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
OF
DUKE ENERGY OHIO, INC.

December 29, 2014

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I. INTRODUCTION

Duke Energy Ohio, Inc. (Duke Energy Ohio or Company), has proposed an electric security plan (ESP) that is reasonable and balanced. It balances the interests and needs of the customers with those of the Company, by assuring reasonable, market-based rates for competitive generation services and by providing a reasonable opportunity for the Company's economic stability. It balances the interests and needs of competitive retail electric service (CRES) providers with those of wholesale auction winners, by assuring fair auctions and a level playing field. It balances the vagaries of the market and its impact on customers with a hedged, more stable rate opportunity. And it balances the absolute of a pure market system with the retention of a level of control in the hands of the Public Utilities Commission of Ohio (Commission).

In contrast, various intervenors[1] seek to impose upon the Company, and its customers, an ESP that is imbalanced; a plan that seeks to unreasonably shift costs, revise prior agreements, needlessly but intentionally expose customers to risk, and deviate from established Commission precedent. As demonstrated herein, intervenors advance their claims using conflicting and, at times, self-serving arguments. The major contentions raised by the intervenors and by Staff are addressed and rebutted, herein. However, it should be noted that the Company's failure to address a given issue should not be interpreted is its acquiescence therewith.

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[1] The intervenors that filed initial briefs (Briefs) herein are: The City of Cincinnati (Cincinnati); Constellation NewEnergy, Inc., and Exelon Generation Company (Constellation/Exelon); Direct Energy Services, LLC, and Direct Energy Business, LLC (Direct); Environmental Law and Policy Center (ELPC); The Greater Cincinnati Health Council (GCHC); Industrial Energy Users-Ohio (IEU); IGS Energy (IGS); The Kroger Company (Kroger); Natural Resources Defense Council (NRDC); Office of the Ohio Consumers' Counsel (OCC); Ohio Development Service Agency (ODSA); Ohio Energy Group (OEG); Ohio Environmental Council (OEC); Ohio Manufacturers' Association (OMA); Ohio Partners for Affordable Energy (OPAE); Retail Energy Supply Association (RESA); Sierra Club (Sierra); University of Cincinnati and Miami University (Universities); and Walmart Stores East, LP, and Sam's East, Inc. (Walmart). Staff of the Commission (Staff) also filed a Brief.

The proposed ESP should be approved, as described in the Application and supporting testimony and as discussed herein.

II. THE COMPANY HAS MET ITS BURDEN OF PROOF.

As discussed in the Company's Brief, it has met its burden of proving that each of the proposed elements of its ESP falls within the provisions of R.C. 4928.143 and that the ESP is better, in the aggregate, than the results that would be expected under the provisions of R.C. 4928.142. Walmart disagrees, but fails to articulate how the "proposed ESP [does not satisfy] all of requisite legal standards."[2] Rather, Walmart simply takes issue with three discrete components of the proposed ESP (rate structure, Rider DCI, and Rider PSR), which elements will be discussed later.

The Commission has previously examined the law governing SSO applications, as well as guiding policy considerations. As the Commission has found:

> Chapter 4928 of the Revised Code provides an integrated system of regulation in which specific provisions were designed to advance state policies of ensuring access to adequate, reliable, and reasonably priced electric service in the context of significant economic and environmental challenges. In reviewing [an ESP] application, the Commission is cognizant of the challenges facing Ohioans and the electric industry and will be guided by the policies of the state as established by the General Assembly in Section 4928.02, Revised Code[.][3]

As the Commission has further confirmed, R.C. 4928.143 sets forth the requirements for an ESP, including both the mandatory and optional provisions, and mandates approval of the ESP if, "including its pricing and all other terms and conditions including deferrals and future recovery of deferrals, [the ESP] is more favorable in the aggregate as compared to the expected

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[2] Walmart Brief, at pg. 3.

[3] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order, at pg. 13 (August 8, 2012). *See also 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 pg. 10 (September 4, 2013).

results that would otherwise apply in [a market rate offer] under Section 4928.142, Revised Code."[4] That is, the Commission has rightfully recognized and enforced the two conditions necessary for approving an ESP – its components must fit within R.C. 4928.143 and, taken together, the components must be better than the expected results under R.C. 4928.142.

The controlling – and required – analysis, therefore, is whether the proposed ESP satisfies the provisions of R.C. 4928.143. Walmart seeks to divert the Commission's attention away from its prior pronouncements, fabricating a requirement that does not otherwise exist. Specifically, Walmart would have the Commission expand the list of conditions from two to three, adding that each element of the proposed ESP must be necessary to maintain essential electric service to customers.[5] But the law does not so provide.

As the Ohio Supreme Court has repeatedly held:

> When analyzing a statute, our primary goal is to apply the legislative intent manifested in the words of the statute. Statutes that are plain and unambiguous must be applied as written without further interpretation. In construing the terms of a particular statute, words must be given their usual, normal, and/or customary meanings.[6]

Words can neither be inserted nor deleted; rather, a court must give effect to the words as used by the General Assembly.[7]

R.C. 4928.141, as drafted, simply reflects the General Assembly's intent that Ohio's electric distribution utilities (EDUs) provide a standard service offer (SSO) "of all competitive retail electric services necessary to maintain essential electric service to customers, including a firm supply of electric generation service." To enable EDUs to fulfill this expectation, the

[4] *Id*, at pg. 14. *See also Id.*, at pg. 11.
[5] Walmart Brief, at pg. 3.
[6] *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶12 (internal citations omitted). *See also State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 584 (1995).
[7] *Bernardini v. Board of Education for the Conneaut Area City School District*, 58 Ohio St. 2d 1, 4 (1979). ("It is the duty of this court to give effect to the **words used** [in a statute], not to delete words used **or to insert words not used**.")(emphasis in original). *See also In re Application of Columbus Southern Power Company*, 138 Ohio St. 3d 448, 2014-Ohio-462, ¶ 26.

General Assembly made provision for an SSO to take one of two forms – a market rate offer (MRO) or an ESP. And it is in the subsequent, relevant statutes, R.C. 4928.142 and R.C. 4928.143, that the General Assembly articulated the requirements for each form of an SSO. Significantly, the General Assembly did not say, in the later statute, that every element of an ESP must, individually, reflect a competitive retail electric service that is necessary to maintain essential electric service. And such a contention is irreconcilable with the express and unambiguous language employed in R.C. 4928.143(B)(2), which succinctly states that a "plan may provide for or include, without limitation, any of the "following" components as defined in subsections (a) through (i) of that part. Walmart, however, seeks to impermissibly insert words into this provision, such that would only authorize a "plan that includes, without limitation, any of the listed components, **provided they are necessary to maintain essential electric service to customers**." But the Ohio Supreme Court has already rejected a similar attempt to expand R.C. 4928.143.[8]

Further, Walmart's conflated interpretation of Ohio law runs afoul of what the legislature intentionally authorized for inclusion in an ESP. Specifically and for purposes of illustration, an ESP may include provisions related to job retention and economic development. Neither of these elements is necessary to providing competitive retail electric service. Certainly, a distribution company can provide an SSO of competitive retail electric service to non-shopping customers without implementing provisions that may support job retention in its service territory, the costs for which are typically borne by all ratepayers. Similarly, economic development mechanisms are not needed to provide an SSO of competitive retail electric service. It must be conceded, therefore, that the General Assembly, in its wisdom, gave the Commission the flexibility under

[8] *In re Application of Columbus Southern Power Company*, 138 Ohio St. 3d 448, 2014-Ohio-462, ¶ 26 (rejecting contention that, to be recoverable in an ESP, carrying costs must be necessary).

R.C. 4928.143 to approve an ESP that makes provision for competitive retail electric service and also includes other mechanisms for reasonably and appropriately responding to the challenging and very dynamic environment in which Ohio finds itself. Walmart cannot now transform the otherwise clear language to alter that which the Commission has already determined to be true: There are just two requirements to which an ESP application is subject.

III. MANDATORY ASPECTS OF THE ESP

A. Provisions Relating to Supply

1. Supply Should Be Obtained through a Competitive Bidding Process.

As explained in its Brief in these proceedings, the Company structured its proposed competitive bidding process (CBP) plan in reliance upon relevant commitments made in its current ESP.[9] Consistent with those commitments, the Company proposed to procure, on a slice of system basis, full requirements supply, including energy, capacity, market-based transmission service, and ancillary services. The CBP plan includes having an independent auction manager conduct the SSO auctions and the expected participation by the Commission's auction consultant. The auctions will proceed consistent with the terms and conditions of those previous auctions initiated by Duke Energy Ohio.

Only one party – Interstate Gas Supply (IGS) – contests the use of competitive, wholesale auctions to procure SSO supply. But as discussed herein, its position conflicts with prior commitments and Commission findings and must be rejected.

IGS unadvisedly recommends use of retail auctions, in place of the proposed wholesale auctions for purposes of procuring SSO supply. The recommendation is misplaced. IGS agreed,

[9] *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. 11-3549-EL-SSO, *et al*. (ESP II), Stipulation and Recommendation (Oct. 24, 2011)(ESP II Stipulation).

in the context of the current ESP II, to use an auction structure similar to that proposed herein.[10] IGS offers no justification for deviating from such commitment and, indeed, failed to even recall that it existed. Notably, IGS witness Matthew White admitted that he was not aware of the commitments arising from the current ESP II as he did not review the stipulation for purposes of his testimony in the pending proceedings.[11] The commitment, in the ESP II Stipulation, to continued wholesale auctions, alone, is sufficient basis on which the Commission may rely in rejecting IGS's proposal for a retail auction. But additional factors also exist.

Significantly, the Commission has previously rejected this proposal. Most recently, in its investigation into the retail market, the Commission found that the EDU-provided SSO is, and should remain, the default service for non-shopping customers.[12] The Commission's finding is consistent with the Ohio law, which places upon the EDU, such as Duke Energy Ohio, the obligation to provide an SSO and to serve as the provider of last resort.[13] IGS's proposal thus runs afoul of both existing Commission precedent and the law.

Furthermore, IGS's proposal is ill-conceived, as evident from the lack of detail IGS offered in these proceedings. Indeed, IGS failed to introduce into these proceedings any structure for its proposed retail auctions, instead casually referring to testimony offered in another proceeding.[14] And as this casual reference confirms, IGS has not fully developed the parameters for its sought-after retail auction such that an auction could realistically and efficiently occur prior to the commencement of the Company's next ESP. IGS failed to identify any bid documents, an auction schedule, auction parameters, or an auction manager. Rather, it summarily

[10] ESP II Stipulation, Section I.A., at pp. 4-5 (October 26, 2011)(IGS was a signatory to the ESP II Stipulation).
[11] Tr. XI, pp. 3264-3265, 3267.
[12] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order, at pg. 19 (March 26, 2014).
[13] R.C. 4928.14. *See also Id*, Finding and Order, at pg. 20 ("SSO should remain the default service").
[14] IGS Exhibit 10 (Direct Testimony of Matthew White), pp. 21-22.

contends that these details can later be determined in a collaborative. Such a proposal is inefficient, especially where the procurement process recommended by the Company is familiar to the Commission and auction participants, has successfully been implemented throughout the state, and is one that can be executed upon in a relatively expeditious manner.

IGS's proposal is further flawed in that it does not encourage competition. Under IGS's proposal, there would be one auction and it would be held prior to the commencement of the ESP term. This one auction would necessarily concern the SSO supply existing as of the date the auction was held, ignoring the potential for new load to enter the Duke Energy Ohio service territory. To address this omission, IGS anticipates smaller retail auctions for any new load, in which new CRES providers could participate. Such a proposal borders on absurd. Having multiple smaller retail auctions for new load that periodically enters the Duke Energy Ohio service territory cannot be cost-effective or competitively enticing.

As an alternative to its irrational concept of a retail auction for SSO supply, IGS offers a retail adder. This proposal is again not fully developed, as IGS seems to vacillate between an adder that would be paid by SSO customers (and, in turn, conveniently drive up the price against which IGS and other CRES providers compete) or by wholesale auction winners. IGS contends that this adder is necessary to eliminate any competitive disadvantage to CRES providers vis-à-vis wholesale auction participants. Critically, however, there is no statutory provision that allows an ESP to include artificial pricing adjustments to benefit CRES providers.

IGS's proposals lack merit, as this Commission has previously determined, and they must be rejected.

2. The Proposed CBP Plan is Reasonable.

Staff admits that the Company's CBP plan is appropriate and consistent with what the Company and other EDUs have used in the past.[15] However, Staff and Constellation/Exelon recommend certain modifications, allegedly aimed at reducing risk and uncertainty. But these recommendations serve only to inject more risk and more uncertainty, which yields higher auction prices.

a. Extending the procurement periods beyond the ESP term is unsubstantiated, invites risk, and deprives the Company of its right to propose the structure of its future SSOs.

Notwithstanding its general support for the CBP proposed by the Company, Staff suggests a modification to the Bidding Process Timeline. Specifically, Staff proposes that the Commission adopt an auction schedule that would result in the procurement of SSO supply for periods beyond the ESP term.[16] Staff's recommendation properly acknowledges the Commission's ability to approve certain elements of an ESP for periods beyond the term; however, it invites a great deal of risk and uncertainty into the process. Thus, although the stated purpose for this recommendation is to mitigate the undeniable risk caused by volatile wholesale market prices for energy and capacity, it introduces significant risk and uncertainty and thus fails in its intended purpose. Indeed, as even Staff witness Raymond Strom admitted, in his example of an extended auction timeline, wholesale suppliers would be required to participate in auctions in connection with an SSO that had yet to be defined. Such suppliers would not know what other terms the next SSO would entail. Potential suppliers would not know if there were any other riders that could influence the effect of switching, and they would potentially face, *inter alia*, legislative risk and risk associated with the wholesale markets. Mr. Strom agreed that, in light of such risks, suppliers bidding for products that extend into the next SSO would indeed include a

[15] Staff Exhibit 3 (Direct Testimony of Raymond Strom), pg. 3.
[16] Staff Exhibit 3, pg. 5.

premium for risk.[17] Notably, Constellation/Exelon recommends against extending the bidding timeline, suggesting it more appropriate to explore alternatives at a later time.[18]

Equally troubling, Staff's proposal binds Duke Energy Ohio to future procurement processes that may not the most appropriate for what are, today, unknown circumstances. There is no provision in Revised Code Chapter 4928 that compels a utility to accept a Commission-determined procurement process for a future SSO and, significantly, to implement that process before there is any Commission determination as to all components of that future SSO.

b. Allowing the Commission To Unilaterally Alter the CBP Plan, without More Detail, Injects Unnecessary Uncertainty and Risk.

Curiously, Staff argues against the Company's proposed early termination provision,[19] claiming that it will result in needless risk and, thus, higher auction clearing prices,[20] yet Staff simultaneously seeks to alter the CBP Plan to enable the Commission to revise that Plan, at any time and for presumably any reason. These positions cannot be reconciled. In this regard, Duke Energy Ohio first observes that Mr. Strom admitted that he did not attempt in any way to study or quantify the alleged risk associated with early termination and that he understood the Company would not seek to terminate early just for any reason.[21] Mr. Strom further agreed that there is volatility in the market process and market prices and that the SSO auction participants already face risk and uncertainty.[22]

As discussed below, Duke Energy Ohio's ability to terminate the ESP one year early is predicated a very specific occurrence – substantive changes in federal or state law that affect

[17] Tr. XIII, pg. 3827.
[18] Constellation/Exelon Brief, at pg. 18, opposing Staff's recommendation in favor of a future, more appropriate middle ground.
[19] Constellation/Exelon similarly opposes the early termination provision.
[20] Staff Brief, pg. 49.
[21] Tr. XIII, pg. 3815.
[22] Tr. XIII, pg. 3816.

SSOs and rate plans concerning same. The right that Duke Energy Ohio seeks to therefore reserve is not boundless but is instead one that allows for a timely and reasonable response to substantive changes in the law that implicate Chapter 4928.

In contrast to the narrow purposes for which the Company would seek to alter the duration of the ESP and associated CBP Plan, Staff recommends that the Commission be given the right to make changes to the process, without any parameters associated with same. Mr. Strom's recommendation carries with it the admission that there is no present understanding of what changes might be and whether such changes would detract from the attractiveness of the product offered or dissuade potential bidders.[23] Duke Energy Ohio appreciates the need for a competitive SSO procurement process and that, through experience, there may be appropriate modifications serving to enhance the process. But it further appreciates the need for auction participants and their contracting counterparties to know, in a timely manner, the criteria related to their financial undertakings and contractual supply commitments. Thus, Duke Energy Ohio posits that, to mitigate against the risk that is likely to result from undefined circumstances, the Commission consider identifying the conditions pursuant to which future changes to the CBP Plan may be made.

c. Effective advertisements, if consistently implemented in the state, may be appropriate.

Staff's final proposal with regard to the mechanics of the procurement process was that the auction manager place at least one advertisement in an appropriate publication for each auction.[24] Mr. Strom admitted that he is aware that one other Ohio utility has used such an advertisement but he is not aware of whether or not the advertisement solicited additional auction participants. Further Mr. Strom does not have any suggestions for appropriate publications for

[23] Tr. XIII, pg. 3838.
[24] Staff Exhibit 3, pg. 6; Staff Brief, p. 51.

placement of such advertisements. Mr. Strom provided conjecture, but no proof, concerning the potential value of this recommendation. To the extent the suggested advertisement would yield more bidder participation and thus its costs justified, Duke Energy Ohio does not object to this recommendation. But it appears premature at this time, given the lack of effectiveness and detail offered by Staff.

3. The Proposed Bid Documents are Reasonable.

In further compliance with the requirements of R.C. 4928.143, the Company provided the necessary documents to illustrate the details of the proposed auction process. However, Constellation/Exelon disagreed with some of the terms of the proposed Master Supply Agreement (MSA). Specifically, Exelon argued for seven changes to the terms contained in the proposed MSA. These will be addressed in the order presented in Constellation/Exelon's Brief. First, Exelon argues that the sixth recital paragraph in the MSA should be edited to delete the phrase: "including, without limitation, through participation in the base residual auction and incremental auctions administered by PJM." Exelon argues that this language is unnecessary.[25] The language is a recital – a statement of undisputed fact that explains that each SSO supplier will have capacity-related obligations in accordance with controlling PJM tariffs. It is not superfluous and, perhaps most important to Exelon, does not dictate specifically how the capacity-related obligations will be met. Rather, the language includes the caveat, "without limitation," thus leaving to successful auction winners alternatives for providing supply. This language has been approved by the Commission and accepted by suppliers. There is no legitimate justification to changing it now.

[25] Constellation/Exelon Brief, pg. 15.

Second, Exelon argues that three definitions should be corrected to reflect that the beginning of the ESP period is June 1, 2015, not July 1, 2015.[26] The Company agrees with this correction. The remaining suggestions – to change the definition of SSO Customers and to include a definition of percentage of income payment plan (PIPP) customers – appear unnecessary. "SSO Customers," as defined in the MSA, include Residential Customers, yet another defined term. And "Residential Customers" are those customers taking service under Duke Energy Ohio's residential rates (Rate RS, Rate ORH, Rate TD, Rate TD-13, Rate RS3P, and Rate RSLI).[27] PIPP customers are residential customers and there is thus no need to duplicate definitions to identify them a second time.

Next, Exelon argues that the Company should not be permitted to retain a unilateral right to terminate the ESP one year early.[28] For the reasons discussed elsewhere, the argument should be rejected.

Fourth, Exelon argues that "Generation Deactivation" and "Emergency Load Response" charges should be added back to the list of charges for which the Company retains responsibility. Exelon argues that this change should be made because these charges are unhedgeable for the supplier.[29] In other words, although Exelon urges the Commission to reject the Price Stabilization Rider (PSR) as contrary to the workings of a competitive market, it asks the Commission to protect it against market risks it allegedly cannot control. It is undisputed that the competitive market imposes risks upon its participants. And, as a participant, Exelon must be expected to bear risks, including those associated with providing SSO supply. The fact that its business model is perhaps more profitable by avoiding certain costs is unavailing. With the

[26] Constellation/Exelon Brief, pp. 15-16.
[27] *See* Duke Energy Ohio Exhibit 1 (Application), at Attachment F, page 11.
[28] Constellation/Exelon Brief, pg. 16.
[29] Constellation/Exelon Brief, pg. 16.

exclusion of “Generation Deactivation” and “Emergency Load Response” from the MSA, as proposed by the Company, it is acknowledged that the PJM Invoice, presented merely for illustrative purposes, will need to be consistent with that MSA.

Fifth, Exelon argues that the Company should modify the terms contained in the Declaration of Authority in the MSA so as to remove the Company’s reserved right to make changes.[30] Such recommendation is self-serving and contrary to the Company’s right to protect its customers as it deems appropriate. Part of that responsibility includes ensuring that the participants in its auctions are properly credentialed. This recommended change would remove carefully crafted customer protections. The Commission should recognize the value in allowing the Company the appropriate business flexibility to run its auctions in a manner consistent with good business practices.

Sixth, Exelon argues that it should not be required to participate in any resettlement or billing adjustment processes at PJM Interconnection L.L.C (PJM).[31] In other words, Exelon seeks to retain the current, optional resettlement process. Duke Energy Ohio has previously explained the purpose behind this proposed revision and incorporates that explanation here, reserving for the Commission the determination of whether to assist in the timely and efficient resettlement, by PJM, of any billing inaccuracies. In this regard, Duke Energy Ohio observes that the language it proposes for inclusion in the MSA is consistent with that proposed in respect of its Certified Supplier Tariff and such consistency must be maintained as PJM bills both wholesale suppliers and CRES providers.

Finally, Exelon argues that the values in the MSA Attachment B “Seasonal Billing Factor” are missing. The values are not missing, but, for purposes of a draft MSA, were simply

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30 Constellation/Exelon Brief, pp. 16-17.
31 Constellation/Exelon Brief, pg. 17.

not included. Indeed, the same approach was taken in the Company's last ESP proceeding. Such values would naturally be supplied at the appropriate time to allow suppliers to bid appropriately.

Staff did not offer any comments as the Company's proposed MSA, demonstrating acceptance thereof. Staff, however, proposes a change to the Communications Protocol. Specifically, Staff suggests that the obligatory word, "shall," be substituted by the word, "may," in the last paragraph of Section 3.6.[32] To the extent the Company and its identified auction manager retain the right to receive and review the report, this change is acceptable. But to ensure such a circumstance, it must be clear that, if requested by the Company or its auction manager, the auction consultant will produce its post-auction report and enable review or comment.

