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 THE OHIO MANUFACTURERS' ASSOCIATION

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I. INTRODUCTION

On May 29, 2014, Duke Energy Ohio, Inc. (Duke) filed an application with the Public Utilities Commission of Ohio (Commission) to establish a standard service offer (SSO) in the form of an electric security plan (ESP) to be in effect initially from June 1, 2015 through May 31, 2018.[1] A hearing on the ESP proposed in the Application commenced on October 22, 2014, and concluded on November 20, 2014.

On December 15, 2014, Duke, the staff of the Commission (Staff), the Ohio Manufacturers' Association (OMA), the Office of the Ohio Consumers' Counsel (OCC), the Industrial Energy Users-Ohio (IEU), Ohio Partners for Affordable Energy (OPAE), Wal-Mart Stores East, LP, and Sam's East, Inc. (collectively, Walmart), the City of Cincinnati (Cincinnati), the Greater Cincinnati Health Council (GCHC), the University of Cincinnati and Miami

[1] Application at 1 (Duke Ex. 1).

University (collectively, Universities), the Ohio Development Services Agency (ODSA), The Kroger Company (Kroger), IGS Energy (IGS), the Retail Energy Supply Association (RESA), Direct Energy Services, LLC and Direct Energy Business, LLC (Direct Energy), Constellation NewEnergy, Inc. and Exelon Generation Company, LLC (jointly, Exelon), Sierra Club (Sierra), Natural Resources Defense Council (NRDC), the Ohio Environmental Council (OEC), the Environmental Law and Policy Center (ELPC), and the Ohio Energy Group (OEG) filed initial briefs in the proceeding. Pursuant to the Attorney Examiner's directive on the last day of hearing, OMA hereby files its reply brief in the above-captioned proceeding, addressing a number of the arguments raised in the parties' initial briefs. As previously requested, OMA respectfully requests that the Commission reject Duke's proposed ESP as filed as it does not satisfy or comply with the statutory requirements of Chapter 4928, Revised Code. Alternatively, OMA requests that the Commission modify the ESP, as outlined herein.

Upon review of all of the initial briefs that have been filed, it is important to note that Staff and most of the intervenors oppose some aspect of Duke's Application and request that the Commission not approve it as filed.[2] Of particular concern to a majority of the intervenors is the Price Stability Rider (Rider PSR), which is contrary to Ohio and federal law, a Commission-approved stipulation, and the Commission's stated policy goal of transitioning to a fully competitive market. Rider PSR is also unjust and unreasonable. Even the one intervening party that supports the concept of Rider PSR because it believes the Commission should retain jurisdiction over generation supply has concerns with the implementation of the rider and

[2] ODSA's brief was limited to Direct Energy's alternative proposal regarding the percentage of income payment plan (PIPP) program. ODSA Br. at 4. NRDC's brief was limited to Duke's Distribution Decoupling Rider (Rider DDR). NRDC Br. at 1.

proposed several modifications to Rider PSR "in order to protect customers and increase the likelihood that the PSR will provide a valuable hedge against the volatility of the PJM market."[3]

As will be discussed more fully herein, all other intervenors that addressed Rider PSR in their briefs, as well as Staff, strongly objected to the establishment of Rider PSR: referring to Rider PSR, Cincinnati stated that it has "strong opposition to this poorly constructed assault on the public interest by Duke."[4] GCHC stated that "[i]t is undisputed that Rider PSR would be detrimental to customers during the three-year term of the ESP."[5] The Universities concluded that "Rider PSR will actually adversely affect the Universities' hedge position."[6] Walmart stated that "[t]here has been no showing that Rider PSR meets the legal requirements for inclusion in an ESP, and Rider PSR will effectively transfer the risks – and costs – of [Duke's] ownership share of [the Ohio Valley Electric Corporation (OVEC)] to the Company's retail customers."[7] Kroger declared that "[b]ecause the costs Duke seeks to collect through the PSR are best characterized as transition revenues, which [electric distribution utilities (EDUs)] may not lawfully recover after December 31, 2010, the Commission should deny the Company's collection of these costs through the PSR."[8]

IGS concluded that "[t]he PSR is contrary to Ohio law, Federal law, and is unlikely to bring any actual price stability to customers. Rather, the PSR will merely serve to insulate Duke's shareholders against the risk of Duke's uneconomical generation and shift that risk to Duke ratepayers."[9] RESA asserted that "Rider PSR simply does not function as a market hedge

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[3] OEG Br. at 2, 14.
[4] Cincinnati Br. at 2.
[5] GCHC Br. at 20.
[6] Universities Br. at 2.
[7] Walmart Br. at 10.
[8] Kroger Br. at 14.
[9] IGS Br. at 4.

and the Commission should not be fooled."[10] Direct Energy argued that "Rider PSR is a reversal of the path Ohio has been on since 2001, which is to allow customers control over their electricity supply costs through choice. Rider PSR would force customers to pay for generation they do not use and does not stabilize rates; instead Rider PSR inserts unavoidable monthly market risk into customer bills."[11] Exelon noted that "Duke ratepayers are guaranteeing that the OVEC generation earns a profit by covering any difference in the revenues from the sale of the power and cost of generation" because "the costs charged by OVEC to Duke, which will be covered by ratepayers under Rider PSR, include a return on OVEC"s investment."[12] Sierra asserted that the "[c]ost and revenue projections that show a cumulative loss for customers over the next ten years and the massive uncertainty associated with Rider PSR, easily outweigh the qualitative 'benefits' offered by Duke, which are not benefits at all." [13]

Further, OPAE explained that "[u]nder Ohio's competitive retail generation market, Duke's distribution customers cannot be required to subsidize energy and capacity produced by any power plants."[14] OEC asserted that "the PSR is a generation based rider in contravention of the letter and spirit of Ohio's law and policy, and that ultimately is anti-consumer, anti-competitive, and anti-environment."[15] ELPC asserted that: "[t]he Commission should not allow Duke to use the PSR as a way of getting out of a bad business decision."[16] IEU explained that "the PSR will likely increase customers' bills, will not provide a hedge, but will protect Duke from the price risk associated with its retention of its interest in the OVEC Entitlement."[17] IEU highlighted that "[t]he estimates (to the extent they can be relied upon to make a reasoned

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[10] RESA Br. at 8.
[11] Direct Energy Br. at 12.
[12] Exelon Br. at 5 (citations omitted).
[13] Sierra Br. at 5.
[14] OPAE Br. at 9.
[15] OEC Br. at 3-4.
[16] ELPC Br. at 5.
[17] IEU Br. at 6.

decision) point in only one direction: at least until 2024, customers will likely incur a cost of the PSR is authorized."[18] OCC asserted that "Duke's proposal to make customers guarantee utility profits through re-regulation should be rejected in this state where Ohio law favors the competitive market."[19] Finally, Staff stated that it "is concerned that going down the PSR path may ultimately be a mistake."[20] Comparable objections to the establishment of a rider similar to the one that Duke is proposing (Rider PSR) were made by many of these same intervenors in another EDU's ESP proceeding currently pending before the Commission.[21]

Although Duke recognizes that it has the burden of proof in this proceeding,[22] Duke failed to meet its burden to demonstrate that its ESP application (and the proposals contained therein) is just and reasonable and consistent with the policy of the state.

