the PSR will reduce that volatility. It will not.

Duke says that the PUCO has an opportunity to "approve a measure that is intended to mitigate rate volatility" and afford Duke's customers "a level of stability and predictability."[10] But the PSR is not likely to produce stability or predictability[11] -- and Duke barely discusses the evidence either in its favor or against it. As discussed in the PUCO Staff and intervenors' Initial Briefs, stability and predictability are not likely to be the outcome of OVEC's operations or the proposed PSR.[12]

Duke claims that the PSR "can assist with the mitigation of price spikes, without causing any impact to the wholesale market,"[13] but the evidence shows otherwise. The PSR can have extremely detrimental effects to the wholesale market.

The uniformity of opponents' arguments speaks to the real legal and factual problems underlying the PSR. In the absence of discussion of these numerous issues by

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[9] OCC Initial Brief at 11-17.

[10] Duke Initial Brief at 22.

[11] OCC Initial Brief at 11-17.

[12] PUCO Staff Initial Brief at 21-24; Constellation/Exelon Initial Brief at 7-12; Direct Energy Initial Brief at 12; ELPC Initial Brief at 7-10; GCHC Brief at 5-7; IEU-Ohio Initial Brief at 26-29; IGS Initial Brief at 26-28; Kroger Initial Brief at 9-10; OCC Initial Brief at 11-17; OEC Initial Brief at 12-14; OMA Initial Brief at 22-23; OPAE Initial Brief at 10-11; RESA Initial Brief at 7-11; Sierra Club Initial Brief at 18-20; Universities Initial Brief at 6-7.

[13] Duke Initial Brief at 24.

Duke, OCC would point to the wide-ranging issues and concerns with Duke's proposed PSR, addressed by the PUCO Staff and intervenors, as follows:

1. The PSR is contrary to the PUCO's goal of achieving a fully-competitive market, an objective made plain in Duke's last ESP proceeding.[14]

2. The PSR would adjust the compensation Duke receives for wholesale electric service, a matter that is not within the jurisdiction of the PUCO and is preempted by FERC's jurisdiction under the Federal Power Act.[15]

3. Costs recovered through the PSR would not be subject to prudence review by the PUCO and the PUCO could not "independently disallow any costs Duke will assess its retail customers" through the PSR.[16] Any challenge to the prudence of OVEC costs underlying the PSR would be through a complaint at FERC.[17] A complaining party would not only have the burden of proving the costs were unreasonable but would have to overcome the presumption of reasonableness under the *Mobile Sierra* doctrine.[18]

4. Any concerns about whether the wholesale market is operating efficiently, including any concerns about volatility and reliability, are being addressed and should continue to be addressed before FERC.[19] The PSR "is not a proper or effective remedy to the concerns with the PJM markets."[20]

5. The PSR is not authorized by the Electric Security Plan statute, R.C. 4928.143,[21] and would otherwise be inconsistent and violates Ohio law. This is because it allows costs to be collected from customers without statutory authority. It also is an unlawful anti-competitive subsidy of Duke's generation-related costs by its distribution customers.

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[14] PUCO Staff Initial Brief at 2-5; OPAE Brief at 8.

[15] PUCO Staff Initial Brief at 18-21; City of Cincinnati Initial Brief at 4-8; Constellation/Exelon Initial Brief at 6-7; IEU-Ohio Initial Brief at 19-26; IGS Initial Brief at 21-24.

[16] PUCO Staff Initial Brief at 7-8; IGS Initial Brief at 31-32.

[17] PUCO Staff Initial Brief at 7-8.

[18] PUCO Staff Initial Brief at 8.

[19] PUCO Staff Initial Brief at 9-10.

[20] PUCO Staff Initial Brief at 10.

[21] PUCO Staff Initial Brief at 15.

This violates numerous laws, including R.C. 4928.141,[22] R.C. 4928.143(B)(1),[23] R.C. 4928.143(B)(2),[24] and R.C. 4928.02(H).[25]

6. The PSR subsidy would insulate Duke and its shareholders from the risk of the competitive market with respect to its OVEC interest and unreasonably and unlawfully shift that risk to customers.[26]

7. The PSR, as a financial hedging arrangement, is not "necessary to maintain essential electric service" as required of all SSOs.[27]

8. The PSR violates R.C. 4928.38 that requires electric utilities to be fully on their own in the competitive market for retail electric service.[28]

9. The PSR violates the R.C. 4928.38 and Duke's ETP Stipulation which prohibit the recovery of transition revenue or its equivalent.[29]

10. The PSR violates the Stipulation in Duke's last ESP requiring Duke to divest all of its generation assets.[30]

11. The term of Duke's PSR is indeterminate since Duke could terminate it by selling or transferring its OVEC interest. Any benefits to customers that might occur in the future could be eliminated at Duke's option.[31]

12. Duke filed its case without providing any information to evaluate the economics of OVEC or the PSR.[32]

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[22] PUCO Staff Initial Brief at 15; City of Cincinnati Initial Brief at 7.

[23] City of Cincinnati Initial Brief at 7; IEU Initial Brief at 6-8; OEC Initial Brief at 4.

[24] City of Cincinnati Initial Brief at 7; ELPC Initial Brief at 10-13; IEU Initial Brief at 8-12; IGS Initial Brief at 19-20; Wal-Mart Initial Brief at 9.

[25] PUCO Staff Initial Brief at 15-18; Constellation/Exelon Initial Brief at 5; ELPC Initial Brief at 14-16; GCHC Initial Brief at 10-11; IEU Initial Brief at 12-15; Kroger Initial Brief at 12-13; OPAE Initial Brief at 9; IGS Initial Brief at 20-21; OEC Initial Brief at 10-11.

[26] OPAE Initial Brief at 9.

[27] Wal-Mart Initial Brief at 8.

[28] IEU-Ohio Initial Brief at 15-19; OCC Initial Brief at 17-19; OMA Initial Brief at 19-20; OPAE Initial Brief at 10.

[29] IEU Initial Brief at 15-19; Kroger Initial Brief at 13-14; OPAE Initial Brief at 10.

[30] PUCO Staff Initial Brief at 11-14; City of Cincinnati Initial Brief at 8-9; IGS Initial Brief at 24-26.

[31] City of Cincinnati Initial Brief at 8; GCHC Initial Brief at 7-8; RESA Initial Brief at 14.

[32] Constellation/Exelon Initial Brief at 3; GCHC Initial Brief at 6; IEU-Ohio Initial Brief at 26-29.

13. Duke's claims that the PSR will provide rate stability depend on Duke's long-term forecast. But Duke's PSR is proposed in this case for the three year term of the ESP. During this three year time frame, according to Duke's own estimates, customers will be harmed. Indeed, PUCO Staff states that the "PSR could be extremely costly for customers during the *ESP III term*."[33]

14. Duke failed to meet its burden to show that the PSR would stabilize customer rates.[34]

15. The dollar cost to customers of the PSR, as well as its value as a hedge, depends both on changes in energy market prices and changes in OVEC costs.[35]

16. Duke's cash flow from OVEC relies on many "suspect assumptions, including overstated generation output, overstated unforced capacity levels, suspect future energy price projections, and it ignores the risk that OVEC will be excluded from the PJM markets."[36]

17. OVEC's costs per MWh are not stable as reflected by changes over the last few years.[37]

18. Many factors could greatly increase the costs of operating the OVEC units over the next few years. These include additional capital expenditures, increases in coal prices, and future environmental regulations.[38]

19. The PSR is premised upon the so called need to provide price stability and address rate volatility. But, there is no volatility problem since SSO volatility is addressed by the SSO auction process.[39]

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[33] PUCO Staff Initial Brief at 21-22.

[34] PUCO Staff Initial Brief at 21.

[35] PUCO Staff Initial Brief at 21-22; IGS Initial Brief at 27-28.

[36] IGS Initial Brief at 28-31.

[37] IEU-Ohio Initial Brief at 27.

[38] PUCO Staff Initial Brief at 22-23.

[39] OEC Initial Brief at 13; RESA Initial Brief at 10-11.

20. Non-SSO customers can already effectively hedge by purchasing a fixed price product or through self-generation.[40] Rider PSR would create more, not less, volatility for these customers.[41] Taking on these risks was intended to be a matter of customer choice.[42]

21. The OVEC hedge is a bad hedge because the age (59 years old) of OVEC's facilities means that they will face substantial capital improvements to remain operational.

22. The OVEC units "are more costly to dispatch than" other coal-fired generation owned by the University of Cincinnati and Miami University.[43]

23. Because there is not a known cost or benefit associated with OVEC, it is a poor hedge mechanism.[44]

24. Any OVEC hedge is de minimis.[45]

25. The PSR would likely allow the pass through of decommissioning costs to customers after closure of the plants, a potentially significant detriment to customers and a subsidy to Duke of its OVEC interest. [46]

26. Duke did not conduct a competitive process -- as it should have -- to determine whether the OVEC asset presented the best hedge or whether there were "other potentially more beneficial and less costly hedging options."[47]

27. The PSR has no price guarantee -- high or low -- price point for customers. In other words, customers are completely at the risk of the market and OVEC operations.[48]

28. There are significant risks to OVEC's facilities presented by EPA's pending greenhouse gas rules ("GHGs").[49] This includes potential

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[40] Constellation/Exelon Initial Brief at 7-8; Direct Energy Initial Brief at 12-13; RESA Initial Brief at 8.

[41] Constellation/Exelon Initial Brief at 8-9; RESA Initial Brief at 8.

[42] Direct Energy Initial Brief at 12-13.

[43] University of Cincinnati and Miami University ("Universities") Initial Brief at 6-7.

[44] GCHC Initial Brief at 5.

[45] PUCO Staff Initial Brief at 23; GCHC Initial Brief at 7.

[46] City of Cincinnati initial Brief at 8; ELPC Initial Brief at 15; RESA Initial Brief at 10.

[47] ELPC Initial Brief at 5; RESA Initial Brief at 15-16.

[48] ELPC Initial Brief at 5-6.