Significantly, the other bid documents – Bidding Rules, Part I and Part II Applications, and the Glossary – have gone unchallenged and therefore should be approved as proposed.

B. Provisions Relating to Pricing of Generation

1. The Proposed Modifications to Riders RC and RE Are Appropriate.

The Company has proposed a small number of modifications to existing Riders RC and RE, designed to carefully balance improvements to the competitive market with ratepayer price impacts. Staff does not oppose these changes in concept, only asking that the changes be phased in where the rate impact is significant.[33] Most intervenors similarly express no opposition to the modifications to these riders, not even addressing them in briefs. One, Ohio Energy Group (OEG), strongly supports the Company's proposal to retain separate charges for capacity and energy, with the resultant ability to allocate capacity costs on the basis of cost causation.[34] There

[32] Staff Brief, pg. 52.
[33] Staff Brief, pp. 47-47.
[34] OEG Brief, pp. 29-31.

are, however, a few that raise some concerns, all of which should be dismissed by the Commission.

As an initial matter, it is important for the Commission to note that the Company is financially indifferent to how the rates for Riders RC and RE are structured. These riders, by design, simply pass through to customers costs imposed by the wholesale auction winners providing SSO service. Although the cost allocation and rate design for Riders RC and RE have no financial impact on Duke Energy Ohio, the Company nevertheless believes that it has an obligation to propose a cost allocation methodology and rate design that, to the extent possible, is fair to all participants and promotes competition without unfairly advantaging or disadvantaging SSO auction winners versus CRES providers. And because the Company is financially indifferent to this issue, it is the only party offering an opinion on cost allocation and rate design, besides Staff, that can be objective. The proposals offered by the customer groups and CRES providers are partisan and designed to promote their own interests at the expense of others.

The first issue relates to the allocation of capacity costs to Rider RC on a demand basis. Specifically, the Office of the Ohio Consumers' Counsel (OCC) and Ohio Partners for Affordable Energy (OPAE) dispute the wisdom of Company's plan to allocate such costs based on the various rate classes' individual PJM 5 CP, or coincident peak, demands.[35] As explained by Duke Energy Ohio witness James E. Ziolkowski, PJM determines the capacity requirement for the Company's service territory on the basis of 5 CP demand.[36] Under cost-causation

[35] Duke Energy Ohio Exhibit 18 (Direct Testimony of James E. Ziolkowski), as supplemented by Duke Energy Ohio Exhibit 19 (Supplement to Direct Testimony of James E. Ziolkowski) and Duke Energy Ohio Exhibit 20 (Second Supplement to Direct Testimony of James E. Ziolkowski), pg. 9. (All subsequent references to Duke Energy Ohio Exhibit 18 should be deemed to include the supplements thereto, although their specific reference will not be stated, for ease of reading.)
[36] Duke Energy Ohio Exhibit 18, pg. 9.

principles, the Company would therefore allocate the market cost of capacity based on each class's contribution to that demand.

OCC and OPAE both argue that cost-causation principles demand the opposite approach. OCC asserts that, "because the charges Duke proposes to allocate on the basis of PJM peak demand are not billed to Duke by SSO suppliers on such basis," the proposal is inconsistent with cost causation.[37] Similarly, OPAE contends that "there is no evidence that the winning bidders in the SSO auctions would charge residential classes a cost premium, as compared to non-residential customers."[38] OCC points to the fact that the Company has no way to know what capacity costs are included in winning auction bids and suggests that, therefore, the "Retail Capacity Rider construct is merely an **estimate** of what SSO suppliers may pay for capacity – it is a fiction."[39]

But, of course, OCC and OPAE are wrong. The Rider RC calculation – far from being a fiction – is based directly on PJM's market price for capacity. Auction winners indisputably incur a cost for the capacity that they supply. OCC's suggestion that there are no capacity costs included in the SSO auction price is disappointingly ignorant of the nature of the market. The "full requirements" product supplied by SSO auction winners necessarily includes a component for capacity. The nature of the capacity market in PJM is such that the capacity price established in the reliability pricing model auctions is a reasonable proxy for that actual, even if unknowable, cost. OCC certainly agreed with that concept in the Stipulation in the Company's ESP II. The fiction – as OCC terms it – would be to assume, as OCC does, that there are no capacity costs included in the full-requirements products provided by the SSO auction winners.

[37] OCC Brief, pg. 89.
[38] OPAE Brief, pg. 17.
[39] OCC Brief, pg. 90 (emphasis added).

OCC lists six other concerns with this particular modification, some of which are also raised by OPAE, and all of which are refutable. OCC first complains that allocation on the basis of 5 CP is inconsistent with the 12 CP method that the Company **proposed** in **ESP II**. Then it goes on to complain that the ESP II proposal was, at that time, inconsistent with the 5 CP method being used by PJM.[40] If OCC can complain about the ESP II proposal not being consistent with the PJM methodology, then it **cannot** now complain that the ESP III proposal **is** consistent with that same methodology.

OCC also fails to mention that the source of capacity proposed by the Company in its ESP II filing was significantly different than what is being offered here in ESP III. In ESP II, the Company's initial filing, which included the proposed 12 CP allocation method, assumed that the capacity would be provided, primarily, from its owned resources. Therefore, it was a reasonable proposal by the Company to use an allocation methodology consistent with prior Commission-approved methodologies. The source of capacity in ESP III, on the other hand, is exclusively from the market.

It is a long-standing regulatory principle that costs for utility service should be allocated in a manner consistent with how those costs are incurred. It is indisputable that PJM charges its wholesale customers for capacity based on the 5 CP method and, indeed, OCC concedes this point.[41] Each rate class's contribution to the 5 CP is what determines the overall cost of capacity. Common sense would suggest that, because each class's contribution to the 5 CP is what determines the capacity cost charged from PJM, the costs to be included in Rider RC should be allocated in a similar manner. It is the only fair outcome.

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[40] OCC Brief, pg. 90; OCC Exhibit 46 (Direct Testimony of Anthony J. Yankel), pp. 5, 7, 9.
[41] Tr. XII, pp. 3520, 3521, 3523.

The second point raised by OCC is that Duke Energy Ohio will no longer be a Fixed Resource Requirement (FRR) entity during ESP III. OCC believes that it is "meaningless" to ascribe a cost to capacity when the Company does not have its own requirement to self-supply capacity.[42] But this argument does not mention – or change – the reality that capacity is a necessary component of SSO service and that there is a cost to provide that capacity, regardless of whether Duke Energy Ohio supplies capacity as an FRR entity or auction winners supply capacity as a part of their bids. That reality is not changed by the auction offering only a bundled product: an inclusive, energy and capacity product.

Third, OCC notes that the stipulation in ESP II "moderated the effect of the capacity cost allocation" that was included in the application in that case.[43] OCC immediately pulled back from this alleged argument by noting that the stipulation it referred to has no precedential value. The gratuitous undercutting of its own position is unnecessary, as the argument has no merit. What does it matter, in today's proceeding, that the stipulation in another proceeding moderated the effect of the capacity cost allocation?

Nevertheless, OCC implies that the final cost allocation resulting from a comprehensive settlement in the ESP II proceeding proves that the allocation proposed here is somehow harmful. In ESP II, the Company and all signatories agreed to a stipulation that, among other things, reduced the residential ratepayers' share of capacity costs to something less than their actual share, in the process of arriving at an overall resolution of a large number of issues. The fact that the Company again seeks to establish a cost allocation approach for Rider RC that is based on real contributions to demand does not mean that the proposal imposes a premium.

[42] OCC Brief, pg. 91; OCC Exhibit 46, pg. 7.
[43] OCC Brief, pg. 91.

OCC's fourth argument is directly refuted by the one it just made. Here, it suggests that the unbundling of the costs passed on by wholesale suppliers is "unprecedented," even though the application and stipulation in ESP II included a comparable unbundling.[44] Continuing from that start, and relying on witness Anthony J. Yankel, OCC asserts that the Company's proposal is inconsistent with cost-causation principles, both because the Company should be basing the rates on its own costs rather than those of the suppliers and because the Company did not consider all of the suppliers' costs.[45] OPAE, similarly, suggests that cost causation is ignored, as there is no evidence that the SSO suppliers would charge residential classes a "premium" for capacity.[46] As discussed above, the Company's proposal to allocate the capacity costs included in Rider RC is fully supported by the fact that such costs are inexorably tied to each class's contribution to the 5 CP. It is the only cost allocation methodology that fairly allocates costs to cost causers.

OEG's support for the Company's position clearly sets forth the counter-argument to the OCC and OPAE concern. As OEG points out, the unbundling is made necessary by the fact that the auction results in a bundled price. And the auction requires a bundled bid for capacity, energy, market-based transmission, and ancillary services because such a design helps to ensure more interest in the product and, therefore, a better final price.[47] OCC and OPAE "exploit" the cost-efficient auction design through their argument, hoping to have non-residential classes subsidize the higher capacity needs of the residential customers.[48]

OEG argues that the Company's proposed change is directly supported by cost causation, despite the opposite position taken by OCC and OPAE. Indisputably, the bundling in the auction and the subsequent unbundling in the rate for Rider RC does not change the reality (admitted by

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[44] OCC Brief, pg. 92.
[45] OCC Brief, pg. 92.
[46] OPAE Brief, pg. 17.
[47] OEG Brief, pg. 29 (citing Tr. II, pg. 321).
[48] OEG Brief, pg. 29.

OCC) that residential customers require more capacity than non-residential customers, relative to energy usage.[49] OEG stated the problem with outcome advocated by OCC and OPAE succinctly: "[The OCC/OPAE] proposal would socialize capacity costs among all customers and require higher load factor customer classes to subsidize lower load factor customer classes that on average use system resources less efficiently."[50]

In its fifth point, OCC complains about the Company's failure to provide "underlying load research data" to substantiate the proposed allocation method, noting that its data was "demonstrated" to be inaccurate in its most recent base rate case. The Company notes that, in addition to obvious irrelevancy, nothing was "demonstrated" in the cited rate case, as the case was ultimately resolved through a stipulation. OCC's support for impugning the integrity of the Company's load research data was to compare weather-normalized load data provided in the Company's most recent rate case, Case No. 12-1682-EL-AIR, *et al*., to **actual** loads for the twelve-month period prior to the test year used in that case.[51] OCC inexplicably ignored what should be obvious reasons for the differences. First of all, the 2012 data used in the last rate case was one year later than the "actual" data OCC compared it to. Load growth alone would explain some of the difference from one year to the next. Second, the 2011 data, apparently relied upon by OCC witness Yankel, was **actual** data, whereas the data from the rate case was weather-normalized. OCC is comparing apples to oranges and, consequently, its ill-considered attempt to undermine the Company's load data should be dismissed.

Finally, OCC wrongly asserts that the calculation of Rider RC includes both Duke Energy Ohio and Duke Energy Kentucky, Inc., (Duke Energy Kentucky) retail loads. In his direct testimony, OCC witness Yankel asserted that Duke Energy Ohio inappropriately included

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[49] OCC Exhibit 32 (Direct Testimony of Matthew Kahal), pg. 20.
[50] OEG Brief, pg. 30.
[51] OCC Ex. 40, at pg. 14.

Duke Energy Kentucky's load when it applied the formula agreed to in the ESP II Stipulation to calculate Rider RC.[52] During his cross-examination, it was apparent that Mr. Yankel had no understanding of the formula being used to calculate Rider RC. He had no understanding of how the PJM capacity markets worked; and mistakenly confused information provided in discovery showing demand for Duke Energy Ohio that included its wholly owned subsidiary, Duke Energy Kentucky, and other wholesale load with Duke Energy Ohio's own retail demand that included reserves as required under PJM's rules.[53] Despite the fact that Mr. Yankel's testimony on this issue was fully discredited during cross-examination, OCC willfully ignores the truth on this issue, merely reiterating Mr. Yankel's discredited argument in its initial brief. As the evidence presented in the case showed, the Company did **not** include Duke Energy Kentucky's load in the calculation of Rider RC.

The Retail Energy Supply Association (RESA) also raised concerns about proposed changes to Riders RC and RE. RESA first disputed the wisdom of removing the demand component in rates DS, DP, and TS, on the ground that doing so would remove the incentive for any particular customer to reduce demand. But RESA argued for only one side of the equation, ignoring the impact of the current structure on low-load-factor customers as well as the market itself. The Company's change is designed, again, with balance in mind. First of all, the Company's proposed rate design does, in fact, maintain the existing incentives to reduce demand. The proposed rates are designed, just as the rates in place today, to reward customers for improving load factors. RESA's suggestion to the contrary reflects either a misunderstanding of the proposed rate design or simply ignores that continued benefit. The Company acknowledges that incentivizing demand reduction is a worthwhile goal; however, an equally

[52] OCC Exhibit 40, pg. 16.
[53] Tr. XII, pp. 3531-3538.

worthwhile goal is being fair to all customers. Duke Energy Ohio stands by its proposed changes to rate design as being valuable improvements to the market, balancing both of these goals. As the Company has stated throughout its case, the Commission has the responsibility to ensure that neither CRES providers nor SSO auction winners have an advantage or disadvantage when competing for retail load.[54] RESA's proposed rate design for SSO service is intended to produce such an advantage, creating incentives for certain customers to switch away from SSO service.

RESA is also concerned about the compression of the rate differential between summer and winter, for residential and small commercial customers. Rather than phase in these changes, as suggested by Staff,[55] RESA would simply talk about them for the next three years. Those who would benefit from the levelizing and rationalizing effect of the Company's proposal might disagree. RESA argues that the Company's proposal will "thwart customer efforts to rely on usage data to control usage, will eliminate the incentive for customers to reduce peak usage, and will not correspond to how rates are developed and offered by CRES providers."[56]

RESA is wrong on all counts. First, customers would have no less access to data under the Company's proposed rate design than they currently have. Second, customers continue to have incentives to reduce energy consumption, as each kWh of reduction is rewarded with a reduction in the overall bill. And finally, a review of the Apples-to-Apples chart, available on Commission's website, reveals that **all** of the existing published offers from CRES providers for residential service and small commercial service appear to be simple flat rates (*i.e.*, the same per

[54] *See, e.g.*, Duke Energy Ohio Exhibit 2 (Direct Testimony of James P. Henning), pg. 6; Duke Energy Ohio Exhibit 6, pp. 3-4, 17; Tr. II, pg. 321.
[55] Staff Brief, pg. 48.
[56] RESA Brief, pg. 25.

kWh rate for all levels of consumption) – no different than the rates being proposed by Duke Energy Ohio for SSO service.[57]

2. The Proposed Modifications to Rider SCR Should Be Approved

The Company proposed the Supplier Cost Reconciliation Rider (Rider SCR) to continue to provide a means by which to true up the differences between the invoiced cost of SSO service and the revenue collected by Duke Energy Ohio through Riders RE and RC. As is currently the case, Rider SCR will also recover the costs associated with conducting the auctions, as well as costs associated with any audits, consultants, or other incremental costs incurred by or billed to the Company to procure SSO service.[58] Rider SCR, as it currently exists, was the product of a stipulation agreed to and adopted and approved by the Commission in Duke Energy Ohio's previous ESP proceeding.[59] As created and as currently proposed, Rider SCR has a necessary provision that converts it from being bypassable to being non-bypassable when a cost trigger of 10 percent is reached. Only one party opposed the continuance of this rider in its current form.

RESA witness Lael Campbell argued that RESA does not support the continuance of this provision. Mr. Campbell believes that once the 10 percent trigger is reached, the Company should be required to apply to the Commission for a cost recovery mechanism and carry the burden of proof for demonstrating that such a mechanism is the best solution.[60] However, Mr. Campbell admitted that he did not have any knowledge of how such a proceeding might be resolved. He further admitted that the Company is entitled to recover these costs.[61]

Introducing unnecessary litigation has the potential to significantly delay the recovery of costs incurred by Duke Energy Ohio in its provision of SSO service. As these costs are simply

[57] http://www.energychoice.ohio.gov/ApplesToApples.aspx, accessed during week of Dec. 22, 2014, per administrative notice taken, Tr. II, pg. 477.
[58] Duke Energy Ohio Exhibit 6, pg. 19.
[59] ESP II Stipulation, pg. 8; ESP II, Opinion and Order, pg. 12.
[60] RESA Exhibit 3 (Direct Testimony of Lael Campbell), pg. 17.
[61] Tr. X, pg. 2694.

pass-through charges, there is no question that Duke Energy Ohio is entitled to full recovery; therefore, the only issue that would be before the Commission in such a proceeding is whether the charges under Rider SCR would be bypassable or not. Mr. Campbell's admission that he has no idea how the legal process would be resolved means that he likewise has no idea how long such a proceeding would take to be resolved. The conditions that would lead to the Rider SCR exceeding the 10 percent threshold would likely persist for more than one quarter (*i.e.*, the frequency of the Rider SCR filings); so, protracted litigation over the question of bypassability could unnecessarily drag on for multiple periods – and all the while, the balance of dollars to be collected under Rider SCR would continue to grow.

Allowing an unreasonably large balance (*i.e.*, greater than the 10 percent threshold) of under-recovery to flow through Rider SCR on a **bypassable** basis would risk undermining the competitive balance between SSO auction winners and CRES providers. The SSO price-to-compare (*i.e.*, all bypassable charges) would increase relative to CRES offers at an accelerating pace, leading to more switching and an ever increasing imbalance between the revenue collected under Riders RC and RE and the payments to SSO auction winners. The "spiral" can easily be avoided by including a reasonable threshold past which Rider SCR automatically becomes non-bypassable.

The Commission should approve the Rider SCR as proposed by the Company in its Application.

IV. PERMITTED ASPECTS OF THE ESP

A. The Overall Rate Structure of Duke Energy Ohio Is Reasonable.

OCC raises tangential arguments to support an argument that some of the riders proposed by the Company should be rejected. In particular, OCC argues that the Company's ESP does not adequately satisfy the requirements of R.C.4928.02(A) in ensuring availability to consumers of reasonably priced retail electric service. In support of this notion, OCC witness James Williams raised issues related to affordability to demonstrate an alleged lack of regard for protection of at-risk populations. However, Mr. Williams admitted that his view of "reasonably priced" as applied to electric customers is synonymous with, "as low as possible."[62] And Mr. Williams agreed that it is reasonable to use other Ohio utilities as a benchmark for reasonableness.[63] When asked, he admitted that Duke Energy Ohio's rates were the lowest in the state,[64] and that, based upon a comparison with the rate of inflation, for the years 2011 to the present, the increases in Duke Energy Ohio bills have been lower than inflation.[65] Thus, by Mr. Williams's own standards, the Company's rates are in fact within the bounds of reasonableness.

Mr. Williams further attempted to support his argument by claiming that the Company's disconnection of customers is higher than it should be. Mr. Williams readily admits that disconnection may occur for reasons other than unreasonable costs,[66] but maintains that the Commission should consider this in evaluating the ESP. He does recognize that customers who do not pay may be disconnected pursuant to statutory and regulatory requirements, and that paying customers are saddled with costs related to nonpaying customers.[67] Although he was aware of a Commission investigation into credit and collection policies, he believed that the Commission's directive to Duke Energy Ohio to accelerate its collections process was not relevant, despite acknowledging that the Company has only one billing system that serves combined gas and electric customers.[68]

[62] Tr. XII, pg. 3553
[63] Tr. XII, pg. 3554
[64] Tr. XII, pg. 3557.
[65] Tr. XII, pg. 3567, and Duke Energy Ohio Exhibit 36.
[66] Tr. XII, pg. 3568
[67] Tr. XII, pg. 3569.
[68] Tr. XII, pg. 3574

Finally, Mr. Williams expressed a concern for an increase in the number of customers on the PIPP. But Mr. Williams agreed that customers may choose to take advantage of the PIPP program for many reasons, including, perhaps, having lost a job or other life circumstances unrelated to the rates being charged by the Company.[69] So while Mr. Williams claims that the Company did not adequately address affordability for its customers, what Mr. Williams is really stating is that he does not deem the Company's efforts to address affordability adequate in spite of Duke Energy Ohio having the lowest rates in Ohio. Mr. Williams does not make a compelling argument and his concerns should be ignored

Also discussing overall structure, Walmart complains about the purported over-complexity of the Company's rates. Although Walmart witness Steve W. Chriss admits that Ohio law allows for an ESP to include a "broad array of utility costs," he characterized the Company's rate structure as increasing "the complexity of an already extraordinarily complex set of rates."[70] In advancing this contention, Mr. Chriss wrongly contends in his direct testimony that the Company has proposed eight new riders, to replace existing mechanisms, with these new riders being Rider ESSC, Rider LFA, Rider SAW, Rider SAW-R, Rider ECF, Rider EEPF, the PIPP discount, and Rider EER.[71] In actuality, Duke Energy Ohio is proposing to terminate these eight riders,[72] thereby eliminating the alleged complexity to which Mr. Chriss initially contended they contribute.[73]

In addition to manufacturing claims of complexity through an erroneous description of the Company's proposed ESP, Walmart contends that customers must examine a multitude of

[69] Tr. XII, pg. 3577.
[70] Walmart Exhibit 1 (Direct Testimony of Steve W. Chriss), pp. 4-5.
[71] *Id*, at pg. 5.
[72] Duke Energy Ohio Exhibit 18, at Attachment JEZ-4, pg. 1.
[73] *See* Tr. VII, at pp. 2097, wherein Mr. Chriss admitted that he mischaracterized the Company's filing with regard to riders that are expiring. Despite this admission, Walmart persists, in its Brief, to describe the rate structure as extraordinarily complex.

riders in order to complete a bill analysis and that the Commission should consolidate these riders into base rates so that customers "have the information needed to make 'effective customer choices.'"[74] Again, Walmart miscomprehends, both the law and the Company's proposal.

For purposes of making informed and effective decisions in respect of choice, customers need only compare four riders – Rider RC, Rider RE, Rider AER-R, and Rider SCR – to a CRES provider's offer. Specifically, these four riders that comprise the price to compare are relevant for purposes of making effective and informed choices, as these are the riders against which a CRES offer should be evaluated.[75] To the extent a more detail bill analysis is desired, the Company's rate structure readily enables same.

The Company's rate structure, as effective June 1, 2015, is not inordinately complex. In fact, it is not complex at all. It correctly identifies components of the price to compare, so that customers can make informed, effective decisions with regard to participation in choice. It lawfully includes rider mechanisms as provided for by statute or Commission decision that enable reconciliation of costs in a timely and efficient manner[76] and, consequently, mitigates the need for more frequent and administratively burdensome rate cases. Indeed, even Walmart's witness appreciates what the law authorizes[77] and Walmart's mere displeasure with the law is insufficient to defeat the rate structure as described in the Company's application and supporting testimony. Such a conclusion has been affirmed by the Commission through its evaluation into

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[74] Walmart Brief, pp. 4-5.