II. RESPONSIVE ARGUMENTS

A. Rider PSR is unlawful, unjust, and unreasonable and should be denied by the Commission.

As illustrated in numerous parties' initial briefs, Duke's proposal to establish Rider PSR is unlawful (not permitted as part of an ESP), unreasonable, not supported by the record, and should be denied by the Commission. As mentioned previously, only two parties to this proceeding, Duke and OEG, even support the concept of proposed Rider PSR.[23] Investigation into the motivation behind Duke's proposal for the rider and its probable results provide a hearty

[18] Id. at 28.
[19] OCC Br. at 5.
[20] Staff Br. at 5.
[21] *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, et al., see generally, Intervenor Initial Briefs (July 23, 2014) and Reply Briefs (August 15, 2014).
[22] Duke Br. at 3.
[23] Duke Br. at 18-24; OEG Brief at 2-15.

explanation for most parties' opposition to Rider PSR, as well as significant grounds upon which the Commission should deny Duke's proposal to establish the rider.

a. The Commission is prohibited from authorizing Proposed Rider PSR by Federal law.

OMA agrees with Staff and the majority of the intervenors that the Commission is prohibited from approving Rider PSR, which would increase Duke's total compensation for wholesale electric service, as the Commission is preempted from regulating the wholesale price of capacity and energy by the Federal Power Act (FPA).[24] Recent Federal Court decisions have rejected states' attempts to subsidize generators participating in the PJM markets that indirectly affect wholesale markets.[25] The court in *Nazarian* held that, under the Federal Power Act, Congress intended for FERC to occupy the field of wholesale sales of energy in interstate commerce, therefore, field preempting an order of the Maryland Public Service Commission (PSC) directing Maryland utilities to enter into a contract for differences with a new power generation facility for the purpose of incentivizing the facility's construction.[26] The court determined that the Maryland PSC's order functionally had the effect of setting the rate that the new facility would receive in capacity auctions overseen by FERC.[27]

Contrary to OEG's claims, the issues in *Nazarian* are very similar to Duke's proposal.[28] In *Nazarian*, the Maryland PSC required electric utilities to enter into long-term purchase power agreements with generators and the generators were required to sell the energy and capacity from

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[24]See 16 U.S.C. § 824e(a); Staff Br. at 18-21; OCC Br. at 5-6; IEU Br. at 19-26; Exelon Br. at 6-7; Sierra Br. at 21-24; OPAE Br. at 11, 13; IGS Br. at 21-24 .

[25] See *PPL Energy Plus v. Nazarian* , 2014 WL 2445800, 753 F.3d 467 (4th Cir. June 2, 2014); *PPL EnergyPlus, LLC v. Hanna*, 977 F. Supp.2d 372 (D.N.J. 2013). Affirmed in *PPL Energy Plus v. Solomon*.

[26] *Nazarian* at *2-3.

[27] Id. at *5.

[28] OEG Br. at 11-14.

those facilities into the PJM market.[29] The long-term contracts provided a guaranteed revenue stream to the generators if the energy and capacity cleared the PJM markets, and the utilities would pass the differences between the PJM market revenues and the contract price on to ratepayers as charges or credits. Similarly, Duke's proposed Rider PSR is also a recovery mechanism that provides guaranteed recovery for the generator, regardless of the revenues actually received from the PJM energy and capacity markets. As Staff notes, the proponents of the long-term contracts in Maryland also attempted, albeit unsuccessfully, to characterize those contracts as hedges or financial arrangements.[30] The court held that they were not purely financial transactions and they had the potential to distort the price signals in the PJM auctions, which would interfere with the federal statue created to regulate the wholesale price of capacity and energy.[31]

Throughout its brief, Duke continuously refers to the wholesale energy and capacity markets, alleged uncertainty and volatility of those markets, the importance of fuel diversity, and changes being made to the wholesale markets, and offers a "retail mechanism" (Rider PSR) as a way for the Commission to mitigate that volatility.[32] Duke states: "But the Commission should not consider retail choice in a vacuum, with disregard for factors that influence the markets that form the basis for retail rates."[33] Duke's apparent intent is for Rider PSR to have a mitigation effect on the wholesale markets, [34] a clear violation of federal law. Adoption of Rider PSR would result in Duke being compensated for its participation in the wholesale market in a

[29] *Nazarian* at *2-3.
[30] Staff Br. at 19-20.
[31] See supra n. 25.
[32] Duke Br. at 19- 24.
[33] Id. at 19.
[34] See also OEG Br. at 6-8.

manner that conflicts with the PJM auctions, an unlawful encroachment on FERC's exclusive authority over wholesale markets.

b. Establishment of Proposed Rider PSR violates Ohio law.

OMA agrees with Staff and numerous intervenors that Rider PSR is not authorized by Ohio law.[35] Duke relies on Section 4928.143(B)(2)(d), Revised Code, as justification for the creation of Rider PSR.[36] Duke contends that the proposed non-bypassable Rider PSR is a term, condition, or charge that concerns bypassability (or as stated by Duke, "the corollary to bypassability is non-bypassability").[37] Duke cites to "bypassability" as the only delineated issue in Section 4928.143(B)(2)(d), Revised Code, that is applicable to its Application.[38] Duke, therefore, concludes that "a term, condition, or charge relating to a non-bypassable rider is properly included in an ESP, provided the third and final requirement is met."[39] Duke also claims that Rider PSR will "have the effect of stabilizing or providing certainty regarding retail electric service."[40]

Rider PSR is an alleged financial hedge provided by a distribution utility company, and is not related to the power supplied to the SSO, which is the default service, or any of the items contemplated in Section 4928.143(B)(2)(d), Revised Code, that may be included in an electric security plan.[41] Section 4928.143(B)(1), Revised Code, states: "An electric security plan shall include *provisions relating to the supply and pricing* of electric generation service" (emphasis

[35] See, e.g., Staff Br. at 15-18; OCC Br, at 7-19; IEU Br. at 6-12; Walmart Br. at 3-4, 8-10; Kroger Br. at 8-14; IGS Br. at 19-21.
[36] Duke Application at 12; Duke Br. at 18; IGS Br. at 19-21.
[37] Duke Br. at 18.
[38] Id.
[39] Id.
[40] Duke Br. at 18-19.

[41] IEU Br. at 7 (citing to Duke Ex. 1 at 5-7 and Duke Ex. 6 at 12).

added). As Duke recognizes,[42] proposed Rider PSR does not concern default service and is purely a financial transaction and that the power generated by the generating units will in no way be supplied to Ohio customers (i.e., the power generated by OVEC will not provide default service to Ohio customers).[43]

Similarly, the claimed financial hedge is not, as argued by OEG, a limitation on customer shopping as envisioned by Section 4928.143(B)(2)(d), Revised Code.[44] Proposed Rider PSR does not represent a limitation on customer shopping for retail generation service; it places no limitations on the amount of shopping that may occur under the proposed ESP. As stated by Duke many times, Rider PSR does not limit or affect shopping.[45] Customers are free to shop under Duke's proposal; they have to pay for the rider whether they choose to shop or whether they are served by the SSO. Customers will just have to pay an additional charge for costs associated with Rider PSR that is essentially a charge for another source of generation.