[49] ELPC Initial Brief at 6; Kroger Initial Brief at 11-12.

decreases in output, driving earlier retirement than anticipated. Thus, the PSR "would saddle retail electric customers with the cost of environmental regulations related to the Company's share of the OVEC generation assets."[50]

29. Other generation assets in the market, especially renewables and demand response, face considerably less risk from GHG rules and may actually benefit in price performance from them.[51]

30. Rider PSR would provide Duke with "a competitive advantage over other wholesale market generators that do not have revenue assurance from retail electric consumers."[52]

31. Because PSR would guarantee full cost recovery to Duke, Duke would have no incentive to manage its share of OVEC costs or to direct efficient operation of the plants.[53] And Duke would not have the incentive "to bid OVEC into the energy and capacity markets like a rational market participant."[54]

32. Logic suggests that if Duke forecasted OVEC to be extremely profitable, it would have retained the OVEC profits for itself.[55]

In light of the absence of evidence proffered by Duke to support the PSR and the numerous legal and factual problems with the proposal, the PSR should be rejected by the PUCO.

[50] Constellation/Exelon Initial Brief at 10; OEC Initial Brief at 14-15; Wal-Mart Initial Brief at 9-10.

[51] ELPC Initial Brief at 6.

[52] Wal-Mart Initial Brief at 9.

[53] Constellation/Exelon Initial Brief at 6.

[54] IGS Initial Brief at 24.

[55] Kroger Initial Brief at 10-11.

1. Ohio Energy Group's proposal extending the PSR through calendar year 2024 would violate the law, is highly speculative, and would harm customers.

Ohio Energy Group ("OEG") recommended approval of a PSR to continue through year 2024, arguing that it is "good public policy" "to maintain some level of state jurisdiction over generation."[56] But as the PUCO Staff emphasized, this is bad public policy. It amounts to a guarantee of profits for generation services which the distribution utility is not even providing. And, as discussed below, OEG witness Taylor's disingenuous proposal that OEG's own customers be permitted to "opt out" of the PSR is indicative that OEG is not willing to pay for PSR.

Indeed, OEG's proposal suffers from all of the same shortcomings associated with Duke's PSR identified by OCC and other intervenors. Like Duke's proposal, OEG Witness Taylor's proposal for a PSR Rider through calendar year 2024 would subject customers to years of unlawful charges. Additionally, the OEG proposal would be inconsistent with the term of Duke's proposed ESP and contrary to the clear intent of the law, that the term of any provision of an ESP not exceed the term of the ESP as a whole.[57] OEG's proposal would also exacerbate the risk and harm to customers based on Mr. Taylor's speculation about the market ten years into the future. The risk and likely harm to customers would be significantly greater than even Duke's proposal for the term of the ESP.

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[56] OEG Initial Brief at 2.

[57] This intent is clearly shown under R.C. 4928.143 that requires the PUCO to test an ESP that is longer than three years in the fourth year of the ESP and every fourth year thereafter, to determine whether it remains more favorable in the aggregate than an MRO. If only one provision of Duke's ESP were to remain in effect beyond the 3-year proposed term of the ESP, this would prevent testing of that provision in conjunction with the other terms of the ESP.

As discussed above, R.C. 4928.38 required Duke to be fully **on its own** in the competitive electric generation market as of the end of its market development period. That period expired and should not be extended further. Moreover, reliance on Duke's long-term forecasts of OVEC costs and energy market prices, as Mr. Taylor recognizes, is prone to substantial error. As he admits, he doesn't know when "OVEC's all-in costs are likely to be at or below market prices."[58] If he doesn't know when, he cannot know if they will ever be at or below the market price.

Mr. Taylor's recommendation ignores Ohio law. And it relies on Duke's long-term and highly speculative forecast of OVEC costs and energy and capacity market prices. In fact, as he admitted during cross-examination, Mr. Taylor relied entirely on Duke's estimate of OVEC's costs and revenues.[59] He prepared no analysis of OVEC costs or revenues independently that underlie Duke's analysis of the net cost or benefit.[60] Nor did Mr. Taylor analyze Duke's workpapers -- in fact, he did not even review the workpapers until after submitting his testimony and giving a deposition.[61] Furthermore, Mr. Taylor did not attempt to analyze the OVEC budget at all.[62] And his opinions were not informed by the depositions or testimony of OVEC's Chief Financial Officer, Mr. Brodt, or Duke's witnesses Dougherty, Zhang or Jennings pertaining to the OVEC Analysis.[63]

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[58] OEG Ex. 1 at 15 (Taylor Direct).

[59] Tr. VII at 1943 (Taylor Direct).

[60] Tr. VII at 1943 (Taylor Direct).

[61] Tr. VII at 1943 (Taylor Direct).

[62] Tr. VII at 1946.

[63] Tr. VII at 1946-1948 (Taylor Direct).

Given Mr. Taylor's recognition of the insignificance of any benefit to customers of the PSR,[64] it is difficult to understand his insistence on it. Nonetheless, OCC emphasizes that Mr. Taylor changed his position on the opt-out from his testimony in AEP Ohio's recent ESP proceeding. In AEP Ohio's ESP proceeding, Mr. Taylor testified that he would have no objection to the opt-out from the OVEC PPA Rider in that case being extended to an entire class of customers, such as the residential class, so that the class could "self-insure" in Mr. Taylor's terminology.[65] However, only a few months later, in the current case, Mr. Taylor testified that he would disagree with such a proposal.[66] There is no sound basis for Mr. Taylor's change in position from his position in AEP Ohio ESP proceeding. If large customers are permitted to opt-out of Rider PSR, OCC should be permitted to opt out on behalf of the entire residential class. The residential class should enjoy the same right of choosing the best position between regulation and market that the large industrial customers desire. Such a right should not be reserved only for large industrial customers.

OEG's Initial Brief also argues some of the same issues presented by Duke such as the impact of coal plant retirements on reliability in PJM. But OEG's position on this issue, like Duke's position, does not stand up to scrutiny. The assumption that coal plant retirements will impact reliability or drive up energy prices is baseless as discussed previously. OEG's arguments for a PSR, albeit a different PSR, should be rejected.

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[64] Tr. VII at 1910-1911, 10915 (Taylor).

[65] Tr. VII at 1959, 1962 (Taylor).

[66] Tr. VII at 1959 (Taylor).

III. ESP V. MRO

A. Duke's proposed ESP is not more favorable than an MRO under the PUCO's traditional application of the statutory test. It should be rejected or modified.

All parties briefing this issue[67] recognize that the PUCO's traditional analysis of the ESP v. MRO test[68] requires the consideration of three elements: (1) the SSO price of generation to customers, (2) other quantifiable provisions, and (3) qualitative provisions.[69] These three elements, combined, are compared to the results that would be obtained under R.C. 4928.142, if the SSO were proposed in the form of an MRO. From this comparison, the PUCO makes its determination whether the proposed ESP, in the aggregate, is more favorable than an SSO in the form of an MRO. All of the parties briefing this issue, except Duke, agree that the proposed ESP is **less** favorable than an MRO. The PUCO should so find and reject Duke's Application, or modify the provisions in the ESP to satisfy the statutory test.

In addressing the test's first element, Duke's position is that the SSO price of generation would be the same under an SSO offered as an ESP or as an MRO. Duke reasons that the price under either would be determined by the same competitive bid process. OCC and all other parties agree. However, the parties significantly disagree with Duke's analysis under of the test's second and third elements.

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[67] OCC Initial Brief at 55; OMA Initial Brief at 27; IEU Initial Brief at 32; Staff Initial Brief at 57; Kroger Initial Brief at 15.

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

[69] See OCC Ex. 48 at 3-4 (Hixon Direct); OCC Initial Brief at 55. Note, however, that although OCC also applies the PUCO's traditional analysis in this proceeding, it recognizes that the question whether it is lawful to include qualitative provisions in the test currently is pending before the Ohio Supreme Court. See *In the Matter of Northeast Ohio Public Energy Council*, Appeal No. 2013-0513.

Under the second element, Duke claims that no other provisions in its ESP are quantifiable.[70] However, the evidence shows, based upon Duke's own data, that the PSR will cost Ohio's consumers an additional $22 million over the ESP's three year term, and possibly much more thereafter.[71] The PUCO's precedent requires that when an ESP provision is quantifiable and not available under an MRO, the provision must be included as a cost of the ESP.[72] Duke erred in failing to do so. When properly considering the PSR's cost, there's no doubt that the ESP is less favorable than an MRO.

Nevertheless, Duke argues that because the SSO generation price is the same under either form of SSO, and because no other provisions are quantifiable, its proposed ESP must be approved based solely on the alleged qualitative benefits it identifies. [73] However, the evidence shows that these claimed "qualitative benefits" are either (1) not beneficial at all or (2) could be provided if the SSO were in the form of an MRO.

In making its determination under the test, the PUCO must find that Duke's proposed ESP is significantly less favorable than an MRO on a quantitative basis. Because the ESP contains no bona fide qualitative benefits, Duke's Application must be denied, or modified to comply with the statutory test. The PUCO must provide the same relief even if it were to find some measure of qualitative benefits to Duke's Application, considering that the qualitative benefits are insufficient to overcome the significant costs that the PSR would impose on Ohio's consumers.

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[70] Duke Initial Brief at 27, Duke Ex. 6 at 25 (Wathen Direct).

[71] OCC Ex. 48 at 4 (Hixon Direct); OCC Ex. 43 at 7, 17 (Wilson Direct).

[72] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison 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 No. 12-1230-EL-SSO Opinion and Order (July 18, 2012) ("*FirstEnergy ESP III*").

[73] Duke Initial Brief at 27; Duke Ex. 6 at 25 (Wathen Direct).

The following analysis addresses in more detail the elements of the statutory test and how Duke has misconstrued the test's statutory, regulatory and judicial requirements.

1. The test's first element: determination of the SSO generation price

As stated above, the SSO generation price would be determined by essentially the same competitive bid process under either the proposed ESP or an MRO. Thus, all parties briefing this issue agree that the SSO generation price would be quantitatively equal under either form of SSO.

2. The test's second element: cost quantification of ESP provisions

The Ohio Supreme Court has made clear that the only provisions that may be included in an ESP are the pricing for generation supply, pursuant to R.C. 4928.143(B)(1), and the nine other cost items contained in R.C. 4928.143(B)(2).[74] Duke states that its proposed PSR is nothing more than a financial device that provides a hedge to customers against wholesale price volatility.[75] R.C. 4928.143(B)(2) does not permit the inclusion of a such financial hedge in an ESP; so Duke seeks its inclusion under R.C. 4928.143(B)(2)(d).[76] Duke awkwardly claims the PSR is a "charge…relating

[74] *In Re Application of Columbus Southern Power Co., et al*., 128 Ohio St. 3d 512, 2011-Ohio-1788 [¶ 31], 945 N.E.2d 655 ("*Columbus Southern II*").

[75] Duke Ex. 6 at 12 (Wathen Direct).