[75] Duke Energy Ohio Exhibit 18, Attachment JEZ-4, at pg. 3; Tr. XI, pg. 3305.

[76] *See, e.g., In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, *et al*., Opinion and Order, at pp. 16-18, 42 (December 17, 2008)(approving separate rider, to be reconciled annually, for costs associated with the Company's grid modernization program, aka SmartGrid); and ESP II Opinion and Order, at pg. 50 (November 22, 2012)(acknowledging separate proceeding through which Company would seek approval of a distribution revenue decoupling mechanism). *See also* R.C. 4928.05(A)(2), which authorizes "recovery, through a reconcilable rider on an electric distribution utility's distribution rates, of all transmission and transmission-related costs," and R.C. 4928.143(B)(2)(h), which authorizes provisions related to single issue, distribution ratemaking.

[77] Tr. VII, pp. 2098-2099 (Walmart witness Chriss recognizes "what the ESP allows." He further concedes that, although he doesn't like it, a utility may seek distribution cost recovery via riders.

the competitive retail market in Ohio. During the measured analysis completed by the Commission, various issues related to the broader topic of customer billing were addressed. And as a result of that analysis, certain recommendations or directives were made by the Commission, many of which were aimed at uniformity and standardization, so as to enable transparency. Importantly, however, the Commission did not conclude that Ohioans were confused by the number of riders on their electric bills or otherwise dissuaded to participate in customer choice as a result.[78] Indeed, there was no such finding by the Commission, affirming that the rate structure referenced in the Company's filing here is appropriate.

B. Provisions Relating to Distribution

1. The Proposed Distribution Capital Investment Rider Should Be Approved.

Duke Energy Ohio's proposed distribution capital investment rider (Rider DCI) provides a mechanism by which the Company may improve service and reliability by addressing outages before they occur. It is precisely this kind of proactive management of the distribution system that should be championed by intervening parties that support reliable, safe, affordable electric distribution service on behalf of their respective constituent customers. Duke Energy Ohio witness Marc W. Arnold explained in detail what programs are needed and why. However, even though the programs under the rider are anticipated to forestall or prevent the likelihood of outages resulting from antiquated distribution infrastructure, some parties remain opposed.[79] For the reasons set forth below, the Commission should approve Rider DCI.

There is no doubt that Duke Energy Ohio's reliability currently meets all of the Commission's regulations and standards and has been improving over the past five years.

[78] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order, at pp. 25-32 (March 26, 2014)(discussion of bill format void of any reference to utility bills containing too many riders).

[79] GCHC, OPAE, OCC, and OMA.

However, much if not all of the improvement that has been accomplished since 2009 is related to distribution automation deployed in the Company's grid modernization program.[80] While the existing level of improvement will be maintained, it is unclear how much additional improvement will occur as that grid modernization comes to its natural end. Thus, the Company is focusing on the future and seeking to ensure that it provides safe, reliable service over the long term. The programs proposed and explained by Mr. Arnold will enhance reliability and prevent outages, as well as protecting the public from possible safety hazards.

The Company submitted a comprehensive program for replacement of aging infrastructure that will enable it to act proactively to avoid outages. While all of the programs are designed for this purpose, Mr. Arnold explained in greater detail, at hearing, why some of them are vital to the plan. For example, the Underground Cable Injection Program and the Underground Cable Replacement Programs working together are designed to replace underground cables that deteriorate over time due to certain soil conditions.[81] While the Company does currently replace cable due to deterioration, it does so reactively, not proactively.[82]

The DTUG-Online DGA, Sump Pump and Oil Monitoring Program[83] involves installation of equipment that can monitor equipment remotely. This will permit the Company to monitor vaults, manholes, transformers, etc., remotely and more frequently. Mr. Arnold explained that transformers are very expensive pieces of equipment, worth approximately $250,000 each, and that "the downtown system is very dynamic."[84]

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[80] Tr. IX, pg. 2423.
[81] Tr. IX, pg. pg.2390.
[82] *Id*.
[83] DTUG refers to Distribution Transformers Underground, and DGA refers to Dissolved Gas Analysis.
[84] Tr. IX, pg. 2391

Mr. Arnold further explained the Manhole Lid Retrofit Program, which would provide manhole covers that are locked down. Manhole covers weigh approximately 240 pounds and cover areas that contain flammable gases. Manhole covers that are not secure can be launched into the air and into the public way if those gases ignite. Thus, this program is a vital program to ensure safety of the public.[85] Mr. Arnold testified that, based upon his experience, the launching of manholes has happened frequently on other utilities' systems.[86] Likewise, securing the manhole covers provides a measure of security, keeping members of the public from accessing underground equipment.[87]

Another program that is proposed for inclusion in the Company's Rider DCI is the Manhole/Vault Capital Rebuild Program. This initiative includes rebuilding manhole vaults. While the Company does currently rebuild a certain number of vaults that are categorized as a priority, the program is designed to proactively address any problems with vaults.[88]

Another program involves replacing 600 volt cable. Some cable is comprised of paper and lead and is subject to failure as it has been in service for extended periods of time. As it fails, it leaks oil.[89] Again, the Company proposes to replace that cable, proactively avoiding problems. Yet another program involves replacement of vault/network protectors. These pieces of equipment are antiquated and difficult to replace. Consequently, during an outage, it is difficult to accomplish the repair and can require traffic lane closures, sidewalk closures, etc.[90] Still another involves redesigning and rebuilding congested and overcrowded manholes and vaults. Such work will provide enhanced safety to the Company's employees and contractors.

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[85] Tr. IX, pg. 2392
[86] Tr. IX, pg. 2393
[87] Tr. IX, pg. 2394
[88] Tr. IX, pg. 2395
[89] Tr. IX, pg. 2396
[90] Tr. IX, pg. .2397

The list of programs contained in the exhibit attached to Mr. Arnold's Direct Testimony[91] includes numerous vital safety and reliability elements, all of which will unquestionably contribute to distribution improvement. Duke Energy Ohio witness Mark Arnold, responding to questions from OCC, provided ample detail around all of the programs to be included in Rider DCI. Each of the programs involves repair and replacement of antiquated and at-risk infrastructure that would likely create service problems and outages if not addressed. While Mr. Arnold agreed that the Company would always seek to remain in compliance with the Commission's regulations, he testified that this rider is needed so that the Company many proactively address the work that can otherwise only be addressed on a reactive basis. Duke Energy Ohio's proposed Rider DCI components are all consistent with the concept of providing infrastructure modernization. Duke Energy Ohio has demonstrated a need for Rider DCI and the Commission should approve the rider.

Despite the extensive testimony provided, some parties refuse to acknowledge the benefits of these programs. OCC acknowledges that Ohio law permits the inclusion of infrastructure modernization in an ESP,[92] but resolutely refuses to recognize the value of the programs proposed. OCC offered a witness to oppose Riders DCI and DSR, but Mr. Jerome D. Mierzwa's general opposition to cost tracking mechanisms clouded his ability to consider those offered by the Company in this proceeding. Mr. Mierzwa believes that cost trackers should never be approved by a regulatory commission unless the cost items for which they recover are substantial, unpredictable, generally beyond the utility's control and not essential to protecting the utility from dire financial situations.[93] Although Mr. Mierzwa readily agreed that Duke Energy Ohio was entitled to recover through a separate filing subject to the provision that all

[91] Duke Energy Ohio Exhibit 21, Attachment MWA-7.
[92] R.C. 4928.143(B)(2)(h).
[93] OCC Exhibit 45 (Direct Testimony of Jerome D. Mierzwa), pg. 4.

parties could review costs He also agreed that his investigation was limited to material that was provided to him by counsel; he did no independent investigation of any kind.[94] He did not review a decision by the Commission in a FirstEnergy proceeding in which distribution investment riders were approved. And he was even unaware that a FirstEnergy decision was referenced in the testimony of Duke Energy Ohio witnesses Peggy A. Laub and William Don Wathen Jr., although he claimed to have read those witnesses' testimony. He further acknowledged that although a given case may have been relevant, "I just didn't look up every case."[95]

Mr. Mierzwa testified that riders in general are contrary to sound ratemaking principles, and that, to the extent the Ohio Commission has approved riders, he would have not approved them, thus failing to recognize that riders have become established policy in Ohio.[96] Mr. Mierzwa further acknowledged that he opposed Duke Energy Ohio's Rider DCI because he thought it would reduce Duke Energy Ohio's incentive to control cost. But he exhibited his lack of understanding with respect to the rider mechanism in Ohio as he admitted his belief that the rider would provide for cost recovery automatically, with no review procedure.[97] Indeed, he further admitted that he did not know to what extent the Ohio Commission conducts reviews of cost trackers before authorizing recovery of costs.[98] He did admit that a utility that anticipates a Commission review of costs would have a greater incentive to control costs depending on the extent of the review.[99]

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[94] Tr. XI, pg. 3045.
[95] Tr. XI, pg. 3048
[96] Tr. XI, pg. 3049
[97] Tr. XI, pg. 3051.
[98] Tr. XI, pg. 3052
[99] *Id*.

Mr. Mierzwa admitted that he reviewed and relied upon certain pages of the AEP Ohio ESP II decision in Case No. 11-346-EL-SSO.[100] However, despite having claimed to have review these pages, Mr. Mierzwa had very little substantive knowledge of the facts of the case. He did not review any of the evidentiary record or any subsequent filings associated with the distribution capital investment rider that was approved in that proceeding.[101] Thus, although Mr. Mierzwa claims to have formed his opinion in this case by reference to an AEP Ohio case, such an uninformed opinion presents little or no value with respect to Duke Energy Ohio's Rider DCI. The undisputed facts are that Mr. Mierzwa had no idea how the rider process works in Ohio and had no basis upon which to argue that Duke Energy Ohio's Rider DCI should not be approved.

Staff does not oppose the Company's proposed Rider DCI but made several recommendations for modifications. Staff, as well as OCC, recommended that no general or common plant should be included in the calculation, and that the Company not be permitted to incorporate projected plant balances in establishment of the revenue requirement. Furthermore, Staff asked that the rider sunset after a period of time. These recommendations are contrary to Staff positions in other, previous cases and would, if accepted, therefore create inconsistencies with prior Commission precedent and be unfairly discriminatory against Duke Energy Ohio. As discussed below, the FirstEnergy utilities have similar riders that do include general plant, AEP Ohio is seeking a rider that includes general plant, and the FirstEnergy utilities' riders are based on forecasted data. These precedents must be respected.[102]

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[100] Tr. XI, pg. 3045.
[101] Tr. XI, pg. 3055.
[102] *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d 512, 525, 2011-Ohio-1788, 947 N.E.2d 655 (2011).

In a 2010 proceeding, the FirstEnergy utilities proposed a distribution rider that included general and intangible plant and further proposed the use of forecasted data.[103] Staff witnesses Robert Fortney, Hisham Choueiki, and Tamara Turkenton filed testimony in that proceeding and, in doing so, did not oppose the proposed rider and recommend any additional constraints (such as a mandated sunset). The Commission's Opinion and Order in the proceeding approved the companies' rider proposal. Likewise, in a later FirstEnergy proceeding, the Commission permitted recovery of general and intangible plant for a similar rider.[104] In yet another ESP proceeding, AEP Ohio proposed a distribution rider substantially similar to the one in this case. In that proposal, AEP Ohio requested the use of actual rather than forecasted data and did not propose exclusion of general plant. The Commission's Opinion and Order approved the rider but imposed only one condition, as proposed by Staff: that the rider include accumulated deferred income tax against rate base.[105]

2. Approval of Rider DCI Compels Neither a Base Rate Case Nor a Fixed Termination Date.

Another proposed limitation on Rider DCI is that of a sunset provision. Walmart's contention that Duke Energy Ohio has failed to meet its burden of proof, as discussed above, because of its proposed Rider DCI rings hollow. The General Assembly has expressly authorized inclusion, in an ESP, of provisions related to single issue distribution ratemaking.[106] Yet, despite

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[103] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No.10-388-EL-SSO, Application, pp.15,16 (March 23, 2010).
[104] *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order, pg. 10 (July 18, 2012).
[105] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to 4928.143, Ohio Rev.Code, in the Form of an Electric Security Plan,* Case No.11-346-EL-SSO (AEP Ohio ESP II), Opinion and Order, pg. 26 (August 8, 2012).
[106] R.C. 4928.143(B)(2)(h).

this authorization and the Commission's repeated recognition of same,[107] Walmart seeks to impose unreasonable limitations on Rider DCI, compelling the Company to file a base rate case no later than May 31, 2018.[108] Staff recommends a similar limitation on Rider DCI; namely that it terminate on May 31, 2018, followed by a base rate case, unless its continuation is expressly approved in a subsequent SSO proceeding.[109] These recommendations should be rejected.

Walmart's proposal of a base rate case no later than May 31, 2018, will not eliminate the allegedly complex rate structure of which it complains. Rather, many of the riders identified by Walmart as included in the extraordinarily complex design would not be consolidated into base rates (*e.g.*, Rider RC, Rider RE, Rider SCR, Rider AER-R, Rider UE-GEN, Rider PSR, Rider BTR). The complaint, therefore, is illusory; contrived because Walmart disagrees with Ohio's General Assembly. Perhaps realizing this fact, Walmart secondarily posits that a base rate case "is a good thing" because the costs otherwise recovered via Rider DCI and Rider DSR, for example, would be put into base rates and other financial metrics around Duke Energy Ohio's base rates updated.[110] In making this contention, Walmart does not oppose Rider DCI or the related return on equity (ROE) proposed by the Company.[111] Rather, Walmart merely surmises

[107] *See, e.g., In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, *et al*., Opinion and Order, pp. 16-18, 42 (December 17, 2008)(approval of separate rider through which costs associated with Duke Energy Ohio's grid modernization program would be recovered); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and 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. 10-388-EL-SSO, Opinion and Order, pp. 11-12, 46-47 (August 25, 2010)(approval of Delivery Capital Recovery Rider to recover return on and of plant in service associated with distribution, subtransmission, and general and intangible plant); ESP II Opinion and Order, pg. 50 (November 22, 2012)(acknowledging separate proceeding through which Company would seek approval of a distribution revenue decoupling mechanism); and *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order, at pp. 42-47 (August 8, 2012)(approval of separate Distribution Investment Rider, to provide capital funding on distribution infrastructure, and separate).
[108] Walmart Brief, pp. 6-7.
[109] Staff Brief, pg. 32.
[110] Tr. VII, pg. 2099.
[111] Id.

that regulatory lag is mitigated through the rider's existence and, absent a base rate case, the Company would recover more than its distribution revenue requirement.[112] But this contention incorrectly assumes that regulatory lag is the **only** risk that the Company faces. And such is not the case, as even Walmart admitted.[113] But, despite this admission, Walmart performed no analysis of the impact of Rider DCI on the Company's distribution revenue requirement or the business risks that would continue to challenge Duke Energy Ohio subsequent to Rider DCI's approval.[114]

The contention from Walmart that a base rate case be filed no later than May 31, 2018, and Staff's related recommendation of an explicit termination date for the rider undermine its very purpose, as articulated by Ohio's legislature and reinforced by the Commission.

R.C. 4928.143(B)(2)(h) sets forth the requirements applicable to a single issue, distribution rider. To paraphrase, in approving such a request, the Commission must examine the reliability of the utility's distribution system, ensure that the expectations of the utility and its customers are aligned, and ensure that sufficient emphasis and resources are directed to the reliability of the utility's distribution system. The legislature further contemplated that the utility may, under this provision, seek a long-term infrastructure modernization plan. In other words and as confirmed by the Company's existing grid modernization program, every component of an ESP is not limited in duration such that it must terminate when the ESP in which it was initially approved expires.

The rationale behind this statutory provision is evident – distribution infrastructure programs are continuing in nature. A distribution system is complex and evolving, in the wake of technological advancements, continuously aging equipment, and ever-changing customer

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[112] Id, pg. 2100.
[113] Id.
[114] Id, pp. 2100-2101.

expectations. The maintenance and operation of such a system cannot, therefore, be confined to a discrete period of time; these efforts are ongoing. And as the Commission has declared, they should be proactive: "[w]e believe that it is detrimental to the state's economy to require the utility to be reactionary or allow the performance standards to take a negative turn before we encourage the electric utility to proactively and efficiently replace and modernize infrastructure… ."[115] The need to efficiently plan and implement programs under Rider DCI, so as to maximize the benefits afforded thereunder, should not be compromised by an explicit termination date.

Duke Energy Ohio submits that the Commission should follow its own established precedent. The Commission should approve Duke Energy Ohio's Rider DCI without imposing Staff's newly devised limitations.

3. Rider DSR

Consistent with provisions of R.C. 4928.143, Duke Energy Ohio proposed Rider DSR to recover costs of storm restoration in excess of amounts included in base rates. The nature of the rider mechanism and the support for it were described in detail by Duke Energy Ohio witnesses Laub and Wathen. Only OCC and Staff provided comments in their initial briefs related to Rider DSR. OCC merely argued that the Commission should not approve the rider without providing for a detailed review of costs submitted to the Commission. Staff witness Jeffrey Hecker made a number of recommendations that, if implemented, would unacceptably undermine the Company's proposal. Many of Staff's arguments indicate a lack of understanding with respect to storm management, ignore the manner in which such costs are recovered in base rates, and overlook both storm restoration realities and established Commission precedent.

[115] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO*, et al.*, Opinion and Order, pg. 47 (August 8, 2012).

First, the Company does not oppose the Staff's recommendation to allow for recovery of storm costs in excess of amounts in base rates exclusively via a rider, such as the Rider DSR being proposed. Also, the Company can allay concerns expressed by the OCC regarding the level of review required of such a rider as the Company anticipates an annual review of the storm costs to be deferred. As will be discussed below, maintaining recovery outside of rate case will require an adjustment to the 'base line' of storm costs at the time new rates are set (*i.e.*, the effective date of new electric distribution base rates) in a subsequent rate case.

Staff witness Hecker recommended several changes to the Company's proposed rider.[116] His recommendations include:

- Recovery of deferred incremental storm costs should only occur via Rider DSR and not by amortizing the deferral in base rates.
- Audits of costs to be recovered via Rider DR be performed only at the time recovery is sought, rather than annually.
- Recovery of any amounts to be collected via Rider DSR should occur over a one-year period, with the option of extending the recovery period if the amount is deemed "large."
- Carrying costs should accrue on the current year's deferrals only after the end of the year in which accrued. Balances carried over from prior years would continue accruing carrying costs. Staff also recommends that carrying costs cease once recovery begins.
- Only incremental labor should be included for recovery.

[116] Staff Exhibit 4, *passim.*

- Overtime pay for management personnel should not be eligible for deferral or recovery.
- Reimbursements received by Duke Energy Ohio for providing mutual assistance should be credited to customers.

Each of these recommendations will be discussed below.

a. Recovery Exclusively via Rider

Staff's first recommendation is that there should be no base rate recovery of deferred storm costs. In general, the Company does not object to this proposal; however, all parties should be aware that the baseline storm costs (*i.e.*, the $4.4 million from Case No. 12-1682-EL-AIR) will need to be updated at the time new rates are set, subsequent to Commission approval of the Company's next electric distribution base rate case.

b. Staff Audits

Staff states that it intends to perform an audit of the expenses and offsetting revenues at the time the Company seeks to implement Rider DSR (*i.e.*, when the balance of the deferral exceeds $5 million) "regardless of what year those expenses and revenues occurred."[117] Staff's proposal is at odds with the Company's testimony and OCC's proposal[118] that Staff review the amounts to be included in the deferral on an annual basis. It may take a number of years for the deferral of storm costs to reach the threshold that would invoke the Rider DSR. Delaying review of the underlying costs will unnecessarily add a level of difficulty in providing witnesses and other record support for the deferral, where the expenditures were based upon information developed many years prior to the review. No matter how well records are managed, the people who are involved with storm restoration may change jobs or retire, and memories may fade. The

[117] Staff Brief, pg. 37.
[118] OCC Brief, pg. 88.

most effective time to review such data is soon after the occurrence of the event that created the costs. The Company will make the decision each year to create a deferral related to storm costs and under generally accepted accounting principles there must be a level of certainty that such costs are recoverable. Recording deferrals potentially years before the regulator reviews the prudency of such costs unnecessarily creates dilemmas for the Company's accounting policies. The Company recommends that Staff annually review the net costs to be included in the regulatory asset\liability rather than waiting for some unknown period of time to conduct any audit.

c. Recovery Period of Rider DSR

The Company does not oppose Staff' s recommendation regarding the amortization recovery period as long as an opportunity to extend the period beyond a one-year time frame as circumstances require is expressly provided.

d. Carrying Charges

The Company agrees that it is appropriate to begin accruing carrying charges on the current year's deferrals only after the end of the calendar year. All deferrals for prior years would continue accruing carrying costs for every period after the year those prior years' costs were incurred until the costs are fully recovered.

The Company does not agree with Staff's proposal that carrying charges cease after recovery begins. To aptly illustrate this point, consider the nature of a thirty-year home mortgage where, for the first five years, the customer pays only the interest on the loan and, for the next twenty-five years pays down the balance of the loan. Applying Staff's logic, the customer would only have to pay the principal on the loan for years six through thirty and would be excused for paying any interest on the loan for that period. Similar to the experience of the lender of such a home loan, there is a time value of money associated with the deferral. As long as the deferral remains unrecovered, much like the balance of an outstanding home loan, there is a time value associated with that money. And just as a bank is entitled to recover carrying charges on the outstanding balance of a loan it made to a home owner, a utility is entitled to a carrying charge on the unrecovered balance of its deferral. Staff's proposal is unreasonable in that it ignores the time value of money. Staff's own witness acknowledges this point in his testimony - that the Company incurs costs and would lose the time value of money under such circumstances.[119] The Company's request is modest in that it is only seeking a carrying charge at the long-term debt rate but it is a reasonable expectation that carrying charges be accrued on the entire unrecovered balance of the deferral.

e. Incremental Labor

Staff argues that only "incremental" labor should be included in storm related cost recovery. The Company never suggested otherwise and takes no exception to that proposal. Duke Energy Ohio only intends to include labor that is truly incremental to the amounts in base rates. The Company will exclude employees' straight-time labor when working on storms in Duke Energy Ohio's service territory when calculating the storm deferral.

f. Overtime Pay for Management

Staff further argues that management overtime pay should not be included even though Staff acknowledged that Duke Energy Ohio has a written policy to provide for such compensation to management-level employees for their roles in storm restoration. This latter argument contradicts a prior Commission order where the Commission itself explicitly allowed overtime pay for management employees, explaining that such overtime pay was allowed

[119] Tr. XIV, pg. 3876

because the utility had "an established internal policy."[120] It is surprising that Staff is advocating the exclusion of management overtime pay for Duke Energy Ohio when the Commission itself approved this same policy for another utility, under exactly the same circumstances. The Commission should ignore Staff's capricious proposal to apply such a different standard to Duke Energy Ohio with no logical explanation for such a difference.

g. Mutual Assistance

Finally, Staff recommended that the Company reduce storm deferral by the amount of payment received from other utilities for the straight-time portion of the first forty hours of labor. This recommendation fails to recognize the administrative burden required to break out the straight-time labor from the portion of each employee's mutual assistance labor time, even though, as Mr. Hecker recognized,[121] such employees are paid a premium for these hours. The Company would need to manually calculate the straight-time portion for each employee to eliminate this amount from the deferral. The recommendation further neglects to recognize that the work that remains unattended during periods of mutual assistance must still be completed once storm restoration is complete.