Contrary to Duke's and OEG's assertions,[46] Duke has not demonstrated that Rider PSR will either stabilize rates or provide ratepayers with certainty regarding any aspect of their retail electric service. Duke cannot guarantee that the proposed 'financial hedge' would even provide stability to the extent Duke envisions it being "a counter-cyclical hedge, such that in rising market price environments, the benefits under the rider will be positive, thereby offsetting other rates derived from market prices."[47] In fact, as noted by Staff and others, the evidence demonstrates that Rider PSR will not stabilize rates, but, instead, will impose significant costs on customers during the term of the ESP.[48] Duke's own projections indicate that the OVEC costs

[42] Duke Br. at 18.
[43] Tr. Vol. I at 108; see also OCC Br. at 10-11; IEU Br. at 7-8.
[44] OEG Br. at 5.
[45] Duke Br. at 19
[46] Duke Br. at 18-24; OEG Br. at 5-8.
[47] Duke Br. at 24.
[48] Staff Br. at 21; OMA Br. at 22-23; OCC Br. at 11-16, 34-42; IEU Br. at 7, 26-29.

will exceed revenues from 2015 through 2018, resulting in a net charge to customers via Rider PSR.[49] Duke does not project any benefits of Rider PSR during the term of the proposed ESP.[50] Additionally, any purported benefits of the Rider PSR to consumers after the ESP term are merely speculative.[51]

Duke has failed to show how, as compared to the rates SSO and shopping customers will pay, Rider PSR will produce greater stability to customers' retail rates.[52] Duke has failed to demonstrate how shopping customers on fixed-priced contracts with a certified retail electric service (CRES) provider or customers taking service pursuant to a fixed SSO price that was established pursuant to laddered auctions will receive more certain or stable rates when adding an unknown and variable charge (or credit) to customers' bills, which could be volatile as it is based on the output of OVEC being offered into PJM's day-ahead market and will be adjusted quarterly.[53] Rider PSR will introduce uncertainty and risks for customers that do not exist today.[54]

Moreover, OVEC's costs are not fixed and may increase for the implementation of new carbon emission regulations, fuel costs, decommissioning costs, or other environmental upgrades and regulations.[55] Under the Inter-Company Power Agreement (ICPA) (as amended), Duke is required to pay its portion (9%) of the fixed and variable costs of operating the OVEC generation facilities and a return on equity, as well as other charges delineated in the ICPA for the life of the

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[49] Staff Br. at 21 (citing IGS Ex. 12 at TH-4).
[50] OCC Ex. 4.
[51] See Tr. Vol. VII at 2063-64; IEU Br. at 28 (citing OEG Ex. 1 at 18-19 and Tr. Vol. XII at 3404); Staff Br. at 22-24; Kroger Br. at 11; OCC Br. at 33 (citing OCC witness Wilson, OCC Ex. 43 at 19).
[52] OCC Br. at 11.
[53] Tr. Vol. I at 112-114; OCC Br. at 11-14 (citing OCC Ex. 43 at 28-29); OMA Br. at 23 (citing Direct Energy Ex. 1 at 6); IEU Br. at 28-29; Staff Br. at 23-24 (citing OCC witness Wilson, OCC Ex. 4 at 12); Exelon Br. at 11.
[54] IEU Br. at 28; Kroger Br. at 9; Staff Br. at 24; OCC Br. at 34.
[55] Staff Br. at 22 ("The success or failure of the PSR depends on the stability of OVEC's costs."); IEU Br. at 11; RESA Br. at 9 (citing to IEU Exs. 8-12).

OVEC entitlement, which is currently scheduled to end in 2040.[56] As IEU explained, OVEC's average cost of generation increased from 2011 to 2012 and Duke's average cost of electricity from OVEC increased by 71% between 2009 and 2012.[57] The record demonstrates that OVEC's cost estimates have been inaccurate and unreliable.[58] This is disconcerting given that Duke's projections are based upon data obtained from OVEC. As such, the Commission cannot find that Duke's OVEC-related generation costs are certain or stable.[59]

The rider does nothing to stabilize retail generation prices and "could produce greater instability than other tools that are currently available to stabilize rates."[60] Simply stated, it will be an additional charge (or credit) placed on customers' bills (even those under fixed price contracts) that is based upon the difference between OVEC's generation costs and past wholesale auctions.[61] The only stability provided by Rider PSR is the stability provided to Duke, as an equity owner in OVEC, through a guaranteed return on and of its generation investment in OVEC.[62] Even OEG recognizes the lack of certainty in the stabilizing benefits of the supposed "hedge" when it characterizes Rider PSR as providing "*a degree* of stability to customers" and when rationalizing the continuation of the interruptible program, asserting that "[g]iven the uncertainties and risks associated with Duke's chosen rate-setting approach, the Commission should continue the interruptible load program in order to provide greater rate stability to customers currently participating in the program during the proposed ESP period."[63]

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[56] See IEU Ex. 5; Duke Ex. 2 at 10; Duke Ex. 1 at 13-14; OCC Br. at 36-42; RESA Br. at 9-10.
[57] IEU Br. at 4-5, 27 (citing IEU Ex. 5 at 2, IEU Ex. 7 at 2, and IEU Ex. 13).
[58] Id.
[59] Id.
[60] OCC Br. at 11, 16; see also Tr. II at 572 (Duke witness Wathen testified that SSO rates have not been volatile); see also Exelon Br. at 11.
[61] Tr. Vol. I at 101-102; see also IEU Br. at 7 (citing Duke Witness Wathen, Tr. Vol. II at 464); RESA Br. at 9.
[62] Tr. Vol. I at 105-107; OMA Br. at 22 (citing RESA/Constellation witness Campbell, RESA/Constellatin Ex. 3 at 13); Walmart Br. at 9; Kroger Br. at 10-11 (citing Duke witness Wathen, Tr. Vol. II at 519); OCC Br. at 35; Exelon Br. at 7-9.

[63] OEG Br. at 6 (emphasis added), 24.

Additionally, contrary to OEG's assertion,[64] most customers are not exposed 100% to the volatility of the market. As many customers are either under fixed price contracts (either through the SSO or through a CRES provider) or have hedged portions of their supply thereby fixing certain aspects of their supply costs, they are not 100% exposed to the volatility of the wholesale market.[65] As Staff explained:[66]

> The PSR will effectively eliminate the value of these fixed price contracts by introducing an unwanted element of variability and market risk. Also, shopping customers on fixed-price contracts would be forced to pay twice for nonexistent price stabilization. They would pay once (voluntarily) through contract premiums for the fixed-price arrangement and again (involuntarily) through the nonbypassable PSR. Such a result would not constitute 'price stability.'