[76] OEG claims that Rider PSR is authorized under the R.C. 4928.143(B)(2)(d) because it is a charge that relates to a "limitation on customer shopping." OEG Initial Brief at 8. OEG reasons that by basing the PSR on OVEC's cost, customers will be shielded more from price volatility than if they were exposed 100% to wholesale market pricing. Thus, it reasons that the PSR limits the effect of shopping is limited. OEG's analysis (on which Duke does **not** rely) tortures the statute's plain language, which refers to a limitation on the number of shoppers. Indeed, Duke believes that the PSR is competitively neutral.

to…bypassability…as would have the effect of stabilizing or providing certainty regarding retail electric service."[77] Duke's claim must be rejected.

a. The PSR does not "relate to bypassability"

Duke's analysis never explains to what "bypassable" provision of the ESP its PSR relates. Instead, it merely asserts that the PSR must be included in the ESP merely because it is a bypassable rider.[78] The difficulty with Duke's rationale is that **all** charges that conceivably could be imposed in an ESP would necessarily be labeled as either bypassable or non-bypassable and, thus, available for inclusion in an ESP. Considering as much, Duke's interpretation is unlawful because it reads out of the statute the requirement that the PSR charge be related to a provision related to "bypassability." Under Duke's reading, the PSR is includable in the ESP because it is a "[non-bypassable] charge …as would have the effect stabilizing or providing certainty…" Duke's interpretation violates RC. 1.47(B), which provides that the General Assembly intends the entire statute to be effective.

b. The PSR does not provide stability or certainty

As anticipated by OCC and the other intervenors in their Initial Briefs, Duke claims that the PSR will provide stability and certainty to its consumers' electric rates. It reasons that Ohio is entering a time of increased volatility in electricity prices and that the PSR is needed to smooth out price spikes, with customers effectively paying a charge when wholesale prices are low, and receiving a credit to their bills when wholesale prices

[77] Duke Initial Brief at 18.

[78] Id.

are high.[79] The $22 million in PSR charges that Duke customer's will bear during this ESP belies Duke's claim, and the PSR should be rejected on that basis alone. However, the intervenors' witnesses have convincingly demonstrated that the PSR will not provide stability and certainty to Ohio consumers' electricity rates.[80]

For example, OCC witness Wilson explained that SSO customers already are provided stable prices through the staggered one- to three-year contracts secured under the existing competitive bid process. The PSR would harm customers by adding a more volatile, fluctuating wholesale component to the SSO price.[81] Mr. Wilson further explained that the PSR would add instability and uncertainty to shopping customers' electricity prices, particularly those who secure offerings that hedge prices and provide greater stability.[82] He also explained that due to the quarterly lag in updating the PSR, volatility in the wholesale market likely would be reflected in customers' rates at the same time they experience other increases to rates, e.g., from yearly auctions, again leading to further uncertainty and instability.[83]

Because the PSR does not relate to an event of bypassability or provide stability and certainty regarding retail electric service, it does not qualify for inclusion in the ESP under R.C. 4928.143(B)(2)(d) and *Columbus Southern II*. Accordingly, the PUCO must reject it.

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[79] Duke Initial Brief at 18-24.

[80] See pages 2-13 above.

[81] OCC Ex. 43 at 12, 28-29 (Wilson Direct).

[82] Id. at 12, 30-31 (Wilson Direct).

[83] Id. (Wilson Direct).

However, if the PSR were includable in the ESP, it certainly is capable of quantification as shown by Duke's own data, and must be considered as a cost of the ESP.[84] Duke's data shows that the PSR would cost Ohio's consumers $22 million over the 3-year term of the ESP. As stated previously, under the ESP v. MRO test, this significant expense would require that the ESP application be rejected or that it be modified by removing Rider PSR to meet the statutory test.

3. The test's third element: consideration of qualitative benefits.

Duke's analysis of the authority to include "qualitative" benefits in an ESP is confused. On the one hand, it offers the PSR and DCI as qualitative benefits only and recognizes that for inclusion in the ESP they must fall within one of the nine categories listed in R.C. 4928.143(B)(2)(d), as required by *Columbus Southern II*.[85] On the other hand, Duke claims that other provisions of the ESP can be considered under the statutory test merely if they are consistent with state policy -- contrary to *Columbus Southern II*.[86] To support its position, Duke relies on *In Re Columbus Southern Power Co*., 128 Ohio St.3d 402, 2011-Ohio-958 ("*Columbus Southern I*"), in which the PUCO modified the EDU's proposed SSO generation price submitted under R.C. 4928.143(B)(1). On appeal, the EDU claimed that as long as this price was less than that determined under R.C. 4928.142 for an MRO, the PUCO was without authority to modify it. It is in this context that the Court held:

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[84] *FirstEnergy ESP III.*

[85] Duke Initial Brief at 18.

[86] Duke Initial Brief at 27.

> Moreover, while it is true that the commission must approve an electric security plan if it is "more favorable in the aggregate" than an expected market-rate offer, id., that fact does not bind the commission to a strict price comparison. On the contrary, in evaluating the favorability of a plan, the statute instructs the commission to consider "pricing **and all other terms and conditions."** (Emphasis added.) Id. Thus, the commission must consider more than price in determining whether an electric security plan should be modified. [*Columbus Southern I*, ¶ 27.]

The Court's language merely recognizes that R.C. Chapter 4928 does not restrict the PUCO's discretion to **modify** the provisions of an ESP that are properly included under R.C. 4928.143(B), particularly if they violate a state policy in R.C. 4928.02.[87] It does not permit an EDU to include provisions in its ESP that do not fall within the nine listed items in R.C. 4928.143(B)(2).

a. Qualitative benefits falling within R.C. 4928.143(B)(2)

i. The PSR should not be included in the ESP because it does not fall within R.C. 4928.143(B)(2)(d) and because it violates state policies set forth in R.C. 4928.02.

As shown above, when properly considering the PSR under the quantitative analysis, it clearly does not fall within the items listed in R.C. 4928.143(B)(2) and, for that reason, cannot be included in this proposed ESP.

Alternatively, the PUCO need not reach the R.C. 4928.143(B)(2)(d) issue. Under authority of *Columbus Southern I*, the PUCO may modify the proposed ESP if it

[87] Accord: *Elyria Foundry v. Pub. Util. Comm.*114 Ohio St.3d 305, 2007-Ohio-4146, in which the Court found that the PUCO may not approve an application that violates the state policies contained in R.C. 4928.02.

determines the PSR violates state policy or is otherwise unreasonable.[88] In this regard, OCC, the PUCO Staff, and other intervenors provide ample evidence demonstrating how the PSR violates the policy of this state contained in R.C. 4928.02; for example:

1. R.C. 4928.02(A):[89] State policy requires that Duke's customers be provided reasonably priced retail electric service. The evidence demonstrates that the PSR will impose at least $22 million in costs on customers during the ESP with no corresponding benefits.

2. R.C. 4928.02(B):[90] State policy is 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. In accordance with the policy, the PUCO has been transitioning Ohio's EDUs toward a fully-competitive retail market, in which customers are to decide the level of market risk they are willing to absorb. The non-bypassable PSR forces customers to take Duke's claimed hedge when they should select the level of risk they are willing to take in the market through competitive products. Significantly, Duke concurs with the PUCO's articulated policy and uses it as justification for the elimination of the Load Factor Adjustment Rider (Rider LFA), stating that "its continued existence undermines the state's objective to have market influences alone determine the cost of competitive generation service.[91]"

3. R.C. 4928.02(H):[92] Rider PSR violates the proscription against distribution customers subsidizing competitive electric services. If the PSR were approved all of Duke's customers taking distribution service would be required to

[88] The General Assembly protects the EDU by permitting it to withdraw its application in the event of any PUCO modification.

[89] OCC Initial Brief at 34; OMA Initial Brief at 30; Sierra Club Initial Brief at 15.

[90] OCC Initial Brief at 19; Staff Initial Brief at 2; IEU Initial Brief at 14; OEC Initial Brief at 8.

[91] Duke Initial Brief at 29.

[92]OCC Initial Brief at 17-19; Staff Initial Brief at 15; OMA Initial Brief at 20, 31; Environmental Law and Policy Center Initial Brief at 14; Ohio Environmental Council Initial Brief at 10; Retail Energy Supply Association Initial Brief at 17; Constellation NewEnergy/Exelon Generation Company Initial Brief at 4-6; Sierra Club Initial Brief at 15; Kroger Company Initial Brief at 12; Industrial Energy Users Initial Brief at 12; Interstate Gas Supply Initial Brief at 20.

pay the non-bypassable rider, which supports Duke's interest in the OVEC generating facilities.

ThePSR must be disallowed because it clearly violates state policies.

ii. The Distribution Capital Investment Rider should not be included in the ESP because it is available under an SSO in the form of an MRO.

Duke seeks to implement the DCI Rider pursuant to R.C. 4928.143(B)(2)(h). OCC does not dispute that the PUCO has the discretion to approve such riders, but has demonstrated that the DCI Rider, as proposed, is unreasonable and should be rejected.[93]

Although the DCI Rider falls within one of the cost items listed in R.C. 4928.143(B)(2), Duke did not quantify its costs because of the PUCO's finding in *FirstEnergy ESP III*.[94] In that decision, the PUCO recognized that an EDU would accelerate recovery of the subject distribution-related costs under an ESP, compared with recovery through a base rate case if the SSO were in the form an MRO.[95] It reasoned that the costs would be a "wash" over a period of time extending beyond the ESP's term. Yet, in this proceeding, Duke and Staff assert that the DCI Rider can be included in an ESP as a qualitative benefit because it would "accelerate improvements to and modernization of the safety and reliability of the distribution system.[96]" In other words, Duke and Staff ask the PUCO to ignore the accelerated costs consumers would incur to pay for

[93] OCC Initial Brief at 74.

[94] *FirstEnergy ESP III*, Opinion and Order at 10-11, 57 (July 18, 2012).

[95] This issue currently under appeal to the Ohio Supreme Court, *In Re Northeast Ohio Public Energy Council*, Appeal No. 2013-0513.

[96]Duke Initial Brief at 31; Staff Initial Brief at 57.

improvements to the distribution system; but recognize only the benefit of the accelerated improvements.[97]

As stated in OCC's Initial Brief, Duke's Application acknowledged that the qualitative benefits of the DCI Rider would be available if the SSO were in the form of an SSO.[98] Moreover, Staff witness Turkenton agreed with OCC witness Hixon's analysis that Duke would recover these distribution-related costs sooner under an ESP than if an MRO were implemented.[99] Accordingly, it would be unreasonable for the PUCO to recognize the accelerated benefits customers would receive and not the accelerated costs they would incur.