Moreover, and importantly, Staff's recommendation has the potential to create the perverse incentive for utilities not to offer the mutual aid assistance that has worked well for utilities all across the country for decades. It is inconceivable that Staff now wishes to encourage the dismantling of this network of mutual assistance that has benefitted customers in Ohio and elsewhere for so many years.

Many of the Staff's recommendations are simply not acceptable to the Company. Should the Commission accept those Staff's recommendations not agreed to by the Company, it may not

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[120] *In the Matter of the Application of Ohio Power Company to Establish Initial Storm Damage Recovery Rider Rates*, Case No. 12-3255-EL-RDR, Opinion and Order, pg. 25 (April 2, 2014).
[121] Tr. XIV, pg. 3877.

remain viable for the Company to implement Rider DSR. Without an acceptable ESP, further uncertainty and litigation would be unavoidable. What Staff is recommending here is blatantly at odds with its prior position, is without justification, and runs counter to the Commission's prior statements that proactive programs are positive. Thus, the Commission should reject all of Staff's recommendations with regard to Rider DSR, other than those specifically agreed to by the Company.

3. Rider DDR

Duke Energy Ohio proposes to continue its Distribution Decoupling Rider (Rider DDR), which decouples volumetric sales from revenue. This rider supports state policy in that it eliminates the Company's incentive to increase volumetric consumption and, thus, supports the advancement of energy efficiency. Duke Energy Ohio witness Ziolkowski explained the history and the rationale for continuing this rider.[122] No party opposed its continuance and the Natural Resources Defense Council notes that it is working as intended with minimal impact on consumers and should be extended.[123] Duke Energy Ohio agrees and respectfully submits that the Commission should continue this Rider as proposed.

B. Provisions Relating to Stability

The Company has demonstrated, in these proceedings, that its proposed Rider PSR is lawful, reasonable, and beneficial. Further, Duke Energy Ohio has shown that the rider, as structured, is competitively neutral. Despite the uncontroverted admission that wholesale prices for energy and capacity are, and will continue to be, volatile and uncertain and the anticipated changes to the PJM market structure, intervenors and Staff are now asking the Commission to turn a blind eye, to intentionally expose customers to the vagaries of a wholesale market. But the

[122] Duke Energy Ohio Exhibit 18, pp. 19-20.
[123] NRDC Brief, pg. 1.

Commission should not be so persuaded by the panoply of objections, which, as discussed herein, reflect a disregard of the law, prior commitments, and common sense.

1. The Commission has Authority to Approve Rider PSR.

a. Rider PSR is Not Preempted by the Federal Power Act

Relying on two factually inapposite decisions, Staff contends that Rider PSR is preempted by the Federal Power Act.[124] This same argument is advanced by certain other intervenors in the case.[125] But as the cited cases confirm, the claims of preemption are meritless.

As an initial matter, it is necessary to understand precisely the scope of the jurisdiction of the Federal Energy Regulatory Commission (FERC) over the electric industry, as it is not so absolute as to eliminate the Commission's authority to approve Rider PSR.

As the Third Circuit Court of Appeals succinctly stated:

> Electric energy generation and transmission occur in a complex regulatory environment populated by multiple private and public actors operating under the supervision of both state and federal agencies. The Federal Power Act embodies Congress's attempt "to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry."[126]

With the Federal Power Act, Congress placed "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" under federal control.[127] And this federal control is vested with the FERC, which "regulates the sale of electricity at wholesale in interstate commerce."[128] Importantly, however, "Congress preserved state authority over many aspects of the electric energy industry."[129] States, therefore, retain jurisdiction over local energy matters. Indeed, as the federal court recently confirmed, the

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[124] Staff Brief, at pp. 18-21.

[125] *See, e.g.*, IGS Brief, pg. 21; IEU Brief, pg. 20; OCC Brief, pg. 5; Sierra Brief, pg. 21; Constellation/Exelon Brief, pg. 6; and Cincinnati Brief, pg. 5.

[126] *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 246 (3d Cir.2014)(internal citations omitted)(hereinafter referred to as *Solomon*).

[127] Id.

[128] Id, at pg. 247.

[129] Id, at pg. 246.

"FERC's authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates. Unless and until Congress determines otherwise, the states maintain a regulatory role in the nation's electric energy market."[130]

Preemption concerns a comparison between federal and state laws.[131] "[A]ny state law that 'interferes with or is contrary to federal law . . . must yield.'"[132] A preemption analysis also mandates recognition of "the basic assumption that Congress did not intend to displace state law."[133] And "[o]nly a clear and manifest conflict with federal law, or clear and manifest Congressional intent to override state choices, will override the presumption against preemption."[134] As a result of this required analysis, it follows that not every state statute that has an indirect effect on wholesale rates or that incidentally affects federal markets is preempted.[135] "Such an outcome 'would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish . . . , and would render Congress' specific grant of power to the States . . . meaningless."[136] As the federal courts have confirmed, "FERC's reach 'extends only to those matters which are not subject to regulation by the States' and States retain exclusive authority to regulate the retail market."[137]

Intervenors gloss over these conclusions. Indeed, IGS witness Haugen admitted that he reviewed the cases on which his direct testimony is based solely for purposes of "general concepts." But such a cursory review is not appropriate when interpreting a legal application of

[130] Id, at pg. 255.
[131] *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2570, 180 L. Ed. 2d 580 (2011).
[132] *Solomon*, *supra*, at pg. 250, citing *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct.1089, 8 L.Ed.2d 180 (1962).
[133] *Farina v. Nokia, Inc.*, 625 F.3d 97, 116 (3d Cir. 2010). See also, *State, ex rel. Celebrezze v. Environmental Enterprises, Inc.*, 53 Ohio St. 3d 147, 152-153 (1990) and *PNH, Inc. v. Alfa Laval Flow, Inc.*, 130 Ohio St. 3d 278, 281-282 (2010).
[134] *Solomon*, *supra*, at pg. 117.
[135] *See, e.g.*, *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 308, 108 S. Ct. 1145 (1988). See also, *PPL EnergyPlus LCC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014)(hereinafter referred to as *Nazarian*).
[136] *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 515, 109 S. Ct. 1262 (1989).
[137] *Electric Power Supply Ass'n. v. FERC*, 753 F.3d 216, 221 (D.C. Cir. 2014).

facts to the law. Simply put, the facts matter.[138] And when the facts of *Nazarian* and *Solomon* are considered, it necessarily follows that those decisions have no bearing on the outcome of this **retail** matter as the FERC does not have sole and exclusive jurisdiction over all matters related to electricity. Indeed, an examination of the facts confirms that Rider PSR bears no similarity to the state statutory schemes at issue in either *Solomon* or *Nazarian*. And this point is critical, given the limited nature of the holdings in these respective federal cases.

In *Nazarian*, the Maryland Public Service Commission initiated efforts to address a perceived problem; namely, its belief that PJM's reliability pricing model for capacity resources was not sufficiently incentivizing new generation. The state commission solicited offers to construct a new power plant. Through a formalized Generation Order, the Maryland commission set forth the following terms associated with its initiative:

- The successful bidder would be awarded a contract pursuant to which it received a fixed revenue stream for a new generating asset that it would construct.
- The contract required the successful bidder, after plant construction, to sell the energy and capacity from that plant into future PJM wholesale markets.
- If the energy and capacity cleared the wholesale markets and the clearing prices were less than the contracted-for revenue, the local distribution company would be compelled to remit the difference to the bidder.
- If the energy and capacity cleared the wholesale markets and the clearing prices were higher than the contracted-for revenue, the bidder would be compelled to remit the difference to the local distribution company.

[138] Tr. XV, pp. 4090-4091.

The Fourth Circuit Court of Appeals found that the Generation Order was preempted by federal law because it effectively set the price that a generator, participating in PJM's wholesale markets, would receive. As the court found, "the contract price guaranteed by the Generation Order supersedes the PJM rates that [the bidder] would otherwise earn – rates established through a FERC-approved market mechanism."[139] In so concluding, however, the court acknowledged the limited nature of its holding and, by extension, the FERC's jurisdiction:

> [I]t is important to note the limited scope of our holding, which is addressed to the specific program at issue. We need not express an opinion on other state efforts to encourage new generation, such as direct subsidies or tax rebates, that may or may not differ in important ways from the Maryland initiative. It goes without saying that "not every state statute that has some indirect effect" on wholesale rates is preempted.[140]

The factual circumstances in *Solomon* are not materially different. In that case, the New Jersey legislature adopted the Long Term Capacity Pilot Program Act, an act that "instructed New Jersey's Board of Public Utilities to promote the construction of new power-generating facilities in the state."[141] Under the law, new generators were given fifteen-year contracts to supply a set amount of capacity for a set price. These contracts were forced upon the local distribution utility and the generator. Similar to the contractual scheme in Maryland, new generators in New Jersey, after entering into a fixed-price contract, were required to participate in and clear PJM's capacity auction. In exchange, the generators were guaranteed the fixed contract price established by the state for its cleared capacity. The contracts, therefore, "offered financial assurance to [the new] generators: for a fixed amount of capacity, generators would receive a fixed price."[142] The federal circuit court found that the state law attempted to regulate that which was regulated by the FERC, through PJM's reliability pricing model. In so doing, the

139 *Nazarian*, *supra*, pg. 477.
140 Id, pg. 478.
141 *Solomon*, *supra*, pg. 246.
142 Id, pg. 252.

court distinguished the New Jersey law, and resultant contract for differences, from a hedging arrangement:

> New Jersey misses the mark when it argues that each [contract] represents "a contract for differences, functioning like a hedge" and, therefore, does not transact in capacity. . . . The Agreements provide more than risk-hedging; they provide for the supply and sale of capacity, as well. [The law] commands generators to sell capacity to PJM. In return, New Jersey's statute ensures that the generators receive the [fixed contract price] for each quantity of capacity offered at auction and not solely the auction price they would have otherwise received.[143]

The Third Circuit Court of Appeals confirmed the limited nature of its holding, just as was done by its brethren in Maryland. As the court confirmed, "New Jersey does have authority over local energy matters[.]"[144] Indeed, the federal court opined that it would be permissible for the state to "directly subsidize generators so long as the subsidies do not essentially set wholesale prices."[145] And such a recognition by the court is consistent with the current market structure, in which vertically integrated utilities, receiving cost-based state rates, permissibly participate in PJM's competitive auction process.

And setting the price for wholesale capacity via a state-sponsored program was detrimental to New Jersey's efforts. That the state law had an incidental effect on wholesale prices by increasing supply and thus lowering prices, was irrelevant. As the court concluded:

> [T]he law of supply-and-demand is not the law of preemption. When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid. Accordingly, we do not view [the state law's] incidental effects on the interstate wholesale price of electric capacity as the basis of its preemption problem. Indeed, were we to determine otherwise, the states might be left with no authority whatsoever to regulate power plants because every conceivable regulation would have some effect on operating costs or available supply. That is not the law.[146]

[143] Id, pp. 252-253.
[144] Id, pg. 253.
[145] Id, pg. 254, footnote 4.
[146] Id, at pg. 255.

The salient facts in *Nazarian* and *Solomon* confirm that a state law that predetermines the price for capacity of a new generator – that is subject to PJM's minimum offer price rule (MOPR) – impermissibly intrudes on the jurisdiction of the FERC. As the *Solomon* court succinctly stated, the New Jersey law "interfered with PJM's method of determining the price of capacity" and was thus "conflict preempted."[147]

Applying these authorities to these proceedings, it is readily apparent that a claim of preemption necessitates a comparison of federal and state law. As to the latter, the only law at issue is that codified under Title 49 of the Ohio Revised Code, which vests the Commission with broad authority of public utilities and, more specifically, Chapter 4928, which pertains to the requirements for an SSO.[148] Chapter 4928 does not run afoul of the Federal Power Act or the FERC's jurisdiction over the wholesale electricity market. Rather, Title 49 is limited in its scope to retail energy matters. The Federal Power Act limits the FERC's jurisdiction to wholesale transactions and that jurisdiction is not disturbed or threatened by Ohio's Title 49 or, specifically, Chapter 4928. The co-existence of the FERC's jurisdiction over wholesale matters and the Commission's jurisdiction over retail matters was expressly contemplated by, and endorsed under, the Federal Power Act.[149]

Moreover, Rider PSR does not – and cannot – set wholesale capacity prices. Indeed, as discussed herein, Rider PSR, as structured, will have no impact on clearing prices for new, wholesale capacity, the amounts paid by Duke Energy Ohio under a FERC-approved agreement,

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[147] *Solomon, supra*, pg. 249. Conflict preemption mandates a determination that "it is impossible to comply with both state and federal law; state regulation prevents attainment of FERC goals; and that a state regulation's impact on matters within federal control is not an incident of efforts to achieve a proper state purpose." *Northwest Central Pipeline, supra*, at pp. 515-516 (internal citations omitted).

[148] See, *e.g.*, R.C. 4905.04 (Commission vested with power and jurisdiction to supervise and regulate public utilities) and R.C. 4928.141 (an electric distribution utility is to apply to the Commission for approval of a standard service offer of all competitive retail electric services).

[149] *Electric Power Supply Association, supra*, at 221, citing 16 U.S.C. Section 824(a)("FERC's reach extends only to matters that are not subject to regulation by the States." And "[States retain exclusive authority to regulate the retail market.)

or other market participants' motivation to add new or retire old generation. These matters, even if at issue, which they are not, remain exclusively under FERC's jurisdiction. And the facts that were fatal to the state-ordered programs compelling the construction of new generation simply do not exist in respect of Rider PSR.

Rider PSR, as discussed in these proceedings, relies upon the Company's existing contractual entitlement in the Ohio Valley Electric Corporation (OVEC), which, together with its wholly owned subsidiary, the Indiana Kentucky Electric Corporation (IKEC), own two generating plants known as Kyger Creek and Clifty Creek.[150] These plants, in operation prior to the creation of PJM's reliability pricing model in approximately 2006,[151] are not owned by Duke Energy Ohio. And the Company does not operate these plants; rather, OVEC has its own employees who manage and run the plants on a daily basis.[152] Consequently, Duke Energy Ohio, a mere 9 percent shareholder in OVEC, cannot control the management of these two plants and their resultant costs. Rather, Duke Energy Ohio, pursuant to the terms of an Inter-Company Power Agreement (ICPA), approved by the FERC,[153] is contractually obligated to pay OVEC for defined costs in connection with the Company's contractual entitlement to a small portion – 9 percent – of the energy and capacity from the two plants.[154] Critically, therefore, unlike the new generating assets at issue in *Solomon* and *Nazarian*, the generation underlying Rider PSR has been in existence and is not controlled by Duke Energy Ohio.

Furthermore, as proposed by the Company, Rider PSR does not reflect a fixed revenue stream for Duke Energy Ohio. And the same is true with regard to the ICPA – it does not

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[150] Tr. I, pg. 84.
[151] Tr. XV, pg. 4064.
[152] *See* IEU Exhibit 5 (ICPA), at Section 4.01, establishing the OVEC shall operate and maintain the plants. *See also* Tr. XV, pg. 4065.
[153] Tr. II, pg. 403.
[154] *Id.*

establish either a fixed capacity price or energy price payable to any the Sponsoring Companies, including Duke Energy Ohio.[155] There is no predetermined set amount that Duke Energy Ohio will receive month after month, year after year, unlike the circumstances in the federal cases on which intervenors depend. Rather, any capacity revenues to be included in the rider and remitted to customers will be determined by PJM's competitive auction process, with Duke Energy Ohio committed to maximizing those revenues for the benefit of customers. Thus, unlike the new generators at issue in *Nazarian* and *Solomon*, Duke Energy Ohio will continue to be an active, competitive participant in PJM's auction process and its behavior in that regard will not change. To appreciate this fact, Duke Energy Ohio briefly discusses relevant aspects of PJM's base residual auction (BRA) construct.

In structuring its competitive auction process, PJM adopted a series of rules and made provision to protect against market manipulation. The former included PJM's adoption, in 2007, of the MOPR, which governed the bidding by new capacity resources.[156] Significantly, the MOPR does not apply to existing capacity resources, such as those associated with Duke Energy Ohio's contractual entitlement in OVEC. Consequently, offers of zero for capacity resources that participate in the BRA are expressly contemplated by PJM and, indeed, reflect the overwhelming practice.

As IGS witness Haugen admitted, of the approximate 170,000 MWs that cleared the last BRA, almost 140,000 MWs offered in at zero.[157] This was also the case in 2014, relative to the BRA for the 2017/2018 planning year. In that auction, again, almost 82 percent of the cleared capacity had offered in at zero.[158] This occurrence has not been found by PJM or its independent

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[155] Tr. XV, pp. 4063-4064.
[156] Tr. XV, pp. 4070- 4071; Tr. XVI, at pp. 4321-4322.
[157] Tr. XV, pp. 4084-4085.
[158] Duke Energy Ohio Exhibit 39 (Capacity Resource Offer Prices for 2017/18 Delivery Year).

market monitor to artificially or improperly set capacity prices; nor has the occurrence been deemed contrary to the competitive nature of the BRA process. And this occurrence will not be disturbed upon the approval of Rider PSR.

Under Rider PSR, Duke Energy Ohio will undertake to maximize the revenues associated with its contractual entitlement in OVEC. With regard to capacity, this means clearing the BRA. And to understand the Company's intention, it is first important to understand the existing options. Duke Energy Ohio could offer in the capacity commensurate with its OVEC contractual entitlement at zero, similar to the overwhelming majority of BRA participants and receive the clearing price. Alternatively, it could bid an amount higher than the clearing price and receive no capacity revenues. Finally, it could attempt to submit a bid that it suspects may be lower than the clearing price and, in turn, receive the clearing price. Of these options and in order to ensure that the OVEC-related capacity resource clears, Duke Energy Ohio intends to follow the objective approach of continuing to be a price taker, *i.e.*, accepting the clearing price. To do otherwise would create a risk of not clearing the BRA and thus not receiving any capacity revenues. And as this bidding strategy continues under Rider PSR, there will not be an impact on the BRA clearing prices for capacity. As Duke Energy Ohio witness Kenneth Jennings confirmed, if Duke Energy Ohio is offering its OVEC-owned capacity resource at zero today and continues to do so after the approval of Rider PSR, "nothing changes because the behavior doesn't change."[159] And, simply put, if previously offering in capacity at zero did not run afoul of the requirements for participation in a competitive BRA process, continuing to do so will yield the same result. Namely, cleared resources will receive revenues equal to the clearing price, every day.[160] And to the extent such participation is reflected by offers of zero for Duke Energy Ohio's approximately

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[159] Tr. XVI, pp. 4291-4292.
[160] Id, pg. 4313.

200 MW of capacity associated with its contractual entitlement, it must be conceded that such an offer is expressly contemplated by – and, in fact, routinely observed under – PJM's rules.

That the Company's proposal does not undermine the BRA process is also evident from the lack of challenge by entities closest to the process. As was confirmed in these proceedings, the independent market monitor has the ability to investigate claims of market manipulation and market power and can offer recommendations to the FERC or PJM.[161] In this regard, existing generators that extend sell offers in the BRA are subject to market power mitigation.[162] There is no evidence to suggest that Duke Energy Ohio's proposal in respect of the OVEC contractual entitlement is anticompetitive or improper. Notably, the independent market monitor did not even find it necessary to intervene in these proceedings to contest the Rider PSR proposal, as presented by the Company.

With regard to the energy associated with Duke Energy Ohio's contractual entitlement in OVEC, there can be no claim preemption based upon *Nazarian* and *Solomon*, as those cases did not address the wholesale energy market. But the Company would be remiss if it did not address how it intends to bid the energy associated with its OVEC entitlement into the PJM-administered market. As the Company explained, it has adopted an objective process that, like the capacity component, is intended to maximize revenues and minimize costs.

Duke Energy Ohio intends to offer its share of energy into the PJM day ahead and real time markets every day. These day ahead and real time offers will be based upon the variable cost information provided by OVEC, no differently than how it is done today. Subsequently, PJM will clear the energy market, on a daily basis, and decide whether and how much of the offer it will take. If the energy clears, Duke Energy Ohio will receive revenue in the form of the

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161 Tr. XV, pg. 4087.
162 Id.

PJM clearing price, which will offset the variable costs that are assigned to Duke Energy Ohio only in the event it uses its share of the energy. If the energy does not clear, no variable costs will be incurred.[163]

Rider PSR is materially different than the state programs at issue in Maryland and New Jersey, legally and technically. In contrasts to those programs, it is entirely dependent on the competitive PJM market insofar as price determinations are concerned. As structured, the rider does not function to adversely influence behavior that would affect wholesale prices for capacity. Significantly, for the BRAs that have already occurred, wholesale clearing prices for those auctions have been determined and there is nothing about Rider PSR that will alter or influence those prices.[164] For future BRAs, as confirmed by the oral testimony, Duke Energy Ohio's objective is to maximize revenues and it has proposed a bidding strategy to do so. Under this bidding strategy, Duke Energy Ohio will offer the capacity commensurate with its contractual entitlement in OVEC into the BRAs at zero.

With regard to energy, again, there is nothing fixed or predetermined, other than the Company's bidding strategy. And, admittedly, Rider PSR will not induce Duke Energy Ohio to hold back on its offers.[165] Specifically, it will take the cost information from OVEC, over which it has no control[166] and which the Company does not prepare, and tender offers into the day-ahead market. If the energy is picked up by PJM, Duke Energy Ohio will receive energy revenues based upon the day ahead and real time locational marginal prices, and the Company will include 100 percent of such revenues in Rider PSR, for the benefit of customers.