As IEU noted, Duke has not demonstrated that the PSR provides a quantifiable benefit to customers as a "hedge," and Duke cannot point to a benefit to customers during the term of the ESP.[67] However, even if Rider PSR results in a credit on customers' bills, Duke's limited ownership share and relatively small percentage of output from the generating units of OVEC will not provide a meaningful hedge to customers.[68] Given the triviality of this amount, Rider PSR will not provide customers with an appreciable hedge against market volatility or promote stability in rates. As Exelon noted: "In sum, even in the years beyond the ESP when Duke presupposes Rider PSR will be positive, the stabilizing effect on customers would be negligible."[69]

Furthermore, Duke's reliance on the Commission's order in Dayton Power and Light Company's (DP&L) ESP case to support its conclusion that Rider PSR is authorized under Section 4928.143(B)(2)(d), Revised Code, is misplaced as the Commission found that DP&L's

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[64] Id.
[65] See RESA Br. at 7-11.
[66] Staff Br. at 24.
[67] IEU Br. at 26-27; see also RESA Br. at 9.
[68] Staff Br. at 23; OEG Br. at 2; IEU Br. at 29; Exelon Br. at 10-12.
[69] Exelon Br. at 11.

financial integrity charge was related to default service *and* bypassability and it was authorized by the statute "to the extent that such charge is necessary to ensure stability and certainty for the provision of SSO service."[70] The Commission also stated:[71]

> Although generation, transmission, and distribution rates have been unbundled, DP&L is not a structurally separated utility; thus, the financial losses in the generation, transmission, or distribution business of DP&L are financial losses for the entire utility. Therefore, if one of the businesses suffers financial losses, it may impact the entire utility, adversely affecting its ability to provide stable, reliable, or safe retail electric service. The Commission finds that the SSR will provide stable revenue to DP&L for the purpose of maintaining its financial integrity.

On rehearing, the Commission clarified that "the SSR is a financial integrity charge authorized pursuant to R.C. 4928.143(B)(2)(d) and is not a generation charge."[72] Duke's proposed Rider PSR is not related to the default service and is a generation charge.[73] The record is also void of any evidence that Rider PSR is necessary in order to provide stable revenue to Duke for the purpose of maintaining Duke's financial integrity.

While not argued by Duke, the Applicant with the burden of proof in this case, OEG attempts to assist Duke with its legal arguments and justification by trying to fit Rider PSR under other provisions of the ESP statute. In addition to OEG's argument regarding the limitation of shopping contained in Section 4928.143(B)(2)(d), Revised Code, discussed above, OEG spends many pages of its brief discussing the regulatory tools given to the Commission by the General Assembly through SB 221 to protect customers from the wholesale market.[74] However, by its

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[70] *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 21 (September 4, 2013) (emphasis added); *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., Second Entry on Rehearing at 9 (March 19, 2014).

[71] *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 22 (September 4, 2013).

[72] *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., Second Entry on Rehearing at 3 (March 19, 2014).

[73] Staff Br. at 15 (citing to Duke witness Henning Direct Testimony, Duke Ex. 2 at 10).

[74] OEG Br. at 4-10.

own description of the statutory provisions, it is clear that the tools relied upon by OEG are not applicable to Rider PSR. As cited by OEG, Section 4928.143(B)(2)(b), Revised Code, allows for a utility's ESP plan to include a reasonable allowance for construction work in progress for any of the EDU's cost associated with constructing an electric generating facility or for an environmental expenditure for any EDU's electric generating facility.[75] Duke is not requesting to construct a new generating facility or recovery of costs associated with an environmental expenditure for its own generating facility; therefore, Section 4928.143(B)(2)(b), Revised Code, is inapplicable to the case at bar. Additionally, even if Duke was proposing such, the Commission is not authorized to allow such allowance unless the Commission first determines that there is need for the facility and the facility's construction must be sourced through a competitive bid. Neither of which occurred in the case at bar.

Although OEG also cites to Section 4928.143(B)(2)(c), Revised Code, as a tool to allow the Commission to "opt back into some of the traditional features of regulation," OEG correctly notes that this is only applicable to the establishment of a nonbypassable surcharge for the life of an electric generating facility if the capacity and energy from the facility are dedicated to Ohio consumers.[76] Again, any authorization under this provision of the law can only be given after need is first determined and if it was sourced through a competitive process. This tool is inapplicable as Duke is not proposing to dedicate the output from the OVEC units (or any future generating units that may fall under this provision) to Ohio consumers.

Section 4928.143(B)(2)(a), Revised Code, also does not authorize Rider PSR.[77] Section 4928.143(B)(2)(a), Revised Code, allows recovery of prudently incurred costs of "purchased power supplied under the offer," which may include purchased power acquired from an affiliate.

[75] Id. at 4.
[76] Id. at 4.
[77] OMA Br. at 19; IEU Br. at 8.

Duke is not proposing to purchase power to supply the standard offer service under Rider PSR.[78] Therefore, Section 4928.143(B)(2)(a), Revised Code, is not applicable.

Section 4928.143(B)(2)(e), Revised Code, is also not applicable as Rider PSR is not an automatic increase or decrease to any component of the SSO price that is competitively bid.[79] Similarly, Sections 4928.143(B)(2)(g) and (h), Revised Code, are not applicable as Rider PSR is not related to the SSO or Duke's distribution service.[80]

Moreover, Section 4928.143(B)(2)(i), Revised Code, is not applicable as there is no record evidence that Rider PPA would promote economic development and job retention.[81] Duke concedes that OVEC is not expected to close even if Rider PSR does not get approved.[82] Thus, any economic benefits that currently exist in Ohio due to the operation of OVEC will not disappear without the establishment of Rider PSR.[83] The Commission should, however, consider the effect that Rider PSR could have on Ohio's customers that would be paying for increased costs associated with Rider PSR, and the negative effect that an increase in rates will have on Ohio businesses and the ability of those businesses to retain their own jobs and invest in Ohio's economy.

As Staff notes, Duke, as a "wires only" company, is not allowed to recover generation-related costs that are not permitted under Sections 4928.141 to 4928.144, Revised Code. Rider PSR is not authorized by those statutory provisions and does not fall under Section 4928.143, Revised Code, and therefore cannot be included in an ESP. Rider PSR is not a charge related to default service and will not have the effect of stabilizing or providing certainty regarding retail

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[78] Duke Ex. 1 at 13; Tr. Vol. II at 464-65.

[79] IEU Br. at 10.

[80] IEU Br. at 11.

[81] OMA Br. at 24; IEU Br. at 11.

[82] Tr. Vol. I at 63.

[83] RESA/Constellation Ex. 3 at 15-16; IGS Ex. 13 at 9.

electric service as required by the statute. Therefore, given the lack of stability that will result from the establishment and approval of Rider PSR and the fact that Duke has not met its burden to demonstrate that Rider PSR is a mechanism which will have the effect of stabilizing or providing certainty regarding retail electric service pursuant to Section 4928.143(B)(2)(d), Revised Code, Rider PSR should be rejected.

Finally, Rider PSR violates Section 4928.38, Revised Code, as it provides revenues to Duke that are equivalent to transition revenues to assist Duke in the competitive market.[84] Section 4928.38, Revised Code, specifically requires that "[t]he utility's receipt of transition revenues shall terminate at the end of the market development period," and provides that "[w]ith the termination of that approved revenue source, the utility shall be fully on its own in the competitive market." Duke is prohibited from recovering transition revenue or equivalent revenues, such as those revenues created when Rider PSR is a net charge to customers.