Perhaps aware of the unreasonableness of its position, Staff also claims that the DCI Rider provides a qualitative benefit because it is "an economical and efficient process of enabling [Duke] to make investments in its distribution system."[100] Staff witness Turkenton explained on cross examination that this "economical and efficient process" is nothing more than Duke's ability to seek approval of the rider in this pending ESP proceeding, instead of waiting to seek approval of the same rider in a subsequent base rate proceeding. Staff's argument is one of convenience. As OCC stated in its Initial Brief, Duke could have asked for approval of such a rider in its last rate proceeding, which concluded in 2013, but didn't.[101] Staff simply cannot create a qualitative benefit based upon Duke's choice of forums to seek the same relief.

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[97] Staff Ex. 2 at 4-5 (Turkenton Direct).

[98] OCC Initial Brief at 64.

[99] Tr. XIII at 3764 (Turkenton).

[100] Staff Initial Br. at 57.

[101] Tr. XIII at 3773-3774 (Turkenton).

Clearly, the DCI Rider provides accelerated benefits to the Utility and customers incur accelerate costs. It is unreasonable for the PUCO to find that these benefits outweigh the cost that customers pay for them. It is equally unreasonable to find the DCI Rider is a qualitative benefit just because Duke sought recovery in an ESP proceeding, when it could have sought approval of the same rider in its last rate case in 2013, for similar expenses.[102]

b. Qualitative benefits falling under R.C. 4928.02.

In its Initial Brief, Duke recognizes that a provision must fall within R.C. 4928.143(B)(2) to be included in an ESP.[103] However, Duke relies on R.C. 4928.02 as authority for the inclusion of several alleged "qualitative benefits" in this ESP (and in some instances, cites no authority):[104]

- Capacity Rider (Rider RC) and Energy Rider (Rider RE). Duke proposes modifications to rate design that allegedly make the riders comparable to CRES rates Duke relies on R.C. 4928.02(A) and (B).[105]
- Capacity Rider (Rider RC). Duke proposes modification to rate design related to cost allocations. Duke relies on R.C. 4928.02(A).[106]
- Capacity Rider (Rider RC). Duke proposes modifications to rate design to base rates on usage and to eliminate demand aspects. Duke relies on R.C. 4928.02(A).[107]

[102] Staff witness Turkenton suggests that more expense is associated with approving the DCI in an ESP versus a base rate proceeding, but doesn't bother to quantify the expense. Staff Ex. 2 at 5 (Turkenton Direct). On cross examination she admitted that the prosecution of an ESP proceeding also requires considerable time and expense of the parties. Avoiding expenses is not a qualitative benefit of the ESP. Tr. XIII at 3765-3767 (Turkenton).

[103] Duke Initial Brief at 10.

[104] Duke Initial Brief at 27-31.

[105] Duke Initial Brief at 28.

[106] Duke Initial Brief at 28.

[107] Duke Initial Brief at 29.

- Load Factor Adjustment (Rider LFA). Duke proposes modifications to rate design to eliminate the rider. Duke cites no state policy other than to state Rider LFA's continued existence undermines the state's objective to have market influences alone determine the cost of competitive generation service.[108]
- Rider DR-ECF. Duke proposes modifications to rate design to eliminate a demand response program provided in the rider. Duke cites no state policy other than to state that the program's elimination is a move toward pure market pricing.[109]
- Purchase of Receivables Rider (Rider POR). Duke will retain the existing POR program. Duke cites no policy.[110]
- Net Metering Rider (Rider NM). Duke proposes changes to clarify language in its tariff. Duke cites no state policy other than to state that the language change will enhance reasonable rates.[111]

Because the modifications of the above riders (and the retention of Rider POR) do not fall within the nine items listed in R.C. 4918.143(B)(2), they cannot be considered in performing the ESP v. MRO test under 4928.143(C)(1). Duke recognizes as much in its Initial Brief.[112]

Even if these alleged qualitative benefits did fall within R.C. 4928.143(B)(2), they would be excluded from consideration in the test because they also can be offered under an MRO. OCC witness Hixon testified that changes to the rate design riders are also available in an MRO. R.C. 4928.142 requires an MRO applicant to file a proposed rate design and the PUCO's rules require it to provide proposed SSO generation rates derived

[108] Duke Initial Brief at 29.

[109] Duke Initial Brief at 29-30.

[110] Duke Initial Brief at 30.

[111] Duke Initial Brief at 30.

[112] Duke Initial Brief at 18.

from the competitive bid process ("CBP"). Specifically, the rules require the applicant to file (1) a proposed retail rate design, (2) an indication of how bid prices were used for deriving rates, and (3) a description of the rate structure chosen by the utility with the method used to convert bides prices to retail rates.[113] Indeed, Duke filed a proposed retail rate design when it filed an application for an MRO in 2010.[114] Moreover, Staff agrees that an MRO applicant must provide a proposed rate design to the PUCO, that the PUCO has the discretion to approve the design submitted, and that the EDU may submit subsequent MRO applicants and change its current rate design.[115] Thus, the changes to SSO generation-related rates proposed in this ESP for the rate design riders are equally available in an MRO. Because they are available in an MRO, the changes cannot be considered a qualitative benefit reserved only for the ESP.

Duke did not list Rider POR as a benefit in its direct testimony, and it cannot be considered a benefit of this ESP, because it already is being offered.[116] Moreover, no reason exists that Duke couldn't propose to continue the program under an MRO.

Finally, the language revisions proposed for Rider NM are also available under an MRO through an application to amend a tariff.

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[113] Ohio Adm. Code 4901:1-35-03(B)(2)(a), (B)(2)(c), and (B)(2)(i).

[114] *In re Duke Energy Ohio*, PUCO Case No. 10-2586-EL-SSO, Opinion and Order at 52-56 (February 23, 2011).

[115] Tr. XIII at 3775-3779 (Turkenton Cross Examination).

[116] See *FirstEnergy ESP III* and the Commission's rejection of RTEP benefits previously offered.

IV. DISTRIBUTION RIDERS

A. Duke Failed To Demonstrate Any Need For The DCI Rider.

Much like its Application, Duke's Initial Brief stressed and relied on general statements and claims instead of specific details and documentation. Duke's proposed DCI Rider is an example of this shortcoming. Duke begins the defense of the proposed DCI Rider with general observations noting that such Riders are permitted by Ohio law, and that other Ohio electric utilities have had such Riders approved by the PUCO.[117] Although both of these things are true, neither is justification for the PUCO approving a DCI Rider for Duke. There is nothing in R. C. 4928.143(B)(2)(h) that requires the PUCO to approve a DCI-type Rider, or that requires the PUCO to approve a DCI rider for one electric utility if the PUCO has approved such Riders for others. Instead Duke must demonstrate a need for a distribution infrastructure modernization rider and must demonstrate that its interests and those of its customers are aligned regarding service reliability.[118]

Instead of documentation and proof, Duke merely argued that distribution reliability is important to the Utility.[119] OCC does not dispute a general statement by Duke that distribution reliability is important. However, Duke has done nothing to demonstrate that this important service reliability issue is somehow contingent on the specific approval of a DCI Rider.[120]

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[117] Duke Initial Brief at 11.

[118] R.C. 4928.143(B)(2)(h).

[119] Duke Initial Brief at 11.

[120] OMA Initial Brief at 9, OPAE Initial Brief at 20, Greater Cincinnati Health Council Initial Brief at 13.

Duke claims that there are challenges to providing reliable service.[121] Mr. Arnold argued that aging infrastructure and obsolete equipment complicate maintenance of the distribution system.[122] Despite these general claims that would apply to virtually any electric utility in the United States, Duke provided no documentation or analysis to demonstrate that these problems actually exist for Duke and that they can only be solved through the implementation of a DCI Rider. Moreover, when specifically asked, Mr. Arnold could not identify any situations where Duke was unable to find replacement parts for allegedly obsolete equipment.[123] In addition, Mr. Arnold could not quantify any premium associated with having to obtain or fabricate a replacement part for allegedly obsolete equipment.[124] The PUCO should not approve the $104 million DCI Rider program[125] based these general unsupported allegations.

B. The Expectations Of Duke And Its Customers Are Not Aligned Regarding Service Reliability Expectations.

R.C. 4928.143(B)(2)(h) specifies that the expectations of the utility and its customers must be aligned. There is no dispute that both the Utility and its customers want service reliability. However, there is no alignment when it comes to the increased cost of that service reliability. Duke's customers have made it loud and clear both in the most recent distribution rate case, and in the 2013[126] and 2014[127] quarterly PUCO–

[121] Duke Initial Brief at 12.

[122] Duke Initial Brief at 12.

[123] Tr. VIII at 2175.

[124] Tr. VIII at 2175-2176.

[125] OCC Ex. 45 at 8 (Mierzwa Direct).

[126] OCC Ex. 35 at Attachment JDW-15 (Williams Direct).

[127] Duke Ex. 21 at Attachment 2 (Arnold Direct).

required surveys that they do not want to pay higher rates for increased service reliability.[128]

Duke argues that its expectations and those of its customers are aligned regarding service reliability.[129] Duke based this claim on Mr. Arnold being uniquely qualified to understand customer expectations.[130] Yet in making this claim, Duke provided no citation or support for this claim, other than to say that Mr. Arnold works closely with large customers in the Duke service territory and works in the field -- having regular interaction with customers.[131] Even if we accept that Mr. Arnold has interaction with customers, there is nothing in Mr. Arnold's testimony that demonstrates that customers are willing to pay the extra costs -- up to $100 per residential customer per year by 2018[132] -- associated with the DCI Rider to get improved service reliability. There is nothing in Mr. Arnold's testimony that even addresses the cost factor associates with service reliability.

Duke argues that it needs the DCI Rider to proactively address service reliability issues.[133] Yet Duke made absolutely no showing that it was not able to proactively address service reliability issues today without a DCI Rider. In fact as pointed out by

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[128] OCC Ex. 45 at 16 (Mierzwa Direct) See also: Duke Ex. 21 at Attachment 2 at 13 of 47, and Attachment 4 at 2 0f 4 (Arnold Direct), OCC Ex. 35 at 15 (Williams Direct).

[129] Duke Initial Brief at 13.

[130] Duke Initial Brief at 13.

[131] Duke Initial Brief at 13.