[163] Tr. XVI, pp. 4271, *et seq.*
[164] Tr. XII, pg. 3407 and Tr. XV, pp. 4079-4080.
[165] Tr. XV, pg. 4095.
[166] Tr. II, pg. 403.

If Rider PSR is approved, OVEC – the third-party owner of the generation assets – will continue to receive the dollar amounts provided for under the FERC-approved ICPA Agreement, from the Sponsoring Companies. Stated another way, nothing about Rider PSR will alter the cost structure of the FERC-approved ICPA, as between the generator owner and the Sponsoring Companies.[167] And nothing about Rider PSR can or will determine the wholesale prices for energy or capacity. Rather, the FERC-approved ICPA will continue to be the basis for establishing the wholesale prices paid to OVEC from Duke Energy Ohio and the PJM markets will continue to be the FERC-approved mechanism pursuant to which Duke Energy Ohio is compensated for selling its entitlement under the ICPA.

Rider PSR, on the other hand and as discussed below, is a competitively neutral, retail mechanism, permitted under Ohio law and intended to provide stability and predictability with regard to retail rates. As the federal courts have expressly found, states have permissible means of achieving their goals in respect of local energy matters. Critically, the federal courts have acknowledged that such permissible means can include direct subsidies "so long as the subsidies do not essentially set wholesale prices."[168] Although there is clearly no subsidy at issue here, these federal decisions confirm the limited nature of the FERC's jurisdiction and the right of states to participate in the national electricity market through the regulation of the retail market.

b. Rider PSR is Authorized under R.C. 4928.143.

Intervenors contend that Rider PSR is not authorized under R.C. 4928.143(B)(2)(d) simply because this specific rider mechanism is not expressly delineated therein.[169] Walmart similarly argues that the rider is neither lawful nor necessary. But that is not the test. The Supreme Court of Ohio has not stated that the detail of each element of an ESP must be

[167] Tr. XV, at pg. 4075.
[168] *Solomon*, *supra*, at pg. 254, footnote 4.
[169] See, *e.g.*, IEU Brief, at pp. 8-9 and Cincinnati Brief, at pg. 7.

specifically and expressly codified before it can be included in an ESP. Rather, the Court confirmed that R.C. 4928.143(B)(2) allows for "unlimited inclusion of the listed items" or, in other words, the statute merely delineates the **types** of categories that may be included in an ESP.[170] The question, therefore, is whether Rider PSR falls into one of the types of categories in R.C. 4928.143(B)(2). And it does. Specifically, Rider PSR is authorized under R.C. 4928.143(B)(2)(d), which lists as properly included in an ESP:

(1) terms, conditions, or charges

(2) relating to

(a) limitations on customer shopping for retail electric generation service

(b) bypassability

(c) standby, back-up, or supplemental power service

(d) default service

(e) carrying costs

(f) amortization periods or

(g) accounting or deferrals

(3) as would have the effect of stabilizing or providing certainty regarding retail electric service.[171]

In interpreting this statute, the plain language must be considered. "The court must give effect to the words used, making neither additions nor deletions from words chosen by the General Assembly."[172] And the chosen language is broad, allowing for inclusion in an ESP of any term, condition, or charge, provided it relates to one of the seven listed categories and would

[170] *In re Application of Columbus Southern Power Company*, 128 Ohio St. 3d 512, 2011-Ohio-1788, ¶33.
[171] R.C. 4928.143(B)(2)(d). *See also 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 pg. 21 (September 4, 2013).
[172] *In re Columbus Southern, supra*, at ¶26.

have an effect on stabilizing or providing certainty regarding retail electric service. The list limits the type of categories a plan may include, while the phrase “without limitation” allows as many or as much of the listed categories as the Commission finds reasonable.[173]

The General Assembly, therefore, vested the Commission with discretionary authority, and the necessary flexibility, to approve any specific ESP components that meet this broader definition. To conclude otherwise, as intervenors here suggest only with regard to Rider PSR, would similarly render unlawful proposals to which they have previously agreed or for which they are now seeking continuation.[174] And perhaps most illustrative of the shortcoming in Staff’s and intervenors’ argument is the CBP plan, which is not expressly provided for in the ESP provisions. Under the theory advanced by Staff and intervenors that any component to be included in an ESP must be expressly and clearly described in the statute, an ESP could not make provision for competitive procurement of generation supply. Rather, such an outcome would “expressly” be permitted only under a market rate offer, as R.C. 4928.142 clearly identifies the CBP plan.

Now, because of admitted ideological differences, Staff seeks to selectively retreat from its prior positions and to distinguish one rider from a list of riders that are not expressly defined by statute or are not avoidable by shopping customers. State energy matters should not be determined by ideology. They should be determined with reference to the law and the obligations of the Commission to the state, the public utilities it regulates, and their customers.

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[173] Id, at ¶ 33.
[174] *See, e.g.,* Duke Energy Ohio ESP II Stipulation, which made provision for a load factor adjustment and discount for PIPP customers, neither of which is expressly delineated in R.C. 4928.143(B)(2)(d) and the former sought to be extended here by Staff and OEG. *See also In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-346-EL-SSO, *et al*.; Staff Exhibit 1, pg. 11 (recommending approval of a stability charge).

The narrow interpretation that Staff and the intervenors advance here, conveniently only with regard to Rider PSR, has been rejected by the Commission. The Commission has repeatedly found the ESP provisions enable flexibility; that flexibility needed to address complex and ever-changing local energy matters. The Commission has historically approved riders and rate mechanism and procurement methodologies that are not expressly and with specific detail enumerated in R.C. 4928.143(B).

As discussed in the Company's Brief, Rider PSR is a nonbypassable charge, intended to provide stability or predictability with regard to retail electric service.[175] It is akin to a hedge – a mechanism to mitigate the effects of the ever-changing and admittedly volatile wholesale capacity market on which all suppliers, and thus all customers, rely for competitive generation service. And as those market prices continue to demonstrate volatility and change as result of generation retirements, less fuel diversity, protracted litigation, and a variety of market reforms the outcome of which the Commission cannot control, Rider PSR affords all customers stability. Indeed, as market prices increase, so, too, do the benefits under Rider PSR.[176]

c. Rider PSR Is Consistent with State Policy.

Staff and intervenors cite to state policy, contending that it, too, precludes approval of Rider PSR. Conveniently, they fail to suggest that other mechanisms are similarly precluded. They argue, instead, that Rider PSR alone runs afoul of R.C. 4928.02(H). But this contention, intentionally limited in scope, must also fail.

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[175] *See also* OEG Brief, pg. 5 (Rider PSR is also a permissible limitation on shopping).
[176] Duke Energy Ohio Ex. 6, pp. 12, 13.

As an initial matter, state policies are intended to guide the Commission. They do not mandate any particular outcome or preclude the Commission from arriving at outcomes consistent with its mission.[177]

But further, and perhaps more importantly, the language of R.C. 4928.02(H) must be fully considered. Under this provision, the state legislature warned against anticompetitive subsidies flowing between noncompetitive retail electric service and competitive retail electric service, which includes the recovery of generation-related costs through distribution or transmission rates. Here, however, Rider PSR is not providing **retail** generation service. It is uncontroverted that all customers will continue to receive their competitive generation service either through the SSO auctions or CRES contracts. None of the energy and capacity associated with the Company's contractual entitlement in OVEC will be used to directly supply customers and thus it will not – and cannot – displace the energy and capacity to be supplied via competitive auctions or contracts.[178] Consequently, under Rider PSR, there is no anticompetitive subsidy flowing between noncompetitive and competitive retail electric service.

Further, it directly contradicts Commission precedent to contend that Rider PSR enables the recovery of generation-related costs through distribution or transmission rates simply because it is a non-bypassable rider. The designation of the rider as non-bypassable does not render it a distribution or transmission rate. Indeed, had this been the intent of the General Assembly, it would have chosen different words when identifying state policy. It could have, for example, spoken of not recovering any costs associated with any generation facility – whether or not owned by the electric distribution utility – via a non-bypassable rider. But the General Assembly

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[177] *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, *et al*., Opinion and Order, pg. 21 (March 18, 2009); *In re Application of Columbus Southern Power Company, et al.*, 128 Ohio St.3d 512, 523, 2011-Ohio-1788, 947 N.E.2d 655 (2011).
[178] *See, e.g.*, Tr. X, pg. 2691; Tr. XII, pg. 3603; and Tr. XV, pg.4067.

was not so liberal in its drafting. It specifically identified a desire to prevent the collection of generation charges through distribution or transmission rates.

Distribution rates are set in distribution base rate proceedings. As confirmed by the Company's last base rate proceeding, filed in 2012, Rider PSR is not included in base rates and it will not be included in base rates. Further, the Company's transmission costs are recovered through Rider BTR, as provided for under R.C. 4928.05(A)(2) and O.A.C. 4901:1-36. And, again, those transmission rates do not include the net benefits associated with Rider PSR. But Staff and intervenors ignore these salient points and instead wrongly interpret prior cases that, when more closely read, do not eliminate the Commission's authority to approve Rider PSR.

As set forth in the Company's initial brief, the legislative and regulatory paths to retail competition have been appropriately tempered, allowing the Commission the ability to fulfill the intent of the General Assembly while simultaneously protecting utility companies and the customers they serve. Importantly, when the General Assembly first acted to alter the vertically integrated nature of the state's electric companies, it did so by requiring the separation of specific services and the Ohio Supreme Court has upheld this tailored focus.

As the Court has held, "S.B. 3 'provided for restructuring Ohio's electric-utility industry to achieve retail competition with respect to the generation component of electric service.'"[179] Under S.B. 3, "each service component was required to stand on its own."[180] And the state policy that was drafted to compliment Ohio's restructuring law confirmed that the focus was on a clear demarcation between the three services that, together, provide power to customers. Specifically, the policy prohibited "public utilities from using revenues from competitive generation-service components to subsidize the cost of providing noncompetitive distribution service, or vice

[179] *Constellation NewEnergy, Inc., v. Public Utilities Commission*, 104 Ohio St. 3d 530, 2004-Ohio-6767, ¶ 2.
[180] *Migden-Ostrander v. Public Utilities Commission*, 102 Ohio St. 3d 451, 2004 Ohio 3924, ¶ 4.

versa."[181] As the Court recognized, "[t]he unbundling of components required by S.B. 3 'ensured that an electric utility would not subsidize the competitive generation portion of its business by allocating generation expenses to the regulated distribution service provided by the utility.'"[182]

In 2008, the law was revised. And although these revisions maintained the separation of the three components of electric service, they vested the Commission with authority to allow for the recovery of various costs that, while related to generation, do not reflect generation service.

Rider PSR is statutorily permissible and, further, does not violate state policy. As an initial matter, it is undeniable that Rider PSR does not provide generation service to any of Duke Energy Ohio's retail customers. In fact, every witness to have been asked the question agreed that none of the energy and capacity associated with Duke Energy Ohio's contractual entitlement in OVEC would be used to displace the generation supply procured for non-shopping customers via the CBP plan or the generation supply provided to shopping customers under their respective CRES contracts. Further, it is undisputed that, with Rider PSR in place, all customers will continue to have unfettered access to customer choice. The record here is clear – Rider PSR is not associated with, and does not allow for, cost recovery for the component of electric service that is generation.

Intent on blurring the distinction between the purpose of Rider PSR and the recovery mechanisms previously addressed by the Commission, IEU relies upon the Commission's decision in *In the Matter of the Application of Ohio Power Company for Approval of the*

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[181] *Elyria Foundry Co. v. Public Utilities Commission of Ohio*, 114 Ohio St. 3d 305, 2007-Ohio-4164, ¶ 50 (reference to former R.C. 4928.06(G), which is now R.C. 4928.02(H)).
[182] *Elyria, supra*, at ¶ 53 (internal citations omitted).

Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider.[183] But this reliance is misplaced.

In *Sporn*, AEP Ohio requested authority to recover costs associated with the early retirement of Unit 5 of the Sporn Generating Plant – a unit that it owned and for which it had authority to make retirement decisions. In addition to seeking cost recovery under R.C. 4928.143, AEP Ohio sought Commission authority to retire Unit 5. In rejecting the request, the Commission first discussed that which is and is not within its jurisdiction:

> Pursuant to Sections 4928.03 and 4928.05(A)(1), Revised Code, retail electric generation service is a competitive retail electric service and, therefore, not subject to Commission regulation, **except as otherwise provided in Chapter 4928, Revised Code**. Just as the construction and maintenance of an electric generating facility are fundamental to the generation component of electric service, we find that so too is the cost of an electric generating facility.[184]

The Commission then examined whether the requested costs were within R.C. 4928.143 and, therefore, subject to its regulation. Significantly, the Commission focused on the provision relied upon by AEP Ohio in bringing its application – R.C. 4928.143(B)(2)(c) – and concluded that there was no statutory basis on which to grant recovery. As the Commission reasoned:

> Although [AEP Ohio] implies that a broad interpretation of Section 4928.143(B)(2)(c), Revised Code, is warranted, that section provides for the establishment of a nonbypassable surcharge for the life of an electric generating facility, only if certain criteria are met. …Sporn Unit 5 was constructed long ago and, therefore, was not newly used and useful on or after January 1, 2009, as required by the statute. Neither was Sporn Unit 6 sourced through a competitive bid process or subject to a determination of need by the Commission, which are additional criteria found in Section 4928.143(B)(2)(c), Revised Code.[185]

The Commission's decision in *Sporn* is factually inapposite the circumstances here. Duke Energy Ohio is not seeking cost recovery for any component of generation service that it owns or

[183] *In the Matter of the Application of Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order (January 11, 2012).
[184] Id, Finding and Order, at pg. 16 (emphasis added; citations omitted).
[185] Id, pg. 18.

otherwise controls and it has not invoked R.C. 4928.143(B)(2)(c) as relevant to these proceedings. Rather, as discussed above, Rider PSR is authorized under R.C. 4928.143(B)(2)(d), which authorizes the Commission, through the implementation of various mechanisms, to authorize non-bypassable charges that enable stability or predictability in the provision of retail electric service.

In *Sporn*, the Commission did note that the company's request was contrary to the state policy set forth in R.C. 4928.02(H) because it would enable recovery of generation-related costs through distribution rates.[186] But this conclusion must be read in context, and not in the broad manner that intervenors here propose. As the Commission found in *Sporn*, plant closure costs were one aspect of the larger component of generation service associated with the unit in question. Here, however, the OVEC-owned generating units are not provided generation service to Duke Energy Ohio's retail customers and, therefore, Rider PSR will not recover costs for the generation component of electric service.

To accept the premise offered by Staff and intervenors that every non-bypassable rider that concerns some aspect of generation is unlawful, it follows that these parties have consistently supported the implementation of illegal riders. As the limited, but informative, sampling below confirms:

- Staff and intervenors continue, to this day, to support load factor adjustments, arrangements that provide credits based upon generation-related load factors that are provided for via non-bypassable riders.[187]

[186] Id, pg. 19.
[187] OEG Brief, pg. 26; Staff Brief, pg. 55; OMA Brief, pg.15; Universities Brief, pg. 2; GCHC Brief, pg. 15.

- Staff and intervenors continue to support interruptible tariffs, which involve PJM-initiated curtailments and the recovery of generation-related costs associated with participation in such a program via non-bypassable riders.[188]
- Staff has previously supported stability charges, all of which concern the stability of the electric distribution utility while providing a generation-related service.[189]

As the application of state policy to rate plans has evolved, it is undeniable that generation-related mechanisms have been approved. And the critical determination is the underlying purpose for the mechanism. Certainly, if Duke Energy Ohio were seeking to recover costs associated with the provision of generation service through distribution rates, such an attempt would contradict state policy. But Rider PSR does not serve this function – it is a carefully structured mechanism , void of any impermissible anti-competitive subsidies, that enables the provision of safe, reliable, and reasonably electric service.

d. Rider PSR, if Approved, Does Not Create a Violation of Corporate Separation Requirements.

The Greater Cincinnati Health Council (GCHC) acknowledges that much has been discussed about whether OVEC is an affiliate of Duke Energy Ohio. It is surprising that GCHC has opted to continue this argument when it has no legal basis. It is important to note, with regard to the lack of any affiliate status of OVEC, that the FERC has agreed that no sponsoring company of OVEC is an affiliate of OVEC, as they do not have the necessary control.[190] Nevertheless, in support, GCHC points out that OVEC was included as an affiliate on a list of

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[188] OEG Brief, pg.16.

[189] *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.*, Direct Testimony of Hisham Choueiki (March 12, 2013), pg. 11.

[190] Duke Energy Ohio Exhibit 14 and approval thereof in FERC Case No. 11-3441, Entry (May 23, 2011)(administrative notice taken, Tr. II, pg. 479).

affiliates provided in the Company's corporate separation proceeding.[191] In so arguing, however, GCHC ignores the testimony of Duke Energy Ohio witness Mark Hollis who stated that it was his understanding that the terms "common ownership and control" do not fit with respect to OVEC because the entity that owns Duke Energy Ohio does not own any part of OVEC, thus there is no common ownership.[192] He further stated that no one within the Duke Energy family of companies operates the generating assets owned by OVEC, and thus Duke Energy Ohio likewise has no control of OVEC.[193] And in response to cross examination, Mr. Hollis again stated that he did not believe OVEC was an affiliate.[194]

The more important aspect of the discussion is whether or not the Company has complied with the requirements of the statutes and regulations pertinent to an ESP. Duke Energy Ohio witness Hollis firmly established that the current Duke Energy Ohio corporate separation plan (CSP), adopted pursuant to R.C. 4928.17, fulfilled the filing requirements of Chapter 4901:1-35, O.A.C. Mr. Hollis provided a copy of the Company's current CSP attached to his testimony and the Company's most recent application for approval of its CSP was in fact approved by the Commission as recently as June 11, 2014.[195] Thus, GCHC's argument that relies upon ignoring a significant portion of Mr. Hollis' testimony fails.

e. Rider PSR Does Not Constitute Transition Revenues

The Kroger Company, OMA and IEU incorrectly argue that Rider PSR constitutes a form of "transition revenue" and would be similar to recovery of stranded cost revenue under

[191] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of the Fourth Amended Corporate Separation Plan*, Case No. 14-689-EL-UNC, Finding and Order, June 11, 2014.
[192] Tr. IV, pg. 969.
[193] Id, pg. 971.
[194] Id, pp. 975 and 978.
[195] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of the Fourth Amended Corporate Separation Plan*, Case No. 14-689-EL-UNC, Finding and Order, June 11, 2014.

R.C.4928.38.[196] IEU claims that the Company is seeking to recover additional transition revenue when the amounts it recovers from PJM are less than the amounts it pays OVEC. IEU then argues that the Company has not adequately supported its request for such transition revenue.[197] As Rider PSR was not proposed pursuant to R.C. 4928.32 or 4828.40, IEU's argument is not helpful.

Kroger argues that providing an EDU with revenue associated with the costs of a generating facility is tantamount to providing the EDU with transition revenue.[198] This is an argument that requires several leaps of logic. First, Kroger's mere assertion that Rider PSR constitutes "transition revenue" without any additional legal support or logic fails. Rider PSR is not proposed pursuant to the relevant transition revenue statutes. Moreover, nothing about Rider PSR is designed to recover any stranded costs. Rider PSR is proposed as a financial hedge and is permitted under R.C. 4828.143.

Second, Kroger further incorrectly argues without logic or legal support that Rider PSR is related to generation facilities. Although Rider PSR reflects a hedge based upon a contractual entitlement, it does not fall into the established mechanism that was created by the General Assembly many years ago to provide for recovery of stranded investment during the transition of the electric utility to competition in the state of Ohio. In order to make a compelling argument, Kroger must completely ignore the fact that the Company does not propose Rider PSR under any relevant provision of Ohio law that deals with stranded costs and transition revenue. It must also ignore that comprehensive process that must be followed under the law in order to recover transition revenue. While Kroger and others may wish to characterize Rider PSR as something

[196] IEU Brief, p.15.
[197] IEU Brief, p.18.
[198] Kroger Brief, p.13.

other than the financial hedge that it proposes, such parties are far afield of supporting their respective claims that Rider PSR revenue bears any connection to transition revenue.

3. The Alternate Proposals Offered by Staff and Intervenors Are Not Reasonable.

Staff acknowledges that its primary opposition is rooted in philosophical beliefs – that Rider PSS allegedly runs afoul of the Commission's goal of transitioning Ohio's electric distribution utilities to competitive markets. Yet, fully appreciating the realities of the wholesale market and the risk exposure created thereby, Staff surmises that there are other viable means of mitigating the admitted volatility and uncertainty in the wholesale market. Staff is wrong.

Staff's first suggestion is to rely upon the auctions for SSO supply that are laddered. Although such an auction format has a price smoothing effect in that resulting SSO prices reflect, at times, combined auction clearing prices, the laddering format cannot counteract increasing wholesale capacity market prices. As evident from recent history, the last wholesale auction conducted on behalf of the FirstEnergy companies prior to the January 7, 2014, polar vortex and related extreme weather events, the auction clearing price was $68.31 per mWh.[199] In contrast, in the first such auction held on behalf of these same companies after the January 2014 weather events, the auction clearing price was $73.82 per mWh,[200] or $5.51 per mWh higher. Staff would have the Commission disregard these single auction clearing prices, claiming that SSO customers will not feel the direct effects. But Staff patently disregards the fact that events influencing the wholesale market also influence retail rates. And although reliance on a basic laddering approach may have functioned well in the past, circumstances are changing and it would be unreasonable to reject an option to counter the impending consequences.

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[199] Tr. XII, pg. 3446.
[200] Duke Energy Ohio Exhibit 30 (Auction report prepared by CRA).

Staff next would have the Commission disallow Rider PSR in favor the possibility – however remote – that an EDU such as Duke Energy Ohio will build new generation. Staff correctly observes that the Commission could approve a non-bypassable charge, under R.C. 4928.143(B)(2)(c), for generation that is competitively sourced and the need for which is determined in a long-term resource plan submitted by the EDU. Critically, this outcome mandates a protracted, multi-step process. First, the EDU must decide that it wants to own generation in Ohio. The EDU must then demonstrate, in its integrated resource planning docket, that a need for additionally, newly sourced generation resources exists. The Commission must conclude that such a need exists. The EDU must then include in its application for an ESP a request, under R.C. 4928.143(B)(2)(c) to recover costs associated with the facility. And, assuming Commission approval that sufficiently ensures timely and full recovery of all related costs by the EDU, the generating plant must be constructed. Years will pass before all of this is realized – years during which the wholesale prices for capacity and energy will be subject to reform, the whims of mother nature, and litigation outcomes. Holding out for the prospect that an EDU, in some future proceedings, may seek to explore new generation in Ohio is not a viable strategy. In fact, it is not a strategy at all. It is an excuse, predicated upon Staff's ideological positions. But state energy policy cannot be so determined.