For all of the aforementioned reasons, the Commission should deny the establishment of proposed Rider PSR as unlawful, as it is not authorized by Chapter 4928, Revised Code.

a. Establishment of Proposed Rider PSR violates the policy of the state.

As established in Section 4928.02(H), Revised Code, it is the policy of the state to:

> Ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.

As discussed by Staff and others, approval of and collection of costs through proposed Rider PSR would force all of Duke's customers, including shopping customers, to subsidize a

[84] IEU Br. at 15-19; OCC Br. at 20.

regulated distribution company's generating assets.[85] Section 4928.02(H), Revised Code, prohibits such result. The Supreme Court of Ohio has rejected similar anti-competitive subsidies for distribution utilities, holding that it was unlawful to allow an EDU to use "revenues from non-competitive distribution service to subsidize the cost of providing a competitive generation-service component."[86] The Commission has also prohibited subsidies from flowing from a noncompetitive retail electric service to a competitive retail electric service.[87] As evidenced by statute and case law, requiring all distribution customers to pay for generation-related costs associated with one or more generating facilities owned by their electric distribution utility is an anti-competitive subsidy that is prohibited. Thus, the Commission should deny Duke's request to establish Rider PSR as an unlawful subsidy that is contrary to state policy.

OCC also explained how the proposed Rider PSR conflicts with Ohio regulatory policy, citing Staff witness Choueiki, asserting that approval of Rider PSR would be contrary to Ohio's move to a fully competitive retail electric market.[88] OCC states that Rider PSR "guarantees profits for Duke's competitive generation service offering at the expense of its captive monopoly distribution customers."[89] OCC also explains how Rider PSR would undermine Duke's incentive to control costs related to OVEC, and that Rider PSR is "a bad deal for customers" because the PUCO would lack a prudence review over the costs that Duke passes onto customers through Rider PSR.[90]

b. Establishment of Proposed Rider PSR is unjust and unreasonable.

[85] Staff Br. at 16; IGS Br. at 13-17, 20; OCC Br. at 17-26; IEU Br. at 12-15.

[86] See generally *Industrial Energy Users-Ohio v. Pub. Util. Comm.*, 2008-Ohio-990, 117 Ohio St. 3d 486, 487-488, 885 N.E.2d 195; see also *In the Matter of the Application of the Ohio Power Company for Approval of the Shutdown of Unit 5 of the Philip Sporn Generating Station and to Establish a Plant Shutdown Rider*, Case No. 10-1454-EL-RDR, Finding and Order at 19 (January 11, 2012) (Sporn Case).

[87] Id.

[88] OCC Br. at 19.

[89] OCC Br. at 20.

[90] OCC Br. at 21-26

Duke has failed to demonstrate that Rider PSR is just and reasonable. Contrary to Duke's assertions and as explained previously,[91] Rider PSR will not create fuel diversity as the coal units will operate with or without Rider PSR.[92] Rider PSR also does not encourage fuel diversity through the construction of renewable generating facilities, and will not prevent generating units from retiring.[93]

Further, Rider PSR does not provide increased reliability of generation service to Duke's customers as suggested by Duke.[94] PJM is the regional transmission organization responsible for coordinating capacity resources in Ohio and 12 other states. Customers pay for reliability through capacity charges under PJM's tariff, which are designed to ensure sufficient capacity to meet the region's needs.[95] As explained by Staff, through the last three Base Residual Auctions administered by PJM, all of the necessary resources required for reliability during the term of the proposed ESP have already been procured for the entire PJM footprint.[96] Thus, granting or denying Duke's proposed Rider PSR will have no impact on PJM's obligation to ensure reliability in Ohio and the region. Additionally, Staff explained that the Commission has other tools to address other potential reliability needs in the future if necessary.[97]

As argued by Staff and various parties, Duke's proposed PSR violates a prior stipulation in Case No. 11-3549-EL-SSO, et al., entered into by Duke and approved by the Commission.[98]

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[91] Duke Br. at 21.
[92] Tr. Vol. I at 99.
[93] Tr. Vol. I at 98, 119-120.
[94] See Duke Ex. 6 at 15; OMA Br. at 23-24; IEU Br. at 26, 30; Staff Br. at 9-10.
[95] Direct Energy Ex. 1 at 7.
[96] Staff Br. at 9-10.
[97] Id. at 10.
[98] Staff Br. at 11-14; OMA Br. at 25-27; OCC Br. at 45-46; see *In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, revised Code I the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case Nos. 11-3549-EL-SSO, et al., Stipulation and Recommendation (October 24, 2011), OCC Ex. 2, Section VII(M) at 24, Section

The stipulation, and the Commission order approving said stipulation, addressed the statutory obligations regarding corporate separation, requiring Duke to transfer all of its generating assets by the end of 2014.[99] The stipulation did not specifically exclude from the transfer requirement Duke's entitlement in the OVEC generating assets.[100] The stipulation and order were clear and, as noted by OCC, Duke witness Wathen's testimony to the contrary "makes little sense."[101]

As explained by IEU, the need for Rider PSR would be completely obviated if, pursuant to its rights under the ICPA, Duke assigned its OVEC entitlement to a Permitted Assignee, such as another Sponsoring Party or a Duke affiliate with credit ratings that are investment grade (e.g., Duke's Kentucky and Indiana operating affiliates).[102] The concerns inherent in establishing Rider PSR and in Duke's continued retention of its OVEC entitlements would be relieved if Duke determined that assigning its entitlements was the most prudent course of action. Given that Duke has the option of avoiding, by means of assignment, the costs to consumers and the legal and policy concerns associated with the establishment of Rider PSR, but has refused, to date, to make such assignment, it is evident that the Company intends to use Rider PSR to insulate itself against losses that may arise in connection with its OVEC entitlements. As such, the Commission should deny its request to establish Rider PSR.

The numerous flaws raised herein with regard to Rider PSR are not cured with the implementation of OEG's modifications,[103] and Rider PSR does not become just and reasonable. While requiring Duke to have some "skin in the game" may be an improvement to encourage

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VIII(A) at 25-26, Section VIII(B) at 26-27, and Section VIII(C) at 27-28, and Opinion and Order (November 22, 2011), OMA Ex. 2 at 45-46 .
[99] Id.
[100] Staff Br. at 11-12.
[101] OCC Br. at 45.
[102] IEU Br. at 30-31.
[103] OEG Br. at 14-15.

some control over the OVEC costs and Duke's bidding decisions,[104] ten percent is insufficient to have a "self-policing" effect as claimed by OEG.[105] It does not properly shift the risk back to the utility where it belongs. As Staff witness Choueiki stated: [106]

> 10 percent is a small incentive. 50 percent is like Mr. Wilson in his testimony is more incentive. Our staff position is 100 percent. Then [Duke has] all the incentive to maximize their revenues and reduce their costs.

In response to further questioning as to whether 100 percent of the risk should reside with Duke, eliminating the alleged "hedge," Staff added:[107]

> To the extent a consumer wants a hedge, maybe Duke ought to contract an affiliate of theirs to go sell insurance to all their residential consumers in Ohio and ask them, hey, for 30 cents, you can get a hedge. Would you like it? And they can say yes or no.