[132] OCC Ex. 35 at 15 (Williams Direct).

[133] Duke Initial Brief at 13.

OCC witness Mierzwa, Duke has been able to address all of its service reliability needs and improve service reliability since 2005 without the use of a DCI Rider.[134]

The PUCO requires its quarterly surveys[135] for a reason. And that reason is so that a Utility can get a direct understanding from its customers about its own customers' expectations for service reliability. The quarterly surveys ask customers about their views on the cost of service reliability, but Duke has ignored them. It is axiomatic that if cost were not a factor then all customers would expect and demand the very best service reliability. But it also axiomatic that there is a cost associated with service reliability. There must be some balance between the cost of service reliability and the level of that reliability. Duke witness Henning acknowledged this very fact.[136] And that is why the statute requires the utility's and customers' interests to be aligned. Duke's interests with the DCI Rider are to accelerate cost recovery and to reduce its business risks. Customers' interests are to keep rates low. The interests are not aligned and the DCI Rider should be rejected.

Duke argued that Staff witness Baker acknowledged that customers' and Duke's expectations regarding service reliability are aligned.[137] However, Mr. Baker's assessment was also made without considering the cost to customers' for service reliability.[138] The recommendation of both Duke and Staff are not consistent with the

[134] OCC Ex. 45 at 4 (Mierzwa Direct).

[135] Ohio Admin. Code 4901:1-10-10(B)(4).

[136] Tr. I at 126.

[137] Duke Initial Brief at 13.

[138] Tr. IV at 3950.

statute because they both ignored the cost aspect of service reliability as well as the results of the PUCO quarterly surveys.

In addition, Duke failed to address, let alone demonstrate, that any of the factors that Mr. Mierzwa identified as a basis for the PUCO approving a Rider like the proposed DCI Rider applied to this situation. There is no evidence in the record to show that the capital costs associated with the DCI Rider are so substantial that Duke must recover those costs through a Rider mechanism rather than through a distribution rate case in order to avoid any financial harm, let alone dire financial harm.[139] Also Duke made absolutely no effort to demonstrate that the costs associated with the DCI Rider were beyond its control.

Not only did Duke fail to demonstrate that its interests are aligned with those of its customers, but Duke also failed to demonstrate that its service reliability would be negatively impacted by the PUCO not approving the DCI Rider. Duke provided no surveys, projections or any type of documentation to support a claim that service reliability would in any way decline without the DCI Rider. Instead, the record reflects the fact that Duke has been able to maintain and improve its service reliability since 2005 without a DCI Rider by relying on distribution base rate cases to recover its capital investment.[140]

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[139] OCC Ex. 45 at 4 (Mierzwa Direct).

[140] OCC Ex. 45 at 11 (Mierzwa Direct).

C. The Staff Does Not Support The DCI Rider.

In its Initial Brief, Staff states that, "in general Staff supports the Distribution Capital Investment Rider."[141] However, in making this statement, the Staff is contradicting the sworn testimony of its own witnesses, McCarter and Baker. Ms. McCarter specifically testified that the Staff does not support the DCI Rider, but that "staff does not oppose [it]."[142] Staff witness Baker confirmed Ms. McCarter stating that, "I don't believe it's staff's testimony that -- that -- that the company needs to have a DCI Rider."[143] Thus, no party to the proceeding supports the Utility proposal.

In addition, Ms. McCarter testified that her analysis of not opposing the DCI Rider did not include any determination of whether any of the accounts in the DCI Rider proposal would actually fit within a long-term infrastructure modernization plan.[144] She also did not do any analysis to determine if any of the proposed DCI programs were above and beyond what the Utility is currently doing.[145] The PUCO should not approve the DCI Rider.

D. The Staff Analysis Of Customer Expectations Is Flawed Because It Did Not Include The Cost Of Service Reliability.

Duke noted that Staff witness Baker testified that customer's expectations regarding service reliability were consistent with the Utility's.[146] However, in reaching that conclusion, Mr. Baker acknowledged that the analysis to determine if customers' and

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[141] Staff Initial Brief at 27.

[142] Tr. XIV at 3909.

[143] Tr. XIV at 3962.

[144] Tr. XIV at 3913.

[145] Tr. XIV at 3913-3914.

[146] Duke Initial Brief at 13.

Utilities' expectations for service reliability are aligned did not consider cost of the service reliability or affordability or unaffordability of the resulting service.[147] Instead he stated that the cost of service reliability was considered as part of the Utility's reliability standards case.[148] However when questioned specifically about the cost associated with service reliability, Mr. Baker testified that the Staff investigation emphasized reliability expectations and not cost expectations.[149] Mr. Baker went on to further separate service reliability from cost for service reliability by admitting that when comparing the expectations of customers and the Utility, the Staff was only looking at "reliability expectations, not cost expectations."[150] Thus the Utility's reliance on Mr. Baker's testimony lacks weight because Mr. Baker ignored the cost component of service reliability in measuring customers' expectations.

Separating service reliability expectations from cost expectations is not practical and has the effect of negating the statutory requirements because all customers would expect perfect service reliability if cost was not a factor. Mr. Baker[151] and even Duke witness Henning[152] acknowledged this truism. Mr. Baker went as far as to testify that there has to be a balance between service reliability expectations and service reliability cost -- but he did not include that balance as part of his review.[153] However, cost is a factor and is an important factor because customers have to be able to afford service in

[147] Tr. V at 1340.

[148] Tr. XIV at 3948.

[149] Tr. XIV at 3950.

[150] Tr. XIV at 3964.

[151] Tr. XIV at 3965.

[152] Tr. I at 126.

[153] Tr. XIV at 3965.

order to use it. In fact, the Legislature has recognized the importance of cost in this equation as is evidenced by R.C. 4928.02(A) which identifies affordability as an important policy consideration for the PUCO. The PUCO should reject the Staff conclusion that Duke's and customer's expectations regarding service reliability are aligned.

E. If The PUCO Adopts The DCI Rider (Contrary To OCC's Recommendations Otherwise) It Should Reduce The Rate Of Return Funded By Customers To Reflect Duke's Accelerated Cost Recovery And Reduced Risks From The DCI Rider.

Duke argues that its proposed Return on Equity ("ROE") of 9.84 per cent is reasonable.[154] Despite this claim it is undisputed that the DCI Rider, if adopted, will accelerate the charges that customers have to pay for the DCI-related programs.[155] Numerous witnesses admitted that this accelerated collection of capital investment would benefit Duke's shareholders, because it would provide Duke with cost recovery on a faster basis. It would also reduce Duke's risk of not collecting the DCI-related capital costs.

OCC witness Kahal testified that implementing the DCI Rider would materially improve Duke's business risk profile because it would permit Duke to make frequent and timely rate adjustments.[156] There was no DCI Rider in place when the PUCO established the rate of return for Duke in its most recent distribution base rate case (Case No. 12-1682-EL-AIR). As a result, the impact of the DCI Rider to reduce Duke's business risk was not and could not have been factored into the rate of return determination, as OCC

[154] Duke Initial Brief at 15-16.

[155] Tr. II at 392-394, 517-518 (Wathan), Tr. III at 784-787, 827-832 (Laub), Tr. VI at 1549-1551, Tr. XIII at 3768-3775, and Tr. XIV at 3914-3916.

[156] OCC Ex. 32 at 10 (Kahal Direct).

Witness Kahal testified.[157] Accordingly, Mr. Kahal recommended that if the PUCO were to implement a DCI Rider, then it would be appropriate to reduce Duke's 9.84 percent rate of return. This would reflect a change in the Utility's business risk profile as well as the general downward trend in capital costs since that rate case.[158]

OCC is not alone in its assessment of the benefits of the DCI (and DSR). Staff witness McCarter acknowledged that with a DCI-type Rider Duke would benefit from: (1) accelerated cost recovery, (2) not evaluating the DCI-related expenses as part of an overall distribution base rate case, and (3) it would be possible for Duke to be earning at or above its authorized return.[159] Staff witness Turkenton testified that the use of a DCI Rider would benefit the Utility because it would enable Duke to recover its investment more quickly.[160] She added that the Storm Distribution Rider would also provide the same benefit for Duke.[161]

Duke's own witnesses also acknowledged this very point. Duke Witness Wathen stated "the point of the rider is that it would allow us to recover these things [capital costs] a lot faster and more efficiently than having to go through a rate case.[162] Duke witness Laub testified that cost recovery through a DCI Rider (compared to a distribution base rate case) would enable the Utility to recover the additional investment on an accelerated basis and this would be a benefit for Duke.[163] Finally Duke witness

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[157] OCC Ex. 32 at 10 (Kahal Direct).

[158] OCC Ex. 32 at 10 (Kahal Direct).

[159] Tr. XIV at 3915.

[160] Tr. XIII at 3772-3773.

[161] Tr. XIII at 3774-3775.

[162] Tr. II at 393.

[163] Tr. III at 785.

Ziolkowski acknowledged that faster cost recovery would be better for Duke.[164] He actually compared the benefit of the DCI Rider to annual distribution base rate cases.[165]

The proposed DCI Rider does not protect consumers from paying excessive distribution charges. If approved, contrary to OCC's recommendation otherwise, it should be modified to include consumer protections. The PUCO should address numerous flaws (other than the inclusion of general plant)[166] in the DCI proposal. First, Duke testified that the DCI Rider would be based on projected costs and not actual expenses.[167] As noted by OCC witness Mierzwa, this would enable Duke to potentially charge customers for expenses that are not actually incurred. Duke would be able to overcharge customers in this manner because Duke did not propose a mechanism to reconcile the projected costs and actual expenses.[168] Staff witness McCarter also raised this concern and Staff recommended that the PUCO reject the use of projected data.[169]

A second flaw the PUCO should address is crediting of O&M cost savings on an expedited basis.[170] To the extent that the additional $104 million in DCI-related spending reduces O&M expenses, then customers and NOT the Utility should get this benefit.

Duke currently credits O&M cost savings to customers on an accelerated basis as part of its natural gas Accelerated Mains Replacement Program ("AMRP") that is used to

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[164] Tr. VI at 1551.

[165] Tr. VI at 1547.

[166] See discussion supra.

[167] Tr. XIV at 3901.

[168] OCC Ex. 45 at 18 (Mierzwa Direct).

[169] Staff Initial Brief ay 30, Staff Ex. 6 at 3 (McCarter Direct).