Although recognizing the benefits resulting from Rider PSR, OEG offers modifications to the proposal, none of which is convincing.

OEG first submits that Duke Energy Ohio should retain 10 percent of Rider PSR, somewhat resembling a sharing mechanism. OEG suggests that such a modification will "provide incentives for [Duke Energy Ohio] to keep OVEC costs as low as possible."[201] The fundamental flaw with this proposal is that it cannot be achieved. Duke Energy Ohio does not

[201] OEG Brief, pg. 14.

control OVEC or the costs that it incurs. As reflected in the FERC-approved ICPA, OVEC is responsible to operate and manage the OVEC-owned plants and the associated costs. OEG's recommendation is unfounded and, as discussed above with regard to how the Company intends to participate in the wholesale energy and capacity markets, it is unnecessary.

OEG next suggests a firm termination date for the rider – a date some nine years in the future.[202] But the rider is structured as a long-term hedge, one under which the Company has proposed to exist for as long as its contractual entitlement exists, which is June 2040. The commitment is reciprocal, in that Duke Energy Ohio is committing to its customers all of the net benefits associated with its contractual entitlement in OVEC until such entitlement ceases to exist.

OEG's next modification is to project and then levelize the benefits under Rider PSR.[203] But this proposal conflicts with the purpose for Rider PSR. As discussed in Duke Energy Ohio's Brief, Rider PSR is intended to run counter to the wholesale markets. Thus, when market prices are increasing or spiking, the benefits of the riders will highest, thereby enabling a credit to flow back to customers. And the credit would occur at the time when it is most needed – when retail generation prices are rising. OEG's proposal eliminates this result, thereby depriving customers of the benefits incorporated into the rider.

Finally, OEG seeks an exemption for certain customers that, in its opinion, can self-insure.[204] But the rider, as structured, is intended to apply to all customers, so as to eliminate any impact on competition, incentives to take competitive generation supply under the SSO or via a CRES contract, and the quest for other exemptions.

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[202] Id, pp. 14-15.
[203] Id, pg. 15.
[204] Id.

4. The claims regarding "divestiture" of the OVEC contractual entitlement are, at both, a distraction and a deliberate disregard of controlling authority.

Staff and a limited number of intervenors urge the Commission to either find that Duke Energy Ohio has failed to transfer its contractual entitlement in OVEC or to compel it to do so. That so few intervenors adopt this position is, in and of itself, rather telling. If, as Staff speculates, the Company is under an existing mandate to transfer its contractual entitlement in OVEC to an affiliate or subsidiary, it is incomprehensible that all other intervenors here that signed the ESP II Stipulation would not advance the same contention. But they do not, because that about which Staff now theorizes is simply wrong.

a. Duke Energy Ohio is not obligated, under the ESP II Stipulation to transfer its contractual entitlement in OVEC.

As the Commission has previously concluded with regard to the ESP II Stipulation, a party "should not, at this late date, be permitted to renege on a package deal approved by the Commission."[205] Although those words were initially meant for Duke Energy Ohio, they are no less applicable here, to other parties to that same agreement that are now seeking to alter that to which they agreed. Specifically, Staff and OCC contend that Duke Energy Ohio is obligated under the ESP II Stipulation to transfer its contractual entitlement in OVEC. Lacking any degree of uniformity, Staff and OCC rely upon different language, none of which supports the position they are advancing.

Staff would have the Commission believe that OVEC is a Duke Energy Ohio generating asset and, as such, the Company is required to transfer it to an affiliate or subsidiary by the December 31, 2014.[206] In appreciating the fallacy that underlies Staff's contentions, is it

[205] *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case No. 12-2400-EL-UNC, Opinion and Order, pg. 29 (February 13, 2014).
[206] Staff Brief, pg. 2.

necessary to revisit the specific and intentional language included in the ESP II Stipulation and supporting testimony; language that Staff witness Choueiki failed to even consider for purposes of his testimony in these proceedings.

The ESP II Stipulation clearly and unequivocally required Duke Energy Ohio to transfer its Generating Assets.[207] Recognizing the importance of eliminating any ambiguity as to what the term "Generating Assets" meant, the term was also clearly and unequivocally defined in the Stipulation as encompassing those assets **directly owned** by Duke Energy Ohio.[208] Further detail was provided in the supplemental testimony of Charles Whitlock, who delineated the specific assets that fell within the definition of Generating Assets.[209] Neither Staff nor any other signatory party quibbled with this definition, when signing the stipulation, when submitting testimony recommending its approval, or during the course of the hearing. Notably, the Stipulation was silent with regard to the Company's contractual entitlement in OVEC, and understandably so. Duke Energy Ohio does not directly own – and has never directly owned – the Kyger Creek or Clifty Creek facilities. Those assets are owned by OVEC and its wholly owned subsidiary, IKEC. The ESP II Stipulation cannot reasonably be interpreted as having necessitated the transfer of Duke Energy Ohio's interest in OVEC.

Staff's interpretation of the ESP II Stipulation at first blush, disappointing and, with further thought, alarming. To summarize – Staff believes that that which is not expressly and intentionally included in a stipulated settlement can, in fact, be read into a stipulation at any time, by any party, and for any reason. In other words, that which may not have been expressly included in a settlement can be inferred. This is not the law of contracts. As intervenors and even

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[207] OCC Exhibit 2 (ESP II Stipulation), pg. 25.
[208] Id, pg. 9, footnote 9.
[209] Duke Energy Ohio Exhibit 25 (Supplemental Direct Testimony of Charles R. Whitlock, Case No. 11-3549-EL-SSO, *et al.*), at Attachment CRW-1.

Staff concede, the settlement process is one in which parties take care to review a written agreement, to ensure that the agreement accurately and correctly reflects the terms to which they are agreeing.[210] And it is a cardinal rule of contract interpretation that the words of the contract shall be applied, as written, to realize the agreement of the parties. A contract cannot be enlarged by the insertion of additional language and the commitments thereunder cannot be changed by subsequent, editorial manipulation.

The ESP II Stipulation is clear. Duke Energy Ohio agreed to transfer to an affiliate or subsidiary its legacy, owned generating assets, assets that there intentionally defined. The parties intended – and agreed upon – nothing with respect to the Company's contractual entitlement in OVEC.

As an aside and further demonstrating the tortuous efforts employed by Staff and intervenors here, if OVEC were an affiliate, as the GCHC contends, Duke Energy Ohio would have no obligation whatsoever to transfer it under the ESP II Stipulation. As that document succinctly provides, generation owned by affiliates was expressly and intentionally excluded from the generating assets to be transferred.[211]

The Staff is also suggesting that the Company's "main objective" in the ESP Stipulation was to be a "wires only" company.[212] Staff's witness Choueiki made this suggestion a number of times during his cross examination and in his direct testimony. But Dr. Choueiki's attempt to characterize Duke Energy Ohio as a "wires only" suffers principally from the fact that there is no record evidence that the Company made such a commitment. The ESP II Stipulation explicitly commits Duke Energy Ohio to transfer the directly owned Generation Assets as defined in the Stipulation; however, as discussed above, it made no mention of contractual entitlements not

[210] Tr. XII, pg. 3413; Tr. V, pg. 1155; Tr. XI, pg. 3264.
[211] OCC Exhibit 2, pg. 9, footnote 9.
[212] Tr. XIII, pg. 3417.

explicitly defined in the stipulation. As a result of the ESP II Stipulation, the legacy generating assets that were formerly directly owned by Duke Energy Ohio will stand on their own in the competitive market. Thus, the Commission has realized its goal of a competitive market for generation supply insofar as it concerns Duke Energy Ohio.

Staff, in direct testimony, recommends that Duke Energy Ohio seek a waiver of the obligation, albeit contrived, to transfer the ICPA and during the hearing in this matter, admitted that the record was replete with evidence that would have supported such a request.[213]

OCC puts a different spin the obligations and commitments reflected in the ESP II Stipulation. But its contentions suffer from the same tortured interpretive method employed by Staff. Specifically, OCC argues that OVEC represents a contractual obligation that existed before the ESP II Stipulation was executed and, as such, Duke Energy Ohio may retain it without Commission approval only upon a showing that transfer would result in substantially increased liabilities to Duke Energy Ohio or that such transfer was prohibited by the terms of the contract.[214] This statement undeniably ignores the passage, as a whole, carving out language that serves the OCC's purpose.

Significantly, however, all of the words in the relevant provision must be read and given effect. And when they are, it is clear that the contractual obligations at issue here are those that relate to the legacy Generation Assets being transferred. As the parties to the ESP II Stipulation intended:

> Following the transfer of the Generation Assets, Duke Energy Ohio shall not without prior Commission approval: 1) provide or loan funds to; 2) provide any parental guarantee or other security for any financing for; and/or 3) assume any liability or responsibility for any obligation of subsidiaries or affiliates that own generating assets, provided however, that contractual obligations arising before the signing of the Stipulation shall be permitted to remain with Duke Energy Ohio

[213] Staff Exhibit 1, pg. 6-7; Tr. XII, pp. 3372, 3373.
[214] OCC Brief, pp. 45-47.

> without Commission approval for the remaining period of the contract but only to the extent that assuming or transferring such obligations is prohibited by the terms of the contract or would result in substantially increased liabilities for Duke Energy Ohio if Duke Energy Ohio were to transfer such obligations to its subsidiary or affiliate.[215]

This language, taken as a whole and read in context, confirms that the intent is to avoid any conduct that would be perceived as violating corporate separation. And such violations could potentially arise if Duke Energy Ohio were providing an unfair competitive advantage to an unregulated affiliate to whom its legacy Generation Assets had been transferred. Simply put, "contractual obligations" refers to those commitments related to the transferred assets. To allow any other interpretation necessarily yields the irrational conclusion that Duke Energy Ohio would be required to transfer most contracts pursuant to which it operates, such as, for example, labor contracts related to its natural gas business or electric distribution business, contracts with Commission-appointed auditors, and contracts with suppliers. Furthermore, even if the Commission would adopt the OCC's absurd interpretation, one must still reach the irrefutable conclusion that there was no mandate to transfer the ICPA. As the record evidence in these proceedings confirms, Duke Energy Ohio could only transfer the ICPA to an affiliate if (1) the affiliate were creditworthy or (2) Duke Energy Ohio remained financially liable for all obligations under the ICPA. If those conditions were not met, a transfer was prohibited by the express terms of the ICPA.[216] OCC's argument is therefore unavailing.

b. Duke Energy Ohio cannot be forced to transfer its contractual entitlement in OVEC.

Reflecting a divide in positions, likely resulting from the acquiescence that the ESP II Stipulation does not compel a transfer, intervenors, including IEU, argue that the Company

[215] OCC Exhibit 2, pp. 25-26.
[216] IEU Exhibit 5 (ICPA), pg. 21. *See also* Tr. V, pp. 1195, 1290, 1319, 1320.

should nonetheless be forced to transfer its contractual entitlement in OVEC.[217] As initial matter and as discussed above, the Company has made no commitment to transfer its entitlement under the ICPA and, therefore, should not be held to a commitment that never existed. However, the bigger hurdle for those parties advocating that the Commission order such a transfer is that the Commission does not have the authority to compel such a transfer. Although the Company agreed to transfer those Generation Assets identified in the ESP II Stipulation, there was no legal requirement to do so. The rules for corporate separation admittedly limit a utility's ability to compete for retail generation service in its own territory but utilities in Ohio have the right to participate in wholesale generation markets by owning generation or by owning entitlements to generation. Furthermore, EDUs are entitled to compete for retail electric generation service in service territories other than their own.[218] Again, the utility would have to own generation service or have an entitlement to generation in order to do so. Either of these two examples reveals the absurdity of those arguing that Duke Energy Ohio can be ordered to divest of generation and/or contracts that entitle it to generation. Finally, it should be noted that the entitlement to OVEC's generation under the ICPA is similar to the "entitlement" Duke Energy Ohio has under the contracts for SSO supply. In both cases, Duke Energy Ohio takes title to the electrons that are provided by the supplier. Taking "title" to the generation provided by the SSO auction winners no more puts Duke Energy Ohio in the retail electric generation business than taking title to electrons provided by OVEC under the ICPA.

For all these reasons, the arguments advanced by Staff and intervenors that Duke Energy has a commitment, or should be ordered by the Commission, to transfer its entitlement under the ICPA should be dismissed. Wishfully thinking that the laws and prior stipulations mean

[217] IEU Brief, pp. 30-31.
[218] R.C. 4928.146.

something other than what is explicitly provided for is no grounds for ignoring the actual explicit language that exists in those laws and stipulations.

V. ESP v. MRO Test

A. Duke Energy Ohio's Proposed ESP Satisfies the Required Comparison to the Results under an MRO.

1. The Test Requires Both Quantitative and Qualitative Evaluation.

The Commission is required to consider a proposed ESP to determine how it compares to the expected results that would apply under an MRO. If the ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate, then the Commission must approve, or modify and approve, that ESP.[219] The Company demonstrated conclusively, through direct testimony, that the ESP proposed in these proceedings is indeed more favorable in the aggregate than the expected results of an MRO.[220] Some parties have attempted to argue that the test has not been met. They are wrong.

The first dispute relates to how the test is to be applied. OCC disputes the Commission's normal approach, asserting that the Ohio Supreme Court has required a "strictly quantitative analysis."[221] A review of the cited case reveals that the Court reached no such conclusion. Indeed, on the referenced pages,[222] the Court discussed only formula-based "POLR" charges versus actual such charges, the inclusion in an ESP of matters other than those listed in the governing statute, and the interpretation of the deadline for Commission action on an ESP. Rather, the Commission should follow its own precedent, under which it performs a thorough

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[219] R.C. 4928.143(C)(1).
[220] Duke Energy Ohio Exhibit 6, pp. 24-27.
[221] OCC Brief, pp. 59, 60 (citing "*In re Application of Columbus Southern Power Company et al.*, 128 Ohio St.3d 512, 519, 520 (2011)").
[222] Although no pinpoint citation to paragraphs was provided, the OCC pages comprise paragraphs 27 through 37. (*In re Columbus S. Power Co.*, 2011-Ohio-1788.)

analysis – as demanded by Ohio law and proposed by Staff – of the proposed ESP, **in the aggregate**,[223] considering both quantitative and qualitative factors.

OCC sets forth a roundabout argument that, in the course of applying the MRO test, the Commission must also consider whether each element of the proposal is consistent with state policies, as set forth in statute.[224] While Duke Energy Ohio does not dispute, in any regard that the an SSO must be consistent with the identified state policies, the need for such consistency is in no way a part of the MRO test.

OCC's error in this regard is apparent upon a close review of the argument. In the middle of a lengthy discussion of the need to comply with state policy, OCC – wrongly, as it turns out – described a PUCO holding. OCC said the following:

> [T]he Court held that the PUCO may not approved a rate plan that violates the policy provisions of R.C. 4928.02. Accordingly, the PUCO held that an electric utility should be deemed to have met the "more favorable in the aggregate" standard "only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in section 4928.02, Revised Code."[225]

In OCC's brief, this quote is followed by a footnote that includes no text, leaving the reader unable to determine the source of the Commission language and purported holding. However, a computer search of Commission orders, searching for precisely the words "only to the extent that the electric utility's proposed MRO is consistent" results in exactly one hit: the FirstEnergy utilities' application, in 2008, for approval of an **MRO**. And, while the second grouping of words that were placed in quotes by OCC do actually appear in that Opinion and Order, the first half of the quoted section is entirely different. OCC's brief uses the second half of the sentence in question as proof that the state policies must be met in order for the MRO test to be satisfied.

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[223] R.C. 4928.143(C)(1). *See also* Staff Exhibit 2 (Direct Testimony of Tamara Turkenton), pg. 3.
[224] R.C. 4928.02.
[225] OCC Brief, pg. 56.

But the Commission was only talking about the contents of an MRO proposal. The actual quote is as follows:

> Moreover, we disagree with FirstEnergy's claim that Section 4928.02, Revised Code, does not impose any obligations or duties upon the Companies. The Ohio Supreme Court recently held that the Commission may not approve a rate plan which violates the policy provisions of Section 4928.02, Revised Code. *See* Elyria Foundry v. Pub. Util. Comm. (2007), 114 Ohio St. 3d 305. Accordingly, an electric utility should be deemed to have met **the statutory requirements of Section 4928.142(A), Revised Code,** only to the extent that the electric utility's proposed MRO is consistent with the policies set forth in Section 4928.02, Revised Code.

The Commission was discussing whether the proposed MRO (not ESP) met the statutory requirements for an MRO. As it was an MRO proceeding, there was of course no reference whatsoever to the ESP vs. MRO test that appears in the ESP statute.

The comparison of a proposed ESP to the expected results under an MRO has nothing to do with consistency with state policy. State policies are certainly a guide to be considered by the Commission, but this issue is entirely independent of the MRO test.

2. Quantitative Evaluation Shows the Proposed ESP to be Equivalent to an MRO.

OCC argues that the proposal must fail the test, first, because the Company claimed only the quantitative equality of proposal with the results of an MRO. Starting from the proposition that the Commission may legally consider only the quantitative comparison, they argue that, if the two are identical, the proposal must not be better. However, as discussed above, the Commission must – and does – consider qualitative factors, as well. If it did not do so, then no ESP based on a wholesale auction could ever be more favorable than an MRO, as MROs are based on directly comparable wholesale auctions.

Several intervenors argue that the quantitative comparison must include Rider PSR.[226] However, this belief is based on Rider PSR actually being quantifiable. In reality, the impact of Rider PSR is entirely based on future events that are outside the control of Duke Energy Ohio. The Company has, in response to discovery, projected what the future cost or benefit of Rider PSR might be, on the basis of numerous assumptions about future events. But, as the Commission is well aware, forecasts are not the same as estimates.[227] And the Commission has previously recognized that there is a limit to how speculative a quantification can be and still be included in the MRO test.[228] Here, the Company intentionally excluded Rider PSR from consideration in the test, as the forecasts are deemed too speculative to rely on.

The parties that question the merits of the Company's calculations are themselves engaging in speculation and conjecture. For example, Sierra argues that the Company's estimates related to environmental compliance are too low. However, Sierra witness Sarah E. Jackson admitted that she had not ever visited the OVEC plants or discussed them with anyone connected with OVEC.[229] Ms. Jackson did no independent research regarding the projected net benefits for OVEC and simply relied upon information provided by Duke Energy Ohio.[230] Nor did she have any particular knowledge with respect to when or if retirement of generating facilities would occur.[231]

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[226] OCC, IEU, Kroger, GCHC likely others

[227] *See* Tr. X, pg. 2934.

[228] *In the matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order, pg. 31 (Dec. 14, 2011)(overturned on other grounds, Entry on Rehearing (Feb. 23, 2012)).

[229] Tr. VIII, pg. 2269.

[230] *Id*.

[231] Tr. Vol. VIII., pg. 2273.

Ms. Jackson further argued that forecasts are uncertain and can change in either direction.[232] While she sought to argue that the Company had not considered sufficient risk associated with certain environmental, regulatory and legal requirements, Ms. Jackson readily admitted that the requirements will undergo a potentially lengthy legislative process and that she cannot pinpoint when such changes will be implemented.[233] Sierra indicates in its Brief that the Company's forecasts should not be believed, as underlying data was not provided in discovery.[234] However, Sierra fails entirely to acknowledge the copious testimony by Duke Energy Ohio witness Dr. Ben Zhang regarding the development and functioning of the Company's modelling system.

Ms. Jackson did acknowledge that the Company had considered environmental regulations related to such matters as effluent limitation, disposal of coal combustion residues, cooling water intake facilities, the National Ambient Air Quality Standards, particulate matter and sulfur dioxide standards, cross-state pollution regulations and ozone regulation.[235] Thus, while the Company may have reached a different conclusion, it cannot be faulted for not having included environmental risk in its analysis. But in either case, the risk factor cannot be measured with any precision.

In contrast to Sierra, intervenor OEG contends, through its witness, Alan S. Taylor, that "OVEC's all-in generation costs are likely to be at or below market prices in the near future."[236] Although he cannot state exactly when Rider PSR will be a net benefit to customers,[237] Mr. Taylor indicated that the Company had portrayed a "conservative outlook for the OVEC net

[232] Tr. Vol. VIII, pg. 2270
[233] Tr. VIII, pg. 2272.
[234] Sierra Brief, pg. 10.
[235] Tr. VIII, pg. 2274
[236] OEG Exhibit 1 (Direct Testimony of Alan S. Taylor), pg. 13.
[237] Tr. VII, pg. 1872.

benefits."[238] Mr. Taylor also noted that the corresponding forecast prepared by AEP Ohio in the context of its pending ESP proceeding "showed greater net benefits than Duke Energy Ohio's forecast." Even that AEP Ohio forecast was, in Mr. Taylor's opinion, "on the conservative side." Explaining, Mr. Taylor stated that both utilities' estimates of future capacity prices at PJM appeared to be too low to attract the development of new generation in the state and that, given pending retirements, there will be upward pressure on capacity prices. Furthermore, Mr. Taylor pointed out that the long-term market values were developed before the full impact of last winter's polar vortex was experienced.[239] Thus, he anticipates greater net benefits of the OVEC hedge than have been otherwise forecast by Duke Energy Ohio.[240]

No party has provided any evidence to demonstrate that the Company's forecasts are anything more than speculation as to the future, leaving any impact of the rider inappropriate for inclusion in the quantitative aspect of the test.

OCC also complains that the Company failed to include the cost of Rider DCI in the test, asserting that Rider DCI would also be available in an MRO and that, although not quantified, the costs of such a rider should be considered.[241] The OCC's position conflicts with the testimony of its own witness. During cross-examination, OCC's witness Hixon acknowledged that the **only** "quantitative" difference that "tips the scales" against the ESP was Rider PSR. In the opinion of OCC's witness testifying to the MRO test, all other of the Company's proposed ESP were quantitatively equal to the results that could be expected under an MRO.[242] The Commission itself has clarified in other cases[243] that the cost of Rider DCI should not be

[238] OEG Exhibit 1, pg. 16.
[239] Tr. VII, pg. 1949.
[240] OEG Exhibit 1, pp. 16-17.
[241] OCC Brief, pp. 63-65.
[242] Tr. Vol. XII, pg 3614.
[243] Case No. 12-1230-EL-SSO, pg. 55.

included in a comparison of the two options as recovery under such a rider would be "wash" when compared to the recovery available under traditional rate cases if the Company was operating under an MRO.