While implementing the PSR for nine and half years removes the uncertainty associated with Duke's early termination provision described below,[108] it also does not address the concerns that risk (and associated costs) are being shifted from the utility to the customers as any purported benefits of the Rider PSR after the ESP term are merely speculative.[109] Additionally, OEG has not demonstrated how volatility created by Rider PSR will be eliminated or reduced with the implementation of its proposed modification. OEG has also not compared its proposal to the rates SSO and shopping customers will pay to demonstrate that Rider PSR, as modified, will produce greater stability to customers' retail rates (a claim of "neutral benefits" does not satisfy the statutory requirement that the charge or condition has "the effect of stabilizing or providing certainty regarding retail electric service."[110]). Similarly, OEG's proposed

[104] OEG Br. at 14 (citing to Tr. Vol. XII at 3397-98).
[105] OEG Br. at 14.
[106] Tr. Vol. XII at 3397.
[107] Id. at 3398.
[108] OEG Br. at 14.
[109] See Tr. Vol. VII at 2063-64; IEU Br. at 28 (citing OEG Ex. 1 at 18-19 and Tr. Vol. XII at 3404); Staff Br. at 22-24; Kroger Br. at 11; OCC Br. at 33 (citing OCC witness Wilson, OCC Ex. 43 at 19).
[110] See Section 4928.143(B)((2)(d), Revised Code.

modification to Rider PSR to "employ a levelization mechanism that would flatten the PSR" is insufficient.[111] As conceded by OEG, "[t]he levelization approach would advance the long-term benefits of the Rider and bring the Rider closer to a market-neutral hedge in all years."[112] A showing of bringing the rider "closer to a market-neutral hedge" does not satisfy the statutory requirement delineated in Section 4928.143(B)(2)(d), Revised Code.

Finally, OEG's modification to allow certain large industrial customers an option to "self-insure" or "opt-out" of Rider PSR does not cure the fatal flaws of Rider PSR,[113] runs counter to OEG's arguments that Rider PSR provides certainty and stability of rates,[114] and is anti-competitive. OEG's argument seems to contradict its argument regarding the importance of competitive neutrality in the state and ensuring that customers similarly situated in different parts of the state are treated equal.[115] Just as providing some customers with an interruptible credit and not others may be inequitable, allowing some customers to opt-out of paying a potentially substantial charge or the uncertainty and risk associated with the charge would be inequitable. As proposed, the opt-out opportunity is only offered once at the beginning of Duke's ESP;[116] thus, OEG's proposal could hinder economic development as new industrial customers looking to locate to or expand in Ohio would not receive similar rate treatment with regard to Rider PSR. Not only would those potential new customers be saddled with the risk and uncertainty of what Rider PSR will actually be in any given quarter, those new customers would be exposed to unlimited, potentially significant increases in their bills, particularly as is projected during the ESP term. As compared to a competitor that exercised its right to opt-out, this could be unfair

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[111] OEG Br. at 15.
[112] Id.
[113] Id.
[114] Id. at 6-8, 10-11.
[115] OEG Br. at 24-25.
[116] Id. at 15 (citing OEG Ex. 1 at 19-21).

and anti-competitive. If Rider PSR truly offers the purported benefits relied upon by OEG to recommend approval of Rider PSR, then an option to not participate or opt-out would not be necessary.

As explained herein, Rider PSR violates Ohio law and undermines the policy of the State. It is also unjust and unreasonable and it is projected to increase customer's bills over the term of the ESP. ELPC recognizes that "[i]n reality, [the proposed PSR] turns its customers into owners of fifty year-old generation for the next thirty-six years."[117] As Kroger noted: "Logic strongly suggests that if Duke had forecasted its OVEC entitlement to be extremely profitable over its term, the Company would not have precluded its shareholders from enjoying those benefits, to the benefit of its customers, by proposing the PSR."[118]

B. Duke's reservation of the right to terminate the ESP early is unlawful, unjust, and unreasonable, and should be denied by the Commission.

Despite the fact that the Company has proposed a three-year ESP to be effective from June 2015 through May 2018, Duke has reserved the right to terminate the proposed ESP one year early, at the conclusion of the second year of the ESP or May 31, 2017.[119] Duke stated that its unilateral right may be exercised upon a substantive change in either Ohio or Federal law (including rules or orders of the Commission, the Federal Energy Regulatory Commission, and PJM), which affect SSOs or SSO rate plans.[120] RESA, Exelon, Direct Energy, and numerous other parties, including OMA, contend that Duke's "reservation" of the right to terminate the ESP at the end of its second year lacks statutory authority and fails to present any objective

[117] ELPC Br. at 2.
[118] Kroger Br. at 11.
[119] Duke Ex. 1 at 16; Duke Ex. 2 at 5; Duke Ex. 6 at 3; Duke Br. at 35.
[120] Duke Ex. 1 at 16.

criteria by which the termination provision may be invoked, and should be denied.[121] Specifically, RESA witness Campbell testified that there is no statutory authority for a utility to terminate an ESP two years into a three year term and Duke failed to cite to or provide objective criteria or circumstances when it might avail itself of the right to terminate early.[122] Given the breadth of the possibilities for which Duke has allegedly reserved the ability to terminate the ESP early, and the dearth of statutory authority for early termination, RESA witness Campbell concluded that the termination provision of the ESP "creates tremendous uncertainty with the market, which adds risk (and therefore cost) to doing business in Duke's service territory, which could chill competition."[123]

Duke also included the unilateral right to early termination in the Master Standard Service Offer Supply Agreement (MSA),[124] which will "introduce unnecessary risk and uncertainty into the SSO supply procurement process," which could impact participation in the SSO auctions and the winning bid prices resulting from those auctions.[125] Duke witness Wathen confirmed that inclusion of the early termination provision in the MSA creates a risk that must be considered by the SSO suppliers that bid into the SSO auctions, but he could not quantify that risk or know how a supplier would price that risk or factor it into their auction bidding practices.[126] Staff witness Strom further recognizes that if Duke implements its early termination right, the entirety of the SSO supply would terminate as of May 31, 2017, which could create

[121] RESA Br. at 26-27 Exelon Br. at 13-15; Direct Energy Br. at 16; OCC Brief at 106-110.
[122] RESA Ex. 3 at 18-20.
[123] RESA Ex. 3 at 19-20; see also OCC Br. at 108-109.
[124] Staff Ex. 3 at 3-4; also see Tr. Vol. II. at 328; OCC Br. at 109; RESA Ex. 3 at 20.
[125] Id.
[126] Tr. Vol. II. at 330.

rate volatility as 100% of the SSO supply would need to be replaced with prevailing market prices at the time.[127]

Permitting Duke to terminate, at its sole discretion and for virtually any reason, the ESP one year early is not specifically authorized by statute, and thus, is prohibited.[128] The provisions which must be included in an ESP are established in Section 4928.143(B)(1), Revised Code; provisions or mechanisms that may be included in an ESP are set forth in Section 4928.143(B)(2). Importantly, early termination or the ability to unilaterally revise an ESP after approval and implementation is not delineated in any of the nine categories.[129] Duke apparently concedes this point as the early termination right is not listed in its brief under the "Mandatory Aspects of the ESP" section (III.A.) or the "Permitted Aspects of the ESP" section (III.B.).[130] Instead, it is listed in the "Remaining Terms and Conditions of the Proposed ESP are Just and Reasonable" section (III.F.3.).[131]

Given that an early termination provision such as that proposed by Duke, does not fall within any of the categories enumerated in Section 4928.143(B)(2), Revised Code, Duke may not permissibly include such a provision in its plan.