[170] OCC Ex. 45 at 18-19 (Mierzwa Direct).

modernize Duke's natural gas distribution infrastructure.[171] Staff witness McCarter acknowledged that accelerated crediting of O&M cost savings in the AMRP cases act as an offset to the program costs.[172] To the extent that Duke's electric customers are required to pay the DCI Rider charges on an accelerated basis, those customers should get the same benefit that Duke's natural gas customers' get from the accelerated O&M cost savings credit.

A third flaw with the proposed DCI Rider that the PUCO should address is the lack of a cap on annual spending levels proposed.[173] If the DCI Rider is approved, contrary to OCC recommendations otherwise, it should be capped. This will limit the level of rate increases that customers will be forced to endure. For example, Ms. McCarter recommended a cap of $85 million in 2018 instead of the proposed $104 million.[174] Moreover, any cap should exclude common general plant and any programs that are not directly related to infrastructure modernization.

A fourth flaw is that the PUCO should address is to protect customers from the possibility of a distribution rate case during the term of the DCI Rider. Staff witness McCarter noted that it was her belief that approval of a DCI Rider would be accompanied by a distribution base rate freeze.[175] Ms. McCarter described a distribution base rate freeze accompanying a DCI Rider as being an "ideal" situation.[176] Customers should not

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[171] OCC Ex. 45 at 19 (Mierzwa Direct), See also Tr. XIV at 3921-3922.

[172] Tr. XIV at 3922.

[173] Staff Initial Brief at 32, Staff Ex. 6 at 5 (McCarter Direct).

[174] Staff Initial Brief at 32, Staff Ex. 6 at 5 (McCarter Direct).

[175] Tr. XIV at 3905.

[176] Tr. XIV at 3905.

be subject to the DCI Rider and a distribution base rate case at the same time. In fact, Ms. McCarter noted that if the Utility were to file a distribution base rate case during the term of the ESP, then the need for a DCI Rider would have to be "weighed and balanced."[177] Staff witness Turkenton added that if Duke had a DCI Rider in place, "they wouldn't need to come in for a base distribution case."[178]

Consequently, if the DCI Rider is approved, Duke should be prohibited from filing a distribution base rate case through the term of its ESP, unless such proceeding is intended to both consolidate all riders with base distribution rates and include a comprehensive earnings review.

However, if the PUCO approves the DCI Rider, then it should also require that Duke file a distribution base rate case prior to any future extension or expansion of the DCI rider in the future in order to fully evaluate the DCI spending.

A fifth flaw with Duke's DCI Rider proposal is that it improperly charges customers for property taxes before they are incurred. OCC witness Mierzwa testified that Duke is assessed tangible personal property taxes when plant is actually placed in service.[179] The tax is assessed the following year and the associated tax is not paid until the year after.[180] Essentially, plant placed in service in 2015 will not be assessed until 2016 and the taxes are not paid until 2017.[181]

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[177] Tr. XIV at 3907-3908.

[178] Tr. XIII at 3770.

[179] OCC Ex. 45 at 20 (Mierzwa Direct).

[180] OCC Ex. 45 at 20 (Mierzwa Direct).

[181] OCC Ex. 45 at 20 (Mierzwa Direct).

For real property taxes the plant is assessed as of January 1st of each year, but not billed until the following year.[182] For example the tax assessed on plant by January 1, 2015 would not be paid until 2016, and the tax on any plant placed in service after January 1, 2015, would not require payment until 2017.[183]

Mr. Mierzwa testified that under the DCI Rider, Duke would include applicable property taxes in rates when the plant is placed in service, even though the property taxes would not be assessed until the following year.[184] It is not reasonable for customers to pay DCI Rider charges for taxes not yet incurred by Duke or reflected on Duke's books. Mr. Mierzwa recommended that if the PUCO were to approve the DCI Rider, then property taxes should not be included in the Rider until the property being taxed is recognized as taxable by the applicable taxing authority.[185]

F. If Duke's Proposed Distribution Storm Rider Is Approved, The PUCO Must Provide Clear Guidelines Under Which The Rider May Be Invoked.

Duke proposes Rider DSR, a non-bypassable rider that is designed to enable Duke to defer and collect expenses that it incurs in responding to major storm events. Specifically, Duke proposes to establish a regulatory asset account to defer the costs above or below the $4.4 million per calendar year included in Duke's current distribution base rates.[186]

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[182] OCC Ex. 45 at 20 (Mierzwa Direct).

[183] OCC Ex. 45 at 20 (Mierzwa Direct).

[184] OCC Ex. 45 at 20 (Mierzwa Direct).

[185] OCC Ex. 45 at 20 (Mierzwa Direct).

[186] Duke Initial Brief at 16, Duke Ex. 9 at 27 (Laub Direct).

OCC Witness Mierzwa testified that Rider DSR should be rejected unless a full review of the major storm O&M costs is required to be conducted in a base rate or other separate proceeding.[187] At hearing, Duke testified that it was amenable to this concept,[188] and Staff supported review of DSR expenses in a separate proceeding.[189]

Thus, OCC renews the request made in its Initial Brief that the PUCO provide clear guidelines under which the rider may be invoked. Consistent with OCC witness Mierzwa's alternative recommendation,[190] Staff's modifications, Duke's clarifications on cross examination, and the process ordered in other proceedings,[191] OCC proposes the following guidelines:

1. Duke must file an annual report with the PUCO and serve a copy on OCC after the end of each calendar year. Based upon that report, the PUCO may, in its discretion or upon a motion setting forth reasonable grounds, order its Staff to conduct a formal audit of the regulatory asset account.

2. Carrying charges shall not be assessed until the end of the calendar year when the amount of the deferral (positive or negative) is determined and no carrying costs shall be recovered during the recovery period.

3. Prior to invoking Rider DSR, Duke must file a separate application with the PUCO to determine the prudence of Duke's major storm expenses. Interested parties will be given the opportunity to intervene in the proceeding. Duke will bear the burden of proving that the major storm O&M costs were prudently incurred and reasonable. Staff and interested parties shall be permitted to file comments within 60 days after the application is docketed. If any

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[187] OCC Initial Brief at 86, *citing* OCC Ex. 45 at 22-23 (Mierzwa Direct); Tr. XI at 3509.

[188] Id., *citing* Tr. II at 539 (Wathen); Tr. III at 776 (Laub).

[189] Id. at 87, *citing* Staff Ex. 4 at 4 (Hecker Direct).

[190] OCC Ex. 45 at 25 (Mierzwa Direct).

[191] See *In re Application of Duke Energy Ohio, Inc*., Case No. 09-1946-EL-ATA, Application (December 11, 2009) at 4, citing Case No. 08-709-EL-AIR; *In re Application of Columbus Southern Power Company and Ohio Power Company*, Case No. 11-346-EL-SSO, Opinion and Order at 68-69 (August 8, 2012).

> objections are not resolved by Duke, the PUCO shall require that an evidentiary hearing be scheduled, with the opportunity to conduct discovery and present testimony.

In its Initial Brief, Staff requests various changes to Duke's DSR.[192] Staff's recommendations do not affect OCC's recommendation that the PUCO approve the above guidelines; however, OCC wishes to comments on Staff's various proposed changes.

Staff requests that it be required to conduct an audit only after the end of each deferral year when the deferred amount of storm repair dollars exceeds $5 million.[193] OCC opposes a strict standard as the trigger of an audit, and recommends that the PUCO have the discretion to conduct an audit or order an audit upon motion setting forth reasonable grounds.

Staff also recommends that the recovery of the major storm costs subject to the DSR be recovered only through the DSR, and that costs not be deferred for collection in a base rate proceeding.[194] OCC does not object to Staff's proposal.

Consistent with the above guidelines, OCC agrees with Staff's proposal that carrying charges not begin until the end of the year when the amount of the deferral is determined and also that there should be no carrying charges during any recovery period.[195]

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[192] Staff Initial Brief at 36-38.

[193] Staff Initial Brief at 37.

[194] Staff Initial Brief at 36.

[195] Staff Initial Brief at 38.

Finally, OCC does not object to proposed accounting recommendations to account for labor expenses associated with the rider,[196] provided that such accounting procedures are subject to review in a proceeding in which Duke files its application to invoke Rider DSR.

V. COST ALLOCATION AND RATE DESIGN

A. Duke's Proposal To Allocate Capacity Costs To Customer Classes Even Though Duke Is Not Billed SSO Supplier Charges By Customer Class, Is Contrary To Cost Causation Principles And Would Unfairly Charge Residential Customers More For Electricity.

As discussed in OCC's Initial Brief, charges from SSO suppliers should be passed through to Duke's customers on the same basis as they are charged, i.e. $/kWh.[197] This is consistent with cost-causation principles as prominently advocated by Duke[198] and also recognizes the value to SSO suppliers provided by the more stable residential load.[199]

But Duke argues for continuation of its Retail Capacity ("RC") Rider which attempts to determine what portion of SSO supplier charges are related to "capacity" and allocate them to customers based on a Coincident Peak ("CP") methodology of allocation.[200] Duke claims that this would reflect the "manner in which such costs are incurred" and is consistent with cost causation.[201] Duke claims that certain changes it

[196] Staff Initial Brief at 38-46.

[197] OCC Initial Brief at 89-94, 115-119.

[198] Duke Initial Brief at 16 & fn. 16.

[199] Id.

[200] Duke Initial Brief at 5-8.

[201] Duke Initial Brief at 5-6.

proposes in this methodology, such as using a 5CP rather than a 12CP method of allocation, are refinements to its allocation method.[202]

But it is contrary to cost allocation principles to charge a cost to customers in a manner other than the way it is charged to the electric utility. Additionally, Duke provided no example of another charge that is re-allocated in such a manner.[203] Such an artificial re-allocation approach is unprecedented and contrary to regulatory policy. And it is more complex, not more simple, to charge these costs as Duke has proposed. Moreover, Duke no longer self-supplies capacity requirements. It is no longer a Fixed Resource Requirement ("FRR") entity. A capacity charge thus is unrelated to any costs Duke is incurring from its own generation and inserts an improper estimate of capacity costs where none is needed.[204] All SSO Supplier charges should be passed through to customers as they are charged -- on a $/kWh basis.

B. The DCI Rider Should Be Allocated Based On Net Plant In Service Because This Is Consistent With Cost Causation Principles As Opposed To A "Simple," But Wrong, Allocation Endorsed By Duke And Other Parties.

Two parties -- Greater Cincinnati Health Council ("GCHC") and Kroger -- argue that, to the extent the DCI Rider is approved, the associated costs should be allocated other than based on an allocation of net plant in service as proposed by OCC.[205] These parties also oppose Duke's proposed allocation on the basis of what Duke termed "total

[202] Id.