It must also be noted that the Commission has previously found that qualitative benefits have significant value and can outweigh even quantitative detriments. In a case where the Commission concluded that the quantitative comparison favored the MRO by almost $400 million, it nevertheless found that the ESP was more favorable, based on the qualitative differences.[244] Thus, even if the Commission were to conclude that the forecasted financial impact of Rider PSR – an amount much smaller than in the referenced case – must be considered, it could and should still find that qualitative benefits exceed any costs, making the ESP more favorable in the aggregate.

Not surprisingly, intervenors also contended that the proposed ESP is qualitatively less favorable than an MRO. They dispute the provision of rate stability and certainty by Rider PSR. They dispute the benefits or availability of retail market enhancement and rate design. They dispute the assurance of reasonable prices, due to return on earnings, SEET test threshold, and cost allocation. They simply ignore the significant qualitative benefit of promoting competition by continuing the Company's Purchase of Receivables (POR) program. But, importantly, Staff finds Rider DCI to be a benefit, as does the Company. And certainly the Commission must, as well, because the Commission has approved riders similar to Rider DCI and Rider DSR for all of the other Ohio electric utilities.

The Commission should evaluate the proposed ESP in the context of the numerous beneficial aspects that the Company has shown through the record evidence.

VI. SIGNIFICANTLY EXCESSIVE EARNINGS TEST

[244] AEP Ohio ESP II, Opinion and Order, pp. 75-77.

A. The Threshold for the Statutory SEET Test Is Reasonable and Should Remain Unchanged.

In its Application, the Company proposed an unchanged threshold level of 15 percent for the annual significantly excessive earnings test (SEET) mandated by Ohio law.[245] Among Staff and all the intervenors in these proceedings, only OCC and OPAE disagreed with the Company's proposal.

OCC initially argues that it is **unlawful** for the Commission to establish, in an ESP proceeding, a forward-looking SEET threshold. "Duke's prospective calculation of the ROE Threshold violates R.C. 4928.143(F) and OAC 4901:1-35-0-3(C)(10)(a) [*sic*] and, thus, is unlawful."[246] This is an astonishing statement, as it directly contradicts the Commission's actions in many prior ESP and SEET proceedings, as well as many of OCC's own prior statements and positions. For example, in July 2014, in AEP Ohio's currently pending ESP proceeding, OCC disputed the threshold proposed by AEP Ohio, but advocated the Commission setting a threshold to OCC's liking: "A SEET threshold of 12% or lower should be adopted by the Commission."[247] If OCC's new interpretation of the SEET requirement is to be believed, it appears that OCC was recommending, in the AEP Ohio case, an illegal act. Similarly, OCC has signed stipulations in Duke Energy Ohio's two prior ESP cases, both of which included forward-looking SEET thresholds, to which OCC did not object.[248] Interestingly, even OPAE, the only

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[245] R.C. 4928.143(F).
[246] OCC Brief, pp. 112-113.
[247] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, *et al.*, OCC Initial Brief, pg. 148 (July 23, 2014).
[248] *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143 Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.*, Stipulation and Recommendation, (October 24, 2011), at p.32; and *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, Case No. 08-920-EL-SSO, *et al*, Stipulation and Recommendation, (October 27, 2008), at p.35.

other party to object to a 15 percent SEET threshold, does not argue that it is illegal to set such a threshold in an ESP. OCC's new position on the law is neither credible nor supportable.

For the second prong of its needless attack on the SEET proposal, OCC suggests that the Company has not met the SEET burden of proof, as set forth in R.C. 4928.143(F). As support for its position, OCC cites to the Commission's Entry on Rehearing in its 2010 SEET investigation proceeding.[249] But OCC misreads that Commission directive. OCC's description of the entry states as follows:

> Even assuming that the SEET ROE Threshold can be set prospectively in an ESP proceeding, the PUCO has recognized that, absent stipulation, the EDU must provide the evidence and analyses its rules and orders require, or the burden of proof cannot be sustained. Lacking any evidence or analyses to support the 15 percent SEET ROE Threshold **in this proceeding**, Duke has failed in its burden and its proposed SEET ROE Threshold must be denied.[250]

Contrary to OCC's description, the Commission never said anything about the burden or the level of required proof or the evidence required in a non-stipulated proceeding that establishes a going-forward threshold. Rather, the Commission's instruction related to the evidence required in a SEET application.

> If . . . the SEET determinant factors are addressed in [a] stipulation, the utility can file **its SEET application** and supporting testimony consistent with that [stipulation]. Where [a] stipulation did not address issues relating to SEET, Duke must file the required information in accordance with the directives in this proceeding.

Finally, OCC addressed the substance of the SEET proposal, claiming that the only "credible" evidence on this topic was provided by OCC witness Matthew Kahal, who opined that the market cost of capital has declined since the Company's ESP II proceeding and that its operational risk profile is improved through the divestiture of generation assets and the riders

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[249] OCC Brief, pg. 113 (*citing In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Substitute Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Entry on Rehearing, pp. 6-7 (August 25, 2010)).

[250] OCC Brief, pg. 113 (emphasis added).

proposed in ESP III. OPAE similarly argued that current market conditions and the Company's risk profile justify a lower threshold.

But these parties ignore other relevant evidence in the record. On rebuttal, Duke Energy Ohio offered the testimony of Dr. Roger A. Morin, a highly respected professor, author, and expert who has testified in countless proceedings, before almost fifty regulatory bodies.[251] Dr. Morin directly rebutted the contention of Mr. Kahal that accelerated cost recovery through riders proposed in ESP III will reduce Duke Energy Ohio's business risk. As Dr. Morin stated, Mr. Kahal admitted that he had performed no studies or analysis – such as a comprehensive risk profile of Duke Energy Ohio – to justify his belief that such a reduction would occur.[252] And, on cross-examination by counsel for the OCC, Dr. Morin discussed his conclusion that the approval of the sort of distribution riders at issue here has no impact on business risk or the justifiable ROE that should be approved.[253] As he explained, to the extent that a justified ROE is based on a comparison with similar companies, it is inappropriate to reduce the ROE in response to approval of a risk-mitigating measure, because most of those similar companies also have similar risk-mitigating measures.[254]

Finally, the arguments advanced by OCC and OPAE fail to acknowledge that the SEET threshold being proposed in these proceedings is intended only to eliminate potential litigation over what constitutes 'significantly' excessive earnings. OCC laments the fact that the legislature included the term 'significantly' when SB 221 was codified. The term 'significantly excessive' must mean something more than just 'excessive'; otherwise, the legislature would not have made the distinction that apparently still troubles the OCC. Wishing that SB 221 did not include this

[251] Duke Energy Ohio Exhibit 40 (Rebuttal Testimony of Dr. Roger A. Morin), pp. 1-3.
[252] Duke Energy Ohio Exhibit 40, pg. 5; Tr. VII, pp. 1786-1788.
[253] Tr. XVI, pp. 4225-4229 (*e.g.*, "the impact of revenue decoupling on ROE is zero" pg. 4227).
[254] Duke Energy Ohio Exhibit 40, pp. 71-72; Tr. XVI, pg. 4229.

provision does not mean that it can be ignored. The 15 percent threshold being advocated by the Company only means that there would be no need to go through protracted litigation when Duke Energy Ohio's earnings are below that number, as 15 percent is not **significantly** excessive. It should not be lost on the Commission or the intervenors that, even if the Company's earnings exceeded 15 percent, it is not necessarily the case that its earnings were significantly excessive. Exceeding the threshold only means that the Company would have to prove that its earnings were not significantly excessive. The proposed 15 percent SEET threshold effectively balances the interests of stakeholders and the Company in avoiding litigation over earnings that are not "significantly" excessive.

Nothing in Mr. Kahal's testimony supports a reduction in the SEET threshold that has been in place for Duke Energy Ohio since 2008. Duke Energy Ohio proposed, here, a threshold and methodology that is eminently reasonable and should be approved.

B. The SEET Calculation Methodology Should Remain Unchanged.

The methodology for calculating the earnings that are tested through the SEET process has be conclusively determined by the Commission.[255] And that methodology has been applied to Duke Energy Ohio's earnings, since the SEET's inception.[256] Nevertheless, Staff proposes to change that methodology, without evidence of in-depth discussion, in this case.

In its Brief, Staff reiterates a recommendation made by witness Choueiki regarding the Company calculation of earnings under the SEET.[257] Specifically, Staff suggests that, assuming the Commission denies the Company's proposed Rider PSR, the Commission should exclude,

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[255] *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order (June 30, 2010).
[256] *In the Matter of the Application of Duke Energy Ohio, Inc. for Administration of the Significantly Excessive Earnings Test Under Section 4928.143(F), Revised Code*, Case Nos. 12-1280-EL-UNC, 13-804-EL-UNC, 14-577-EL-UNC.
[257] Staff Brief, pg. 5.

from the annual SEET calculation, the revenues and expenses associated with Duke Energy Ohio's entitlement under the FERC-approved ICPA. Mr. Choueiki says that, in order to "assign not only the risks but also the rewards associated with [OVEC] to the owners of Duke Energy Ohio," all expenses and revenues associated with the Company's interest in OVEC[258] be excluded from the SEET test. On cross-examination, however, Mr. Choueiki admitted that he was "not sure exactly what the details of the SEET test are." He could not even respond positively when asked if he was aware of whether the Commission had adopted any parameters for the administration of the SEET test.[259] Without the witness having even a rudimentary knowledge of how the SEET test functions, this Staff recommendation should be rejected.

Staff's proposal is inexplicable inasmuch as it is advocating that the Commission violate an explicit provision of the Ohio Revised Code. R.C. 4928.143(F) addresses the components of the SEET and, under that statute, the legislature provided explicit examples of the items to be included or excluded from the SEET calculation. Only the last sentence of R.C. 4928.143(F) addresses any revenue, expenses, or earnings to be excluded from the SEET calculation: "In making its determination of significantly excessive earnings under this division, the **commission shall not consider, directly or indirectly, the revenue, expenses, or earnings of any affiliate or parent company**."[260] The revenue, expense, and earnings associated with Duke Energy Ohio's entitlement under the FERC-approved ICPA is reflected directly on Duke Energy Ohio's books and records. These revenues, expenses, and earnings are <u>not</u> the revenues, expenses, and earnings of any affiliate or subsidiary. Consequently, there is no provision under the law that

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[258] The words in Mr. Choueiki's testimony actually refer to Duke Energy Ohio have "interests in the OVEC generating stations." Duke Energy Ohio has no ownership interest in the generating stations. The Company's ownership interest is only in the OVEC legal entity.
[259] Tr. XII, pg. 3485.
[260] R.C. 4928.143(F)(emphasis added).

would allow the Commission to exclude the revenue, expenses, and earnings of Duke Energy Ohio that are **not** derived from a subsidiary or affiliate.

In its 2010 evaluation of how the SEET would be applied, the Commission stated that the determination of whether gains and losses associated with off-system sales (*i.e.*, the wholesale sales at issue in this proceeding) is included in the SEET calculation would be decided on a case-by-case basis.[261] However, the law itself seems less ambiguous and Duke Energy Ohio has, in every annual SEET review, **included** its gains and losses on wholesale sales consistent with R.C. 4928.143(F). Wholesale sales activity is an ongoing activity for the Company and, thus, not an "extraordinary" or "nonrecurring" event.

Whether the Commission approves or denies the Company's proposed Rider PSR, there is no flexibility in R.C. 4928.143(F) to accommodate the Staff suggestion here. Consequently, the Commission should reject Staff's recommendation regarding the SEET calculation.

VII. OTHER

A. Purchase of Receivables and Uncollectible Rider

OCC argues in its brief that "the PUCO should also not require [Duke Energy Ohio's] SSO customers to pay for the bad debt of customers of competitive suppliers. Instead the PUCO should order the Utility to charge competitive suppliers for the bad debts of their customers by taking a percentage off the amount [Duke Energy Ohio] reimburses competitive suppliers as their billing agent in order to cover the customers' bad debts."[262] Similarly, OPAE argues that the POR program is an "improper" and "involuntary" subsidy to CRES providers. OCC's concern on this issue simply misses the point. The combination of the Company's POR program

[261] *In the Matter of the Investigation into the Development of the Significantly Excessive Earnings Test Pursuant to Amended Senate Bill 221 for Electric Utilities*, Case No. 09-786-EL-UNC, Finding and Order, pp. 3-4 (June 30, 2010).
[262] OCC Brief, pg. 3-4.

and its uncollectible expense rider (Rider UE-GEN) levels the competitive playing field between CRES providers and SSO auction winners. Winners of the SSO auctions provide generation service to Duke Energy Ohio's SSO customers. Duke Energy Ohio compensates the SSO auction winners for 100 percent of the deliveries made for SSO service. Duke Energy Ohio is made whole by collecting revenue under Rider RC, Rider RE, and Rider SCR.

The Company's proposal to continue the existing POR program, with only modest changes, and to continue to purchase CRES receivables at no discount, puts CRES providers on the same competitive level as SSO auction winners as both are fully compensated for the generation service they provide. The implication is that both SSO auction winners and CRES providers can offer a slightly lower price for generation service inasmuch as neither has to factor in bad debt expense into their offers.

Where the POR program levels the competitive playing field between CRES and SSO auction winners, Rider UE-GEN ensures that Duke Energy Ohio is made whole for its role in providing generation service. Duke Energy Ohio is responsible for the receivables associated with SSO service and, because it purchases receivables from CRES providers, it is also responsible for the receivables of CRES providers participating in the POR program. The net effect is that Duke Energy Ohio owns the receivables for **all**[263] generation service. Because Duke Energy Ohio will own all of the receivables associated with generation service, regardless of whether the service is provided under the SSO or by CRES providers, it follows that Rider UE-GEN should be non-bypassable. Furthermore, it is important to continue Rider UE-GEN to ensure that Duke Energy Ohio is made whole for the provision of pass-through services such as the generation service provided by SSO auction winners or CRES providers.

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[263] Because participation in the CRES program is currently voluntary, receivables from some CRES providers is not included. The Company is proposing in ESP III, to make the POR program compulsory meaning all receivables for generation service, CRES or SSO, will be owned by Duke Energy Ohio.

When viewed from the proper perspective, the Company's existing and proposed POR program, combined with its Rider UE-GEN, is absolutely consistent with the state policy goals under R.C. 4928.02(H) insofar as it unquestionably ensures effective competition in the provision of retail service. There is no improper subsidy flowing to any party in the POR program or under Rider UE-GEN as suggested by OPAE. Quite the contrary – this program balances the competitive playing field between SSO auction winners and CRES providers in a manner that could not exist without the program.

It should also be noted that the Commission has recently engaged in an in-depth evaluation of the competitive retail electric market in Ohio and, as a part of that process, has considered the impact of programs under which EDUs would purchase CRES providers' accounts receivable. Although refraining, in that proceeding, from requiring such programs, the Commission concluded that it "encourages each EDU to include in its next distribution rate case or SSO an application to implement a POR program or equivalent."[264] It is indisputable that the Commission supports POR programs such as the one in place in Duke Energy Ohio's territory.

For all of the reasons stated above, OCC's and OPAE's arguments should be dismissed. The Commission should approve the Company's proposals regarding the continuation of the POR program and Rider UE-GEN, as they constitutes a significant qualitative benefit being offered in this proposed ESP.

B. Load Factor Adjustment

Duke Energy Ohio has proposed to eliminate Rider Load Factor Adjustment (LFA), as it is a non-market-based influence on usage behavior, thus undermining the state's objective of

[264] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service* Market, Case No. 12-3151-EL-COI, Finding and Order, pg. 21 (March 26, 2014).

having the cost of competitive generation services determined by market influences alone.[265] Staff and intervening parties argue variously that Rider LFA should either be phased out over a period of three years[266] or maintained indefinitely.[267] The Company maintains its position that Rider LFA be terminated, effective June 1, 2015.

C. Economic Competitiveness Fund

As explained by Duke Energy Ohio witness Ziolkowski, the Company proposes to eliminate Distribution Rider - Economic Competitiveness Fund (Rider DR-ECF). This interruptible load program is no longer required. The Company proposes a true-up of any over- or under-recovery of costs included in Rider DR-ECF as of May 31, 2015.[268]

OEG is the only party seeking to continue this rider as a means of recovering costs incurred by Duke Energy Ohio should the Commission accept its recommendation to continue the Large Customer Interruptible Program related to the Company's FRR status as agreed to in the ESP II Stipulation. The Company does not agree with OEG's proposal to continue the Large Customer Interruptible Program. Assuming the Commission agrees to discontinue that program, Rider ECF should be eliminated subject to a final true-up. No other party disagreed with this proposal.

D. Percentage of Income Payment Plan

The Company did not make any recommendations in its application with respect to the PIPP except to note that the discount agreed to in the previous ESP proceeding would end on May 31, 2015. Beginning June 1, 2015, the PIPP load is to be combined with other SSO load

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[265] Duke Energy Ohio Exhibit 6, pp. 21-22.
[266] Staff, Kroger, OEG, and OMA
[267] Universities and GCHC.
[268] Direct Testimony of James E. Ziolkowski, Duke Energy Ohio Exh.18, pg.7-8.

and supplied through the SSO auction process.[269] Additionally, the Company recognized that the Ohio Development Services Agency (ODSA) has the statutory right to aggregate the PIPP load and solicit generation supply from CRES providers.[270]

No party opposes the inclusion of PIPP customers into the SSO load that is to be served by the auctions. However, Direct Energy advocates that the Commission should direct the Company to use the output from its contractual entitlement from OVEC to serve PIPP customers.[271] Direct Energy witness Teresa L. Ringenbach acknowledged, however, that ODSA has the authority to aggregate PIPP load to acquire service.[272] While Ms. Ringenbach agreed that the option would rest with ODSA to determine whether it wished to receive service from Duke Energy Ohio in this way, Ms. Ringenbach had never discussed this option with anyone at ODSA.[273] It is abundantly clear that ODSA does not wish to avail itself of the option that Ms. Ringenbach proposes.[274] Likewise, Ms. Ringenbach also did not adequately consider the ramifications of her proposal on the way in which such proposal would work in connection with the timing of the PJM base residual auctions or the way in which the Universal Service Fund (USF) works.[275] For all of these reasons, Direct Energy's proposal that the Company serve PIPP customers through its OVEC entitlement is ill conceived and should be rejected.

E. Early Termination

The Company expressly reserved the right to terminate its proposed ESP at the conclusion of the second year thereof, or May 31, 3017.[276] This reservation is carefully circumscribed such that it may be exercised only in the event that there is a substantive change in

[269] Direct Testimony of James E. Ziolkowski, Duke Energy Ohio Exh. 18, pg.7
[270] Id.
[271] Direct Exhibit 1 (Direct Testimony of Teresa Ringenbach), pg. 9.
[272] Tr. IX, pg. 2663.
[273] Tr. Vol.IX, pg. 2664.
[274] Initial Post-Hearing Brief of the Ohio Development Services Agency, (December 15, 2014).
[275] Tr. IX, pg. 2667.
[276] Application, pg. 16

Ohio or federal law that affects SSOs or rate plans concerning them. The time period within the Company would exercise this right is similarly circumscribed such that notice of termination would have to be provided to the Commission no later than September 1, 2016. In initial briefs, some of the intervening parties oppose the Company's reservation of the right to termination early.[277]

Staff argues that a right to terminate early would introduce unnecessary risk and uncertainty into the SSO supply procurement process. However, Staff witness Strom admitted that he has made no effort to quantify the level of such risk.[278] He further admitted that SSO auction participants already face risk and uncertainty because of a volatile market and that risk and uncertainty are inherent in any activity of this nature.[279]

In response to the perceived risk that the Staff raises as an impediment, Staff argues that one way to manage this perceived risk would be to require that any subsequent ESP include the same competitive bidding process for procurement of SSO supply, and require the auction blending process to continue unabated.[280] However, Mr. Strom readily admits that he is not recommending to the Commission that the Company's next ESP be for a three year term.[281] He is also not asking the Commission to dictate to Duke Energy Ohio that its next application be in the form of an ESP.[282] However, the auction schedule proposed by Mr. Strom, which carries forward into the next, yet-to-be-filed ESP, would require SSO suppliers to participate in an auction relative to the SSO supply, not knowing what other terms of the SSO would be.[283] The bidders would not know if there would be any riders that could influence or affect switching;

[277] Staff Brief, pg. 49 and Staff Exhibit 3, pp. 3-4, Kroger Brief, pg. 7.
[278] Tr. XIII, pg. 3815.
[279] Tr. XIII, pg. 3816.
[280] Staff Exhibit 3, at 5.
[281] Tr. XIII, pg. 3820
[282] Tr. XIII, pg. 3821.
[283] Tr. XIII, pg. 3824.

they would not know the rate design approved; they might face legislative risk; and there would be risk associated with the PJM capacity market.[284] Finally, Mr. Strom admitted that he views the Company's reservation of the right to terminate early as unlimited, despite the parameters described by the Company in its reservation of the right.[285] Thus, Mr. Strom's recommendations around the auction process, and specifically the Company's reservation of the right to terminate early, is inadequately supported in the record.

Similarly, Constellation/Exelon and RESA's arguments that the criteria are not objective, or that uncertainty will be created, fails for the same reasons. Exelon admits that it has participated in previous Duke Energy Ohio auctions and although it now makes recommendations related to changing the Master Supply Agreement, Exelon has agreed to and signed previous iterations of that agreement.[286] Thus, the changes recommended are not necessary in order to entice Exelon to participate, as it has already done so previously.

OMA merely reiterates arguments made elsewhere.[287] OMA is not a potential bidder in the SSO auctions. Thus, OMA's arguments related to uncertainty should be given little credence or attention. OMA did not offer a witness to support its argument and thus adds no value to the discussion.

Direct Energy also argues that the Company's reservation of the right to terminate early is too vague and nebulously asserts that the provision is "unfair and places too much power into the hands of one party." This is a curious statement given that it is Duke Energy Ohio's responsibility to procure service for its load and to ensure that the auction process is managed pursuant to the Commission's requirements. The Company has delineated the terms under which

[284] Tr. XIII, pg. 3825.
[285] Tr. XIII, pg.3827.
[286] Tr. X, pg. 2710
[287] OMA Brief, pp. 5-6.

it might exercise its option, and those terms are quite limited and specific. Direct Energy did not offer any expert testimony to establish its case and thus has not supported its argument.