Moreover, contrary to Duke's assertion, the early termination right is not just and reasonable and should not "be allowed." [132] Without any record support, Duke claims that this provision "is a reasonable risk-mitigation measure" "in the rapidly changing market environment that utilities face."[133] As noted by RESA witness Campbell, it is quite the opposite: "[T]he lack of certainty regarding the term of the ESP, and the potential outcome if Duke elects to trigger its

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[127] Staff Ex. 3 at 4.

[128] RESA Ex. 3 at 18; see *In re Application of Columbus Southern Power Company, et al.* (2011), 128 Ohio St. 3d 512, 520, 947 N.E.2d 655.

[129] OMA Br. at 7-8.

[130] Duke Br. at 3-23 (see Sections III.A. and III.B.).

[131] Id. at 33-37 (see Section III.F.).

[132] Duke Br. at 35-36.

[133] Id. at 36.

unilateral termination 'right,' imposes on customers, CRES providers, SSO suppliers, and both the competitive retail and wholesale markets a high degree of uncertainty and instability."[134] Historically, CRES suppliers have structured CRES offerings within the context of the ESP and the ESP term. Thus, an option to terminate the ESP early will create additional risk and uncertainty that will have to be added to product offerings by CRES suppliers.[135] A unilateral early termination provision could also limit the availability of longer term CRES contracts and, therefore, impact the ability of customers to enter into longer term contracts with CRES suppliers to create certainty in their electric rates.[136]

Additionally, Commission authorization of this type of action sets forth a dangerous precedent for other EDUs similarly situated to the Company whereas they too will attempt to skirt the jurisdiction of the Commission regarding such matters. Permitting one EDU to terminate its ESP early may open the door for approval of similar requests by other Ohio EDUs, which would further destabilize the security, for consumers and others, supposedly arising from the approval of an ESP.

Given the broad "change in law" provision contained in the Application and without any further support or explanation in pre-filed testimony or its brief limiting such language or setting forth objective criteria, Duke may, at its sole discretion, terminate its ESP early if it becomes apparent to Duke that it may be more beneficial for the Company to terminate the ESP early than to continue the plan through the end of the three year period.[137] Because the terms set forth in the early termination language are so imprecise, the Company may tailor its rationale for early termination of the ESP to fall within virtually any of the categories set forth above.

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[134] RESA Br. at 27 (citing RESA Ex. 3 at 19); see also OCC Br. at 109-110.
[135] RESA Ex. 3 at 19-20; OCC Br. at 109.
[136] Id.
[137] Duke Ex. 1 at 16-17; see also Duke Brief at 35-36 (which is void of any additional explanation or information); RESA Ex. 3 at 18-21 and Attachments LC-2 and LC-3.

For all the reasons stated above and as recommended by Staff and others, the Company's unilateral option to terminate the ESP as of May 31, 2017 should be rejected and removed from the MSA.[138]

C. Proposed Rider DCI is unlawful, unjust, and unreasonable. and should be denied by the Commission.

Contrary to Duke's assertions,[139] Duke has failed to demonstrate that its proposal to recover from ratepayers costs associated with distribution capital investment pursuant to Rider DCI is lawful, just, and reasonable. According to Duke's Application, the Company is establishing Rider DCI "to enable the necessary investment in the Company's distribution system, while allowing for appropriate and timely cost recovery."[140] In its brief, Duke also stated that Rider DCI "is designed to allow the Company to address reliability concerns proactively" and "to ensure the continuation of reliable and safe service."[141]

Section 4928.143(B)(2)(h), Revised Code, authorizes a utility to request single issue ratemaking for a distribution infrastructure modernization plan that includes recovery of costs through its ESP.[142] The statute gives the Commission discretion as to whether to approve such a request, but requires the Commission to examine the reliability of the EDUs distribution system and "ensure that customers' and the [EDU's] expectations are aligned" and that the EDU is "placing sufficient emphasis on and dedicating sufficient resources to the reliability of its distribution system."[143] The EDU has the burden to prove the need for and the overall reasonableness of establishing a single issue distribution rider.[144] As Staff argues, Rider DCI is

[138] Staff Ex. 3 at 3-4; RESA Ex. 3 at18-21; also see supra n.107.
[139] Duke Br. at 11-16
[140] Application at 11.
[141] Duke Br. at 12-13.
[142] OCC Br. at 74.
[143] Section 4928.143(B)(2)(h), Revised Code.
[144] OCC Br. at 74.

not intended to be a substitute for a distribution rate case and Rider DCI should not permit Duke to recover the costs of all capital expenditures.[145]

Duke has alternative means for recovery of capital investments from ratepayers, and has not demonstrated that the traditional base rate mechanism is insufficient to collect its costs.[146] Timely recovery for investments made to maintain a reliable system can occur through a base rate case, and there are no guarantees that recovery of the same capital investments through a rider mechanism (in lieu of a base rate case) will improve the reliability of the system.[147] Duke confirmed that it is currently meeting its reliability standards without the establishment of Rider DCI and that it will continue to meet its reliability standards in the future, even without the approval of Rider DCI.[148] Nonetheless, as argued by intervenors, Duke has not appropriately demonstrated that its implementation of Rider DCI as proposed is just, reasonable, prudent, or lawful and, thus, recoverable from consumers.[149]

As explained by Staff and OCC, the inclusion of General Plant in Rider DCI is unlawful, unjust, and unreasonable and should not be authorized.[150] General Plant should be excluded from recovery in Rider DCI as it is inconsistent with the intent of the ESP statute and the Commission's previous rulings, which is to only recovery expenses associated with maintaining the reliability of distribution service.[151] General Plant expenditures (such as communications equipment, office furniture, and security equipment) do not directly relate to maintaining the

[145] Staff Br. at 30.
[146] GCHC Br. at 13; Walmart Ex. 1 at 6; OCC Ex. 47 at 14; OCC Ex. 45 at 17.
[147] Duke Ex. 21 at 17; OCC Ex. 47 at 15-16.
[148] Duke Ex. 21 at 7; see also GCHC Br. at 13 (citing to Tr. I at 131, Tr. II at 391-92); Staff Ex. 7 at 4 (Staff witness Baker confirms that Duke has met both of its reliability performance standards during each of the past three years (2011-2013).
[149] OMA Br. at 10; GCHC Br. at 13; OCC Ex. 47 at 15-17, 25; OCC Ex. 45 at 17.
[150] Staff Br. at 27-30; OCC Br. at 79-81.
[151] Staff Br. at 27-28 (citing *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Establish a Standard Service Offer, in the form of an Electric Security Plan*, Case No. 11-346-EL-SSO, Opinion and Order at 47 (August 8, 2012) (ESP II Case)).

reliability of the distribution service.[152] As such, General Plant is not properly recoverable through Rider DCI. Accordingly, Duke's proposed Rider DCI should be rejected.