[203] OCC Initial Brief at 89.

[204] OCC Initial Brief at 90-91.

[205] GCHC Initial Brief at 14-15; Kroger Initial Brief at 1-3.

base distribution revenues,"[206] but in fact is far more complicated as Kroger witness Higgins testified.[207] GCHC and Kroger instead support "a simple equal percentage increase of base distribution rates," suggesting that this would be "revenue neutral to Duke, simple to administer and fair to all customers."[208] GCHC disputes OCC's proposal because it disputes "the validity" of Duke's cost study that it is based upon.[209] GCHC inappropriately points to the fact that the stipulation in the last rate case varied from the cost study.[210]

But neither the GCHC/Kroger proposed "equal percentage increase," or the Utility's base distribution revenue methodology, is consistent with cost causation principles. These methods should be rejected in favor of a method that follows cost causation -- an allocation of distribution capital improvements based on distribution net plant in service.[211] In addition to the fact that cost causation principles should form the basis for decisions on cost allocation, OCC would emphasize that GCHC's reliance on the allocation of DCI costs in the Stipulation in Duke's last base rate proceeding is inappropriate, as made clear in such Stipulation.[212] And while GCHC appears to have concerns about the "validity" of Duke's cost of service study, it should have raised those concerns on the record of this proceeding so that they could have been addressed by other

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[206] GCHC Initial Brief at 14-15; Kroger Initial Brief at 1-3.

[207] Kroger Ex. 1 at 10-11 (Higgins Direct).

[208] GCHC Initial Brief at 14-15; Kroger Initial Brief at 1-3.

[209] GCHC Initial Brief at 15.

[210] GCHC Initial Brief at 15

[211] OCC Initial Brief at 94-97.

[212] *In the Matter of the Application of Duke Energy Ohio, Inc. for an Increase in Electric Distribution Rates*, Case No. 12-1682-EL-AIR, Stipulation at 2-3 (April 2, 2013).

parties rather than raising the issue in its Initial Brief. The PUCO should reject such concerns in the absence of persuasive testimony in this proceeding.

OCC witness Yankel's net plant in service allocator is the only one that corresponds with the causation of costs being sought to be allocated and should be adopted by the PUCO.

C. If Approved In Any Respect, Rider PSR Should Be Allocated On A Non-Bypassable Basis As Duke Proposed.

Some parties contended that, if approved in any respect, Duke's proposed PSR should be bypassable rather than non-bypassable.[213] This issue was addressed in OCC's Initial Brief.[214] As discussed there, Duke's proposed allocation of this charge on a $/kWh basis to all customers would be the only reasonable basis to allocate this "profit [or loss] sharing mechanism."[215] Since no capacity or energy is actually utilized to serve any customer, allocating the charge to just SSO customers or just shopping customers would improperly suggest that the charge is associated with serving a particular market (SSO or non-SSO). It is not.

IGS argues that "a bypassable PSR would at least not require all distribution customers to subsidize a competitive service and it would not send as negative of a signal to other generators in the market."[216] IGS also argues that a bypassable allocation would "preserve customers' right to choose."[217] But Duke's proposed PSR is not about "choosing" or "competition." It is a subsidy and it is a subsidy that, if approved, will not

[213] IGS Initial Brief at 32.

[214] OCC Initial Brief at 99-100.

[215] OCC Initial Brief at 99-100.

[216] IGS Initial Brief at 32.

[217] IGS Initial Brief at 32.

provide any actual generation service to any customer (shopping or not). Unless all customers are given the right to choose whether to take the PSR, all customers should have to pay for the PSR if the PUCO finds that they should have to pay any money toward it at all.

D. The PUCO Should Reject OEG's Proposal To Continue The Subsidy To Duke's 4 Large Interruptible Customers At The Expense Of Other Customers.

OEG proposes the continuation of Duke's large customer interruptible program despite the fact that Duke, will no longer have the generation resources or obligation to generate power to meet customer requirements.[218] Indeed, OEG proposes an "enhanced version" of the interruptible program, proposing to "modify and expand its terms."[219] As Duke recognized in proposing to eliminate this program, there is no longer a basis for Duke to offer such service. Such a program would only serve to subsidize large customers at the expense of small customers. OEG's proposals should be rejected.

OCC addressed this issue in its Initial Brief.[220] As OCC discussed there, the interruptible program was intended to terminate at the conclusion of the current ESP. This coincides with the termination of Duke's election of an FRR plan and its notice to PJM of its intent to participate (with any of its generating resources) in RPM and the 2015/2016 base residual auctions.[221] Duke has twice notified interruptible customers of the upcoming termination of this service.[222]

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[218] OEG Initial Brief at 16-26.

[219] OEG Initial Brief at 25-26.

[220] OCC Initial Brief at 97-99

[221] OCC Initial Brief at 97-98.

[222] OCC Initial Brief at 98.

OEG argues that eliminating Duke's FRR plan "will not alter the value of its large customer interruptible load program."[223] OEG's position in this regard is groundless. OEG argues that Duke "could still bid that load into the PJM RPM market as a capacity resource and that it could continue "to provide benefits to customers in Duke's service territory."[224] But if Duke is **not** incurring generation costs -- and others are responsible for meeting MWh demands -- curtailing load on Duke's system will no longer provide a value connected to any interruptible credit.

OEG argues that there will be reliability benefits from "reduce[d] strains on the electric grid during peak times, increasing the reliability of the grid." This improperly suggests that with Duke no longer in generation business, it, rather than PJM, still has a role in ensuring economic dispatch and reliability of generation. That is not the case. As OCC witness Yankel testified, eliminating the interruptible credit will not affect reliability, which will rest with PJM.[225]

OEG again points to the impact of coal plant retirements and suggests that Duke should use its interruptible customers' resources to "bolster the reliability of its system."[226] But there is no evidence that the reliability of Duke's transmission or distribution system is improved by the reduction in load. This is strictly a generation issue and OEG is simply wrong that there is a benefit to reliability.

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[223] OEG Initial Brief at 17.

[224] OEG Initial Brief at 17.

[225] OCC Ex. 46 at 30 (Yankel Direct).

[226] OEG Initial Brief at 17-18.

OEG also suggests that there would be an economic benefit from Duke's interruptible load program.[227] And OEG points to the PUCO's past recognition of the benefits of interruptible programs to both interruptible customers who can accept a lower quality of service and to customers who benefit from enhanced reliability.[228] But OEG's claims relate to interruptible programs that relate to a time when electric utilities maintained an obligation to serve load with their own generating resources. That is no longer the case. Any interruptible credit would now be simply a subsidy.

OEG also argues that PJM pricing for demand response, particularly for incremental auctions, is not a sufficient incentive or stable enough for Duke's large interruptible customers to participate and the "potential benefits of that interruptible load to all customers would be lost."[229] Further, OEG questions the legality of PJM's demand response program.[230] But the fact is that PJM's demand response program provides a yet-to-be matched system of market-based valuation for demand reduction. Although there is some question over whether that market may be allowed to continue as currently designed by PJM, until those legal issues are resolved, the PUCO should recognize that PJM's demand response market is the most appropriate mechanism for recognizing the value of interruption. Even in the absence of that market, there is no basis to provide a subsidy to Duke's large interruptible customers, when it cannot provide an offset to costs Duke incurs for supply requirements since no such requirement will exist any longer.

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[227] OEG Initial Brief at 17.

[228] OEG Initial Brief at 17-18, citing Case No. 11-346-EL-SSO, Opinion and Order, at 26 (August 8, 2012).

[229] OEG Initial Brief at 19-20.

[230] OEG Initial Brief at 23-24.

OEG also argues that Duke's interruptible program is little different than its PowerShare program that compensates other customers for demand response, a program slated to continue through December 31, 2016.[231] OEG argues that the large customer interruptible program provides a slightly higher value ($4.88/kW v. $3.00/kW) to large customers, but that the large customer program provides firm emergency curtailments throughout the year and not just in the summer.[232] OEG also argues that because the PowerShare program is approved only through December 31, 2016, it will not provide benefits through the ESP period.[233]

But neither of these programs will be beneficial to other customers after May 31, 2015 when Duke is no longer an FRR entity. If Duke's large interruptible customers choose to take advantage of the PowerShare program until December 31, 2016, they will continue to receive a subsidy on the backs of other customers without providing any real benefit to Duke or its customers. But neither program should continue and other customers should be held harmless from these subsidies. The interruptible credit should be terminated as Duke has proposed.

In summation, OEG proposes to continue a cost reduction benefit to four large customers, subsidized by other customers. The PUCO should reject it.

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[231] OEG Initial Brief at 20-23.

[232] OEG Brief at 21-23.

[233] OEG Brief at 21-22.

VI. EARLY TERMINATION

A. Duke's Proposal To Unilaterally Terminate Its ESP A Year Early Should Not Be Allowed.

Duke proposes a 3-year ESP from June 1, 2015 through May 31, 2018.[234] However, it seeks the authority to terminate its ESP one year early "in the event there has been a substantive change in Ohio or federal law that affects SSOs or rate plans concerning SSOs."[235] In its Initial Brief, Duke argues that the ability to terminate its ESP early is "a reasonable risk-mitigation measure" in the "rapidly changing market environment that utilities face . . . ."[236] However, in its Initial Brief Duke does not attempt to refute intervenors' testimony that its proposal could result in higher costs for customers, nor does Duke provide any statutory basis for its proposal.

B. Duke's Proposal Unreasonably Shifts Market Risk To Wholesale Suppliers And Consumers And Could Translate Into Higher Prices For Customers.

To secure electric supply for the SSO, Duke proposes a competitive bid process under which prospective suppliers will participate in a series of auctions.[237] Duke would require the successful bidders to enter into the Master Supply SSO Agreement ("MSSA"), which would bind successful suppliers to provide electric supplies for the ESP's third delivery year.[238] Nevertheless, the MSSA would unreasonably permit Duke

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[234] Duke Energy Ohio Initial Brief at 35.

[235] Id.

[236] Id.

[237] OCC Initial Brief at 108-109, *citing* Duke Ex. 1 at 16 (Application).