Kroger, Constellation/Exelon, OMA, RESA, and OCC argue that R.C.4928.143(B)(1) does not provide authority for early termination. Yet, the parties neglect to recognize the clear language of the statute that simply states:

> An electric security plan shall include provisions relating to the supply and pricing of electric generation service. In addition, if the proposed electric security plan has a term longer than three years, it may include provisions in the plan to permit the commission to test the plan pursuant to division (E) of this section and any transitional conditions that should be adopted by the Commission if the commission terminates the plan as authorized by that division.

Nothing in this statute requires that an ESP be proposed for any specified term. The Company may propose an ESP to be for any period of years that it chooses. Thus, nothing in the statute precludes the right to terminate "early" and the parties have not pointed to any specific language that supports this incorrect legal argument.

OCC asserts that the reservation of a right to terminate early impacts the Company's burden of proof in that, OCC claims, the Company must establish that a two-year ESP would pass a statutorily mandated comparison of the two-year ESP to an MRO. OCC correctly maintains that the Company has the burden of proof to demonstrate that the proposed ESP is more favorable in the aggregate than an MRO. However, OCC's extrapolation of this statutory requirement fails. The Company's proposed ESP necessarily includes all of the elements included in its Application. The Application in this instance includes a reservation of the right to terminate early under certain established criteria. Nowhere in the statute is there a provision that requires that each *individual element* of the application must meet the "in the aggregate test." Such a requirement would render the test incomprehensible. Instead, the Commission will reach a conclusion that the entire application meets the test. In this case, the right to terminate early is merely a detail embedded in the overall proposal. Despite OCC's attempt to write a new requirement into the statute, no such language exists to support this argument.

As has been established elsewhere in the record, there is much volatility in the market, and that volatility is caused by a large number of inherent factors. As the result of such volatility, the Company reserves a right to terminate the ESP given certain specified factors that might significantly impact the policy supporting the existing ESP proposal. The Commission should permit this flexibility in order to protect customers and the Company, as appropriate in these volatile circumstances.

F. Supplier Tariff Changes

1. Billing for Non-Commodity Charges

In response to the overwhelming support for its POR program,[288] Duke Energy Ohio is keeping that program in place. Nonetheless, it must be recognized that the CRES provider receivables, which are purchased by the Company with no discount, must still be paid by the customer who purchased the CRES services. And, if the bill remains unpaid, the charge for those CRES services ultimately becomes a part of Rider UE-GEN and is borne by <u>all</u> customers. Thus, Duke Energy Ohio seeks to limit the charges covered by the POR program to only those incurred in the supply of generation services to customers. And, to enable such a limitation, CRES providers would correspondingly not be authorized to place other charges on the consolidated utility bill.

IGS and RESA advocate for denial of the Company's proposal, asking the Commission to mandate that EDUs provide billing services for CRES providers' offering of any services that they may wish to market. Although they argue as if this is a natural aspect of the CRES

[288] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service* Market, Case No. 12-3151-EL-COI, Finding and Order (March 26, 2014).

business, the proposal is actually a revolutionary expansion of the Ohio legislature's intent. IGS and RESA are wrong, as will be seen through a review of the rationales for this position.

a. Contrary to undisputed evidence and simple logic, intervenors believe Duke Energy Ohio can bill for non-electric services by CRES providers and exclude those charged from the POR program.

IGS first proposes that the Commission could "simply" order the Company to allow billing for non-commodity services and to exclude those charges from the POR program.[289] Noting that Duke Energy Ohio witness Jones had testified that the Company is not technologically able to do that, IGS attempts to refute the Company's rationale by pointing to billing done for an affiliate of the Company's (Duke Energy One). IGS's witness White, quoted in the IGS brief, suggested that the fact that Duke Energy One charges for non-commodity services proves that the Company "has the ability to differentiate between unregulated non-electric charges and electric commodity charges."[290] Similarly, RESA witness Ringenbach "pointed out that Duke's billing system is already designed to charge for utility service, CRES or utility generation charges, and other non-commodity services."[291]

But it is not a question of knowing how to "differentiate" non-electric charges from commodity charges. IGS apparently does not understand the difference between Duke Energy One and CRES providers, and does not understand the Company's billing system. A few basic facts and concepts are important.

Duke Energy One is affiliated with Duke Energy Ohio, as both entities are members of the Duke Energy Corporation family. Duke Energy One does, as indicated by witness Hollis, sell **non**-electric services to customers of Duke Energy Ohio. However, it is not certified by the

[289] IGS Brief, pg. 9.
[290] IGS Brief, pg. 9 (*citing* IGS Exhibit 10, pg. 8).
[291] RESA Brief, pg. 5 (citing RESA Ex. 1, pg. 7).

Commission as a CRES provider, and, indeed, Duke Energy One does not sell any retail electric services.[292] CRES providers, on the other hand, by definition are sellers of retail electric services. They might also sell non-electric services, just as they might sell widgets, but it is their offering of retail electric services that causes them to be CRES providers.

Pursuant to Commission rule, Duke Energy Ohio offers consolidated billing to CRES providers, for their electric service charges. "Each electric utility shall coordinate with CRES providers to promote nondiscriminatory access to **electric services**, to ensure timely enrollment with CRES providers to maintain a customer's electric service, and to timely and correctly switch the customer's electric service between CRES providers."[293] "Electric utilities shall make consolidated billing available to CRES providers . . ..."[294] It is critical that the Commission's carefully drafted rule indicates that the requirement to provide consolidated billing relates to **electric services**, and nothing else.

The Company's own Supplier Tariff provides the details around available billing options, which options include consolidated billing.[295] Here, it is important to recognize the automated communication system established by the utility to provide billing services efficiently and cost effectively. Enrollments must be accomplished by use of electronic Direct Access Service Requests (or "DASRs").[296] Electric service meter reading information is then electronically transmitted by the utility to the CRES provider, broken down by each individual account.[297] Usage and charges are transmitted electronically between the Company and the CRES provider, in standard formats.[298] Due to the number of electric service accounts for which the Company

[292] R.C. 4928.01(A)(27).
[293] O.A.C. 4901:1-10-29(A) (emphasis added).
[294] O.A.C. 4901:1-10-29(G)(1).
[295] P.U.C.O. Electric No. 20, Sheet No. 39, Section X, Billing Services and Obligations.
[296] P.U.C.O. Electric No. 20, Sheet No. 39, Section VII, End-Use Customer Enrollment Process.
[297] P.U.C.O. Electric No. 20, Sheet No. 39, Section X, Billing Services and Obligations, paragraph 10.4.
[298] P.U.C.O. Electric No. 20, Sheet No. 39, Section X, Billing Services and Obligations, paragraphs 10.7, 10.9.

provides billing, certainly standardization and computerization are critical elements of the process.

The intervenors suggest that, somehow, the Company's ability to also bill for non-electric services provided by a company that is not a CRES provider proves that the Company's standardized and computerized system can "distinguish" and separate out electric services from non-electric services. The fallacy in this argument is that the Company's billing for Duke Energy One gives rise to **no** need to evaluate charges and separate them into electric versus non-electric buckets. The automated system that is in place to support CRES providers and the retail electric service market is not set up to bill for other products and services that may be offered by suppliers of electric generation. Witness Jones made this clear, and no logical connection can be drawn to the provision of billing services for Duke Energy One.

b. Although entirely unconnected with the billing issue, IGS and RESA attempt to support their request for billing services by suggesting that Duke Energy Ohio is violating corporate separation requirements.

IGS and RESA also attempt to support their requests for Commission-mandated billing services for CRES providers' **non**-electric products and services by arguing that Duke Energy Ohio is currently violating Ohio corporate separation requirements.[299] While most of the argument is actually aimed at a conclusion that the Company failed to meet its ESP filing requirements, it appears that these intervenors use this to support the billing request by asserting that the Commission should not approve a tariff provision that "would place Duke in further violation of its corporate separation requirements."[300] To reach such a conclusion, IGS and RESA would have to show that the proposed tariff revision to prohibit non-commodity charges on consolidated bills would itself constitute a corporate separation violation.

[299] IGS Brief, pp. 10-11.
[300] IGS Brief, pg. 10. *See also* RESA Brief, pp. 4-5.

The failure of this logic, as with the first rationale for their position, is based on ignoring the basic facts. Duke Energy One is **not** a CRES provider. Duke Energy Ohio does not provide any different billing services for an affiliated CRES provider than it does for non-affiliated CRES providers. It is, therefore, not providing any undue preference or advantage to an affiliate, as compared to a non-affiliated entity in similar circumstances.

This argument provides no support for RESA's or IGS's position on billing for non-electric products and services.

c. IGS proposes that the Commission require Duke Energy Ohio to bill for non-electric products and services.

Rather than the Company's tariff changes that are designed to protect ratepayers at large from excessive uncollectible expenses, IGS would have the Commission require tariff changes that would specifically allow use of bill-ready billing for charges for non-electric products and services.[301]

As discussed above, IGS ignores the reality that the Company's billing system does not have the capability to keep certain CRES provider charges out of the POR program and, ultimately, the uncollectible expense rider. Making the change requested by IGS would thus, indisputably, raise overall bills paid by other ratepayers; all so that IGS could offer non-electric, competitive services without having to bill for them directly. This is unfair and unreasonable.

2. Other Supplier Tariff Revisions

Duke Energy Ohio proposed additional changes to its supplier tariff that were largely unopposed by all by one of the intervening parties. However, RESA opposes two of the requested changes.

[301] IGS Brief, pp. 11-12.

One of the requested amendments to the tariff is a change to the definition of the term "Interval Meter" in order to clarify the distinction between existing meters from which the Company has historically used customer energy usage data (CEUD) to reconcile with PJM and the newer advanced meters that the Company has deployed in its grid modernization initiative. In response to this proposal to clarify the definition, RESA takes advantage of the concept to argue yet again that suppliers must have access to CEUD.[302] In making its argument, RESA observes that the Company is nearly 100 percent complete in its deployment of advanced meters. However, RESA goes on to admit that matters related to the provision of customer energy usage data have been dealt with in other dockets.[303] Those other proceedings and investigations are better forums to engage in the process necessary to establish requirements for providing CEUD to CRES providers.

The Company is well aware that suppliers wish to have access to the data that is created as a result of the deployment of advanced meters. However, as explained by Duke Energy Ohio witness Daniel Jones, there is much discussion occurring in multiple forums, including multiple stakeholders, to determine how CEUD from the advanced meters will be provided to suppliers, but such a system will cause the Company to incur significant costs and nothing has been resolved before the Commission regarding how such costs will be recovered and from whom they will be recovered.[304] And as explained further by Mr. Jones, the Company is seeking to define "Interval Meter" more clearly in order to distinguish the types of meters and the information that flows from the meters and why. The interval meters used for larger commercial customers are used in order to report usage data to PJM, and consequently, the Company wishes

[302] Initial Trial Brief By the Retail Energy Supply Association at pg.34.
[303] *See, for example*, *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market, Case No. 12-3151-EL-COI*, Opinion and Order (March 26, 2014), and *In the Matter of the Application of Duke Energy Ohio, Inc., to File for Tariff Approval*, Case No.14-2209-EL-ATA, Application (December 16, 2014).
[304] Tr. IV, pp. 1054-1055.

to make clear in its tariff that there are differences that must be recognized in order to accurately move forward with advanced meters for residential customers.[305] Contrary to RESA's assertion, the Company is not seeking to "avoid the issue of AMI," but, rather, the Company is seeking to make clear the status of its present capabilities so as to eliminate confusion in its current tariff. Thus, RESA's arguments are not well founded and are in fact not relevant to the Company's current proceeding. Matters related to the provision of CEUD are yet to be resolved at the Commission, and the resolution will entail significant discussion and engagement with multiple stakeholders as well as other electric distribution companies. Thus, RESA's attempt to jump the gun should be disregarded.

The Company proposed one additional change to the supplier tariff involving a requirement that suppliers doing business in Duke Energy Ohio's service territory consent to participate in the adjustment or resettlement process that occurs for settlement of charges with PJM. RESA argues that this language is one-sided and unfair. RESA then suggests that the MSA should be modified to state that the Company or CRES providers may authorize or initiate a billing adjustment or resettlement under PJM's rules, regulations, or agreements. However, RESA misses the point of the proposed change to the process. The status quo is that CRES providers who initiate resettlement with PJM must seek voluntary cooperation with the process from other participating CRES. When CRES providers do not agree to participate, the resettlement cannot occur. In order to remedy this anomaly, the Company proposes to make such participation mandatory so that there can be no disagreement with the process. This was explained by Mr. Jones in his prefiled direct testimony and there is coordinated language proposed in the Company's MSA that was provided as an attachment to the testimony of Robert

[305] Tr. IV, pg. 1056.

J. Lee. In order to make the process viable, the Commission should approve the Company's proposed change to the tariff to make participation in the resettlement process mandatory.

G. Corporate Separation

IGS and RESA asserted that Duke Energy Ohio is currently violating Ohio corporate separation requirements. Both parties specifically recommend that the Commission order Duke Energy Ohio to bill for any services (including ones other than retail electric service) that may be offered by CRES providers in the Company's service territory, regardless of the Company's inability to do so or the cost of system changes that would be necessary.[306] IGS also asks the Commission to find that Duke Energy Ohio has not demonstrated its compliance with corporate separation requirements.[307] These parties' assertions are incorrect and misplaced.

As an initial matter, these are not the proceedings in which to prosecute an alleged corporate separation plan violation. Rather, as the Commission's rule plainly provide, these proceedings are limited to matters relating to the current status of a corporate separation plan adopted pursuant to R.C. 4928.17, including a delineation of all existing waivers and plans for future revision[308] and confirmation that the plan complies with state law and Commission regulation.[309] Here, Duke Energy Ohio has introduced into the record its **Commission-approved** corporate separation plan, approval that confirms compliance with applicable law and regulation, and has further discussed waivers and its intention regarding future revision.[310] Despite this fact, IGS and RESA seek to improperly expand the scope of these proceedings, transforming them into something more akin to a complaint under R.C. 4905.26 but without their needing to bear the burden of proof. IGS Energy has already been admonished by the

[306] IGS Brief, pp. 5, 11-12; RESA Brief, pp. 5-6.
[307] IGS Brief, pp. 10-11.
[308] O.A.C. 4901:1-35(C)(4)
[309] O.A.C. 4901:1-35(F).
[310] Duke Energy Ohio Exh.11 (Direct Testimony of Mark E. Hollis), pp. 6-7.

Commission as to the proper procedure for pursuing allegations of corporate separation violations. Those admonitions are no less relevant here. Indeed, a closer examination of the facts on which IGS relies in asserting unlawful conduct on the part of Duke Energy Ohio compels a rejection of its claim.

IGS is advancing claims of wrongdoing through an attorney; a witness who admittedly understands the significance of providing sworn testimony claiming discrimination and, as an officer of the court, presumably would not allege misconduct without a proper factual basis for doing so.[311] And when the facts are examined, it is clear that IGS ignored them.

This position ignores the obvious differences between billings for CRES providers and billings for Duke Energy One. On the one hand, the Commission would be requiring the utility to modify, and then use, its ratepayer supported systems for the purpose of billing customers for **non**-electric, optional products and services – all the while keeping those charges out of the POR program and uncollectible expense rider. On the other hand, Duke Energy Ohio bills for non-electric products and services offered by an entity that is entirely unregulated. The technological system requirements for one are entirely different than those for the other. One would be an offering tied to CRES services; the other is independent. They are not comparable situations and therefore do not demonstrate any corporate separation violation.

Further, Duke Energy Ohio is not providing its affiliate with an unduly preferential or favorable advantage vis-à-vis its competitors. As the facts confirm, Duke Energy Ohio has not conclusively and affirmatively rejected offers by non-affiliated providers to include charges for non-commodity services on its bills[312]. As such, no entity is benefitting from the receipt of a service that has been refused others. And Title 49 does not create a cause of action for future

[311] Tr. XI, pg. 3267, *et seq.*
[312] Tr. XI pg. 3279-3281

claims of discrimination. IGS witness White attempted to overcome the timing issues that are fatal to his claim, suggesting that Duke Energy Ohio started engaging in discriminatory conduct when Mr. Jones provided oral testimony in these proceedings. Such a suggestion cannot withstand logic, as Mr. White submitted his written allegations of corporate separation violations **before** Mr. Jones took the stand.[313] And the testimony provided by Mr. Jones does not confirm any unlawful acts on the part of Duke Energy Ohio. Further, as the facts confirm, Duke Energy One is appropriately charged for the services it receives, consistent with Commission-approved service agreements.[314]

The legal basis for a claim that Duke Energy Ohio has violated its corporate separation plan simply does not exist.

H. Rider BDP

GCHC argues that its favorable exemption from applicability of Rider BDP should continue. However, Rider BDP remains unchanged and continues, what is discontinued is GCHC's **exemption** from this rider. The exemption was provided by the terms of the Stipulation in Duke Energy Ohio's stipulation in the ESP II, provision 7, I, page 21. As the terms of this ESP are ending, the agreement with GCHC has expired.

I. Data Access

The Ohio Environmental Council (OEC) presented a witness to make recommendations regarding data access and metrics for Duke Energy Ohio's customers and the use of environmental and performance metrics to measure Duke Energy Ohio's performance relative to its grid modernization program. OEC witness Dick Munson's recommendations were made in the absence of any apparent knowledge of reporting requirements in Ohio. Indeed, the document

[313] IGS Exhibit 10, pg. 5
[314] Tr. XI, pp. 3281-3282

attached to his testimony was prepared for proceedings in Illinois and not adapted in any way to Ohio.[315] Mr. Munson did not discuss his proposal with any Ohio utilities prior to including it in his filed testimony.[316] Mr. Munson further admitted that third-party entities in Illinois do not currently have access to customer energy usage data.[317] And he also admitted that he is not familiar with any of the technical details regarding hardware deployed by Duke Energy Ohio as they relate to billing and access.[318] He is not aware of the status of time-of-use rates in Ohio and does not know if any Duke Energy Ohio customers are on time-of-use rates.[319] He had no knowledge of any statements from the Commission or regulations regarding access to customer energy usage data, and has not participated in the Duke Energy Ohio SmartGrid collaborative[320] or the Commission's investigation in to competition in the retail electric services market. He likewise is unaware of how costs are recovered by the Company for grid modernization and has not worked with the Company's supplier portal.[321] Finally, Mr. Munson has no knowledge about what metrics the Company currently reports in connection with grid modernization.[322] While Mr. Munson may have some knowledge and value to the regulatory stakeholders in Illinois, he utterly lacks any knowledge of value in Ohio. His recommendations should not be accorded any weight. Moreover, they seem to be quite unrelated to any relevant matters in this proceeding and should be disregarded for that reason as well.

VIII. OTHER ISSUES RAISED ON BRIEF

[315] Tr. XII, pg. 3355
[316] Tr. XII, pg. 3356
[317] Id.
[318] Tr. XII, pg.3357
[319] Id.
[320] Tr. XII, pg. 3358
[321] Tr. XII, pg. 3359.
[322] Tr. XII, pg.3361

OCC contends that the Attorney Examiner erred in allowing the rebuttal testimony of Roger A. Morin.[323] OCC's purpose in doing so is to refute the ROE that the Company has proposed in respect of its Rider DCI. For the reasons set forth in the Company's Brief and below, OCC's argument must fail.

It is important to first address what the applicable statutory provisions and Commission regulations require with regard to an ESP application. Notably, they are unlike those governing traditional, or base rate, cases. They do not require, as part of the initial application, an entire rate of return analysis. R.C. 4928.143(B)(2)(h), applicable to riders such as that challenged herby OCC, sets forth what the Commission must find in approving a distribution rider. But these requirements concern only reliability, alignment of expectations, and sufficient dedication of resources. Insofar as it concerns an ROE, the controlling statute simply authorizes the Commission to approve a just and reasonable ROE.[324] The Commission's regulations do not identify any additional requirements as to an ROE that must be included in the ESP application.[325]

Duke Energy Ohio supported its proposed ROE with reference to the ROE that the Commission approved for its most recent distribution rate case. As discussed in the Company's Brief, such support is consistent with that relied upon the Commission in other rate proceedings.[326] OCC, opposing the use of this ROE, offered testimony of Mr. Kahal, who merely criticized the ROE as too high, claiming that the ROE should be lower. Mr. Kahal did not calculate how much lower and thus offered no testimony on this specific point. But it remains that the OCC offered evidence on the issue of the ROE. Perhaps recognizing its actions that invited a response, OCC now improperly attacks the introduction of rebuttal testimony, which confirmed that the Company's proposed ROE is reasonable.

Rebuttal testimony is within the discretion of the Attorney Examiner and is permissible for purposes of contracting the opponent's evidence.[327] Here, OCC affirmatively and in its case, offered

[323] OCC Brief, at pp. 123-126.
[324] R.C. 4928.143(B)(2)(h).
[325] O.A.C. 4901:1035-03(C)(9)(g).
[326] Duke Energy Ohio Brief, at pg. 15.
[327] *In the Matter of the Joint Application of Bell Atlantic Corporation and GTE Corporation for Consent and Approval of a Change in Control*, Case No. 9801398-TP-AMT, Entry (July 16, 1999).

evidence tending to contradict that offered by the Company. Specifically, OCC, through its witness, claimed that Rider DCI, had it been included in the last base rate case, would have yielded a lower ROE.[328] The Company, despite having met its initial burden of proof, is undeniably permitted to refute this allegation through rebuttal testimony.[329] That is, the Company must be permitted to offer evidence, the need for which only become relevant after the introduction of the OCC's evidence.[330] The Attorney Examiner did not err in admitting Dr. Morin's testimony into the record.

IX CONCLUSION

The ESP proposed by Duke Energy Ohio in these proceedings complies with Ohio law and regulations and will result in Duke Energy Ohio providing services thereunder at just and reasonable prices, under terms and conditions that, considered in the aggregate, are more favorable that the expected result under R.C. 4928.142. Duke Energy Ohio respectfully requests that the Commission overturn its prior decision with regard to confidentiality agreements and approve the proposed ESP, without modification other than as specifically agreed to by Duke Energy Ohio, herein.

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[328] OCC Brief, at pg. 123.

[329] See *e.g., In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan*, Case No. 08-917-EL-SSO, *et al*., Order on Remand, at pg. 8 (October 3, 2011)(company's rebuttal testimony specifically in response to intervenor testimony).

[330] *In the Matter of the Application of Jackson County Power, LLC, for a Certificate of Environmental Compatibility and Public Need for an Electric Generating Plant in Jackson County, Ohio*, Case No. 00-839-EL-BGN, Entry on Rehearing (September 17, 2001).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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