[238] Id., *citing* Duke Ex. 4 at 12; Tr. II at 328-329 (Lee Cross Examination).

to terminate the agreement for the third delivery year -- without recourse by the selected suppliers.[239]

In its Initial Brief, OCC explained that multiple parties -- including suppliers,[240] the PUCO Staff,[241] and even Duke witness Lee -- acknowledge that the uncertainty and instability due to the early termination provisions of the MSSA would subject wholesale suppliers to increased risks. In turn, these risks could stifle competition and result in higher SSO prices.[242] These parties reiterate these concerns in their initial briefs. Staff maintains that, "Duke's proposal will introduce unnecessary risk and uncertainty into the SSO supply procurement process, perhaps leading to chilled participation levels and less than robust winning bid prices in the auction."[243] Constellation/Exelon explains that, "Giving Duke discretion to decide on a moment's notice to end the ESP a year earlier than scheduled creates tremendous uncertainty within the market, adds risk (and cost), all of which could chill competition."[244] RESA notes that, "[T]he early termination provision will impose on customers, CRES providers, SSO suppliers, and both competitive retail and wholesale markets a high degree of uncertainty and instability."[245]

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[239] Id., *citing* Duke Ex. 1 at Attachment F, at 13, ¶ 2.4 (Application).

[240] Id., *citing* RESA Ex. 3 at 20 (Campbell Direct).

[241] Id., *citing* Staff Ex. 3 at 3-4 (Strom Direct).

[242] Id., *citing* RESA Ex. 3 (Campbell Direct); Staff Ex. 3 at 3-4 (Strom Direct); Tr. XIII at 3831.

[243] See, Staff Initial Brief at 49.

[244] Constellation/Exelon Initial Brief at 14.

[245] RESA Initial Brief at 27.

C. Duke's Early Termination Proposal Is Overly Vague And Neither Duke's Application Nor Its Initial Brief Provide Any Statutory Authority In Support.

No party to this proceeding supports Duke's early termination proposal. Rather OCC, Staff, RESA, Constellation/Exelon, Direct Energy, and the Kroger all recommend that it be rejected.[246] OCC agrees with Direct Energy's concern that the proposed language of Duke's early termination proposal is vague and ambiguous.[247] Under the language, Duke could argue that virtually any change in Ohio or federal law or any subsequent PUCO decision that remotely relates to the ESP could be grounds to terminate.[248] Exelon also shares this concern, noting that "there is no objective criterion by which Duke may avail itself of the provision, or by which the Commission would evaluate whether Duke's election of the termination provision is proper."[249] For this reason alone, Duke's proposal should be rejected.

OCC also notes that the Kroger Company, RESA, and Exelon agree with OCC's analysis that early termination is not authorized by statute.[250] Duke cites no statutory support in its Application or Initial Brief. Accordingly, Duke's early termination proposal should be rejected for the reasons stated in OCC's Initial Brief.[251]

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[246] PUCO Staff Initial Brief at 49; RESA Initial Brief at 26; Exelon Initial Brief at 13; Direct Energy Brief at 16; Kroger Company Brief at 7.

[247] Direct Energy Initial Brief at 16.

[248] Direct Energy Initial Brief at 16.

[249] Exelon Initial Brief at 14.

[250] Kroger Company Initial Brief at 7; Exelon Initial Brief at 13; RESA Initial Brief at 26.

[251] OCC Initial Brief at 105-109.

VII. SEET ROE THRESHOLD

A. Duke Fails To Provide Evidence Justifying A SEET ROE Threshold Of 15 Percent.

Duke proposes a SEET that incorporates a 15 percent return on equity ("ROE") threshold. Duke's sole basis for proposing a 15 percent ROE is that it was established in a settlement of Duke's current ESP, which specifically provided that it shall not be binding, or be offered in or relied on, in any other proceeding.[252] Duke offers no further justification or analysis for the 15 percent SEET ROE Threshold in its Initial Brief.

In contrast, OCC witness Kahal established that important changes have taken place since Duke's last ESP proceeding that support a significant reduction in the SEET ROE Threshold.[253] Such changes include: the decline of the market cost of capital; Duke's divestiture of substantially all of its generation; and proposed rate rider arrangements.[254] Testimony also demonstrated that in the recent Ohio Power and Dayton Power & Light (DP&L") ESP proceedings, the PUCO established a SEET ROE Threshold of 12 percent for each utility.[255]

OCC's position is that the SEET ROE threshold should be determined in the annual, stand-alone SEET proceedings or, alternatively, if the threshold is set in this proceeding, it should be set at 12 percent.

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[252] Duke Ex. 9 at 8 (Laub Direct); OCC Initial Brief at 112, *citing* OMA Ex. 2, Tr. III at 784; *Duke ESP II*, Stipulation and Recommendation at 2 (October 24, 2011).

[253] Id., *citing* OCC Ex. 32 at 31 (Kahal Direct).

[254] Id.

[255] Id., *citing In the Matter of the Application of Columbus Southern 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 No. 11-346-EL-SSO, Opinion and Order at 37 (August 8, 2012); *In the Matter of the Application of the Dayton Power and Light Company for Approval of Its Electric Security Plan*, Case No. 12-426-EL-SSO, *et al*., Opinion and Order at 26 (September 4, 2013).

OPAE supports OCC's position that it is not necessary for the PUCO to approve the SEET threshold at this time and instead notes that the SEET ROE Threshold can be set in annual proceedings.[256]

OPAE also concurs with OCC's position on brief that Duke's proposed SEET threshold of 15 percent is too high.[257] OPAE supports OCC's recommendation that, if the PUCO determines that the SEET ROE Threshold can be determined in this ESP proceeding, the PUCO should set Duke's ROE Threshold at 12 percent, a level that is consistent with the PUCO's Orders in the Ohio Power and the DP&L ESP proceedings.[258]

Accordingly, OCC renews its request, supported by OPAE, to set the SEET ROE Threshold in the annual stand-alone SEET proceedings. If the PUCO decides that the SEET ROE Threshold can be determined prospectively in the current ESP proceeding, then Duke's SEET ROE Threshold should be set at 12 percent. [259]

VIII. ENROLL FROM YOUR WALLET SHOULD NOT BE APPROVED

RESA, not Duke proposed a change to the fundamental enrollment process that governs how residential customers may sign up to take competitive electric service from a CRES supplier. Under the PUCO's current rules, a customer must provide their account number to the CRES supplier at the time of enrollment. This requirement serves as a safeguard to protect customers from unauthorized slamming. RESA's proposal would

[256] Id.

[257] OPAE Initial Brief at 25.

[258] OPAE Initial Brief at 25.

[259] See, OCC Initial Brief at 110-115.

significantly reduce this protection for customers. RESA's goal is ostensibly to reduce errors in translation that might occur because customers might not have access to their account number when shopping at the mall or a store. RESA claims that this change would overcome a "long-standing barrier to shopping."

RESA raises this allegation, yet RESA failed to document any actual cases where this "long-standing barrier to shopping" prevented customers from signing up for service, or caused customers any actual harm. Moreover, RESA provided no documentation in the form of customer surveys or even letters from customers complaining about this "long-standing barrier to shopping." Thus RESA failed to establish that the "long-standing barrier to shopping" actually exists or is a problem.

RESA calls its proposal enrolling from your wallet. Yet the fact is that today a customer can enroll from their wallet, if the customer simply carries their account number with them. The RESA proposal is a solution in search of a problem that does not exist. The PUCO should reject the RESA proposal.

IX. THE MARKET ENERGY PLAN SHOULD NOT BE ADOPTED

RESA also proposed a Market Energy Plan ("MEP") as a way of reaching out and marketing to shopping-eligible customers in Duke's service territory. The key to the MEP is that it would require Duke and not the CRES supplier to market the service to customers. Duke would be required to market electric choice to customers that called except for termination or emergencies. That is the Utility would do the work, but the CRES supplier would get the benefit of signing up another customer. The MEP is not a good deal for customers and the PUCO should reject it.

There is nothing to preclude CRES suppliers from offering the same competitive product they propose as part of the MEP -- including a three percent discount from the standard service offer, a six month enrollment period, and no termination fee -- today. The one thing that CRES suppliers do not have today and the one thing that they hope to get from the MEP is to have the Utility market their services. Such a program is not reasonable because it would blur the line between the Utility that offers distribution service and a default option at a regulated price, and the CRES supplier that offers competitive commodity services at a for profit price. Today, some customers still struggle to differentiate between the service provided by the utility and CRES suppliers. Injecting the Utility into the marketing of the commodity service would only add to any confusion that exists today. The PUCO should reject the RESA MEP proposal.

X. CONCLUSION

Duke has proposed an electric security plan that harms both customers and the competitive market. Duke's proposed PSR would cost customers at least $22 million during the term of the ESP and potentially millions more in the future. It would require customers to subsidize Duke's ownership interest in OVEC, violating numerous laws. Duke is supposed to be on its own in the competitive market. This means that shareholders, not customers, should bear the risk of the Duke's OVEC interest. Additionally, the PSR is not a permissible provision under R.C. 4928.143. It does not stabilize or provide certainty for retail electric service. It is not related to bypassability or default service. The PSR is a bad deal for customers. It must be rejected.

Duke also proposed a $104 million DCI Rider as part of its electric security plan. The DCI Rider would benefit the Utility by allowing it to expeditiously collect capital investment expenditures from customers. But Duke failed to demonstrate any need for the DCI Rider. Most importantly, Duke's proposal does not satisfy the law. That law (R.C. 4928.143(h) requires Duke' expenditures to be infrastructure modernization expenditures and requires Duke's interests and those of its customers to be aligned with respect to service reliability. They are not because Duke has ignored customers concerns about the cost of service reliability. If the PUCO, however, were to approve the DCI Rider (over OCC and others' objections), the PUCO should significantly modify the rider. These modifications would have to include establishing annual spending caps, relying on actual spending and not projected spending, eliminating common general plant in the DCI, and accelerated crediting of O&M cost savings.

The PUCO should also reject the OEG proposal for a longer term PSR. While OEG touts the long term PSR for other customers, it wants its members to be excluded from the PSR charge. OEG's opt out approach speaks volumes. And the Utility has expressed no interest in such.

The PUCO should also reject the RESA proposals for the "Enroll from your Wallet" and "Market Energy Plan." There is no record to support these proposals. Additionally, the proposals would undermine customers' efforts to make thoughtful decisions about their energy needs. The proposals would also force the regulated Utility to market unregulated services to customers. These proposals will harm, not benefit customers.

Finally, the PUCO should reject Duke's proposed 15% SEET threshold. The PUCO should adopt a more reasonable level of 12%. Alternatively, the PUCO should address this issue in Duke's annual SEET proceeding.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief by the Office of the Ohio Consumers' Counsel has been served electronically upon those persons listed below this 29th day of December, 2014.

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