Alternatively, if the Commission decides that establishment of Rider DCI is appropriate, OMA recommends that the Commission modify Rider DCI consistent with the proposed modifications offered by Staff and other intervenors.[153] Importantly, OMA agrees with Staff that Rider DCI should not be unlimited and recommends that Staff's proposed caps be implemented.[154] OMA also agrees with Staff's proposal that Rider DCI and its associated rates sunset with the end of the proposed ESP on May 31, 2018.[155] After that date, Staff recommends that Duke be required to file a base rate case to recover any incremental plant in service incurred since the inception of the ESP unless a subsequent ESP has already been approved.[156] Staff also appropriately recommends that no additional costs be included in Rider DCI after May 31, 2018 in order to account for the quarterly true up process.[157]

As explained by GCHC and Kroger, a simple, equal percentage increase of base distribion rates for all rate classes would be a fair and simple method for calculating Rider DCI.[158] Although Duke seems to agree with the intended purpose of the rate design of Rider DCI, the Company used a series of calculations which redistributed cost responsibility among the classes, rather than maintaining the spread of distribution revenue determined in the last base rate case.[159]

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[152] Staff Br. at 27-28 (citing Tr. Vol. XIV at 3902-04).
[153] Staff Brief at 27-33 (Interestingly, Duke did not address any of Staff's proposed modifications to Rider DCI in its initial brief. Barring any arguments or evidence to the contrary, OMA submits that Staff's modifications should be adopted in their entirety.); GCHC Br. at 14-15; Kroger Br. at 3-5; Walmart Br. at 7.
[154] Id. at 32.
[155] Id.
[156] Id.
[157] Id.; also see Walmart Br. at 7.
[158] GCHC Br. at 14-15; Kroger Br. at 3-5.
[159] GCHC at 14-15; Kroger at 4-5.

Duke's proposal to recover from ratepayers, through Rider DCI, the costs for a wide variety of investments underscore its attempt to avoid a distribution rate case.[160] Interestingly, however, even if Duke is granted authority to recover Rider DCI as proposed, the Company did not agree to a distribution rate freeze during the term of the proposed ESP. Despite the decrease in the risk of regulatory lag, Duke also did not make any effort to adjust its return on equity (ROE) calculation to account for the benefits of eliminating regulatory lag by recovering costs through Rider DCI.[161] Duke cannot have it both ways—either the elimination of regulatory lag is valuable, and this value should be reflected in an offset to the Company's requested ROE, or the value of eliminating regulatory lag is not significant and, consequently, Duke should be required to file a distribution rate case in lieu of Rider DCI in order to recover its costs.

The costs that Duke wishes to recover through Rider DCI are best considered in the overall context of Duke's total distribution revenues, expenses, and return on distribution rate base, and the most effective means for such consideration is a distribution rate case.

D. Duke's Proposal to Eliminate the Load Factor Adjustment Rider (Rider LFA) Immediately is unjust and unreasonable and should be modified by the Commission.

Notwithstanding Staff witness Donlon's testimony to the contrary, Duke maintains that Rider LFA should be terminated effective June 1, 2015 (subject to a true-up) in order to eliminate a non-market-based influence in the competitive market and prevent subsidies from occurring between certain rate schedules (i.e., DS, DP, and TS).[162] Duke explains that the establishment of Rider LFA was a result of a negotiated settlement in the last ESP proceeding,

[160] OMA Br. at 12.
[161] OMA Br. at 11 (citing OCC Ex. 32 at 4, 6-7, 8-12 and Walmart Ex. 1 at 7).
[162] Duke Br. at 34 (citing Duke Ex. 6 at 21-22).

which would incentivize large customers for reducing their load factor.[163] Without explanation, Duke fails to address the phased-out approach proposed by Staff witness Donlon to mitigate adverse rate impacts on customers.[164]

Although OMA supports the elimination of cross subsidization within the commercial rate class, OMA agrees with Staff witness Donlon, and others, that Rider LFA should be phased out over the term of the ESP to mitigate the impact on certain customers who will see a rate increase from the elimination.[165] Based upon the theory of gradualism, Staff's recommended phase out is appropriate to "reduce the initial rate impact of those customers receiving a credit for the LFA Rider, while still reducing the cost of those customers that are paying into the LFA Rider."[166] Staff's phase-out proposal is reasonable and should be adopted as a means to mitigate any negative rate impacts that may occur to some customers from the elimination of the rider.

E. Proposals regarding Rider ECF should be carefully scrutinized.

As stated in Duke's Brief, and as supported by testimony throughout the hearing, Duke proposed to eliminate an interruptible load program, and the associated Rider ECF, as Duke is no longer a Fixed Resource Requirement (FRR) entity and no longer needs the demand response associated with this program for a capacity resource to fulfill an FRR obligation.[167] OEG disagrees with Duke's rationale for terminating the program and asserts that the large customer interruptible load program, which currently has four customers participating, should be

[163] Id.; also see Tr. XIV at 3866; OCC Br. at 97-99.
[164] Duke Br. at 34.
[165] Staff Br. at 55-56 (citing Staff Ex. 5 at 3); Kroger Br. at 5-6; see GCHC at 16 (GCHC states its support of the continuation of Rider LFA in its current form and its preference for Staff's proposed gradual phase-out of the rider vs. OEG's proposed alternative).
[166] Staff Br. at 56.
[167] Duke Br. at 34.

continued as a "complimentary option" to Duke's PowerShare program.[168] Not only does OEG recommend that the Commission continue the large customer interruptible load program during the ESP period, OEG recommends enhancing the program by modifying the terms of participation, subjecting the participating customers to unlimited emergency-only interruptions throughout the year.[169]

While there may be some justification for grandfathering or continuing a similar type of demand response program for economic development purposes,[170] the proposed modified version of the interruptible program, as presented by OEG witness Baron,[171] may ultimately expand the amounts recoverable from customers under Duke's Rider ECF and limit the touted benefits inuring to customers from a demand response program, such as an interruptible load program.

Additionally, OEG's contention that discontinuing the interruptible program would place large industrial customers with facilities in Duke's territory at a disadvantage vis-à-vis similar customers in other service territories throughout the state that have interruptible programs,[172] is without merit as the claimed inequities likely exist within Duke's own service territory given that there are only four customers currently participating in Duke's program. Additionally, the issue of whether to continue similar programs is currently pending in two other ESP proceedings before the Commission.[173]

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[168] OEG Br. at 16-26.
[169] Id. at 22; Tr. Vol. VIII at 2320.
[170] OEG Br. at 18.
[171] OEG Br. at 25 ("[T]he Commission should simply modify and expand its terms.").
[172] OEG Br. at 24-25.
[173] See *In the Matter of the Application 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 R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, et al. , Application at 12 (August 4, 2014); see also supra n.21.

Further, discontinuation of Duke's interruptible program does not eliminate the opportunity for customers to be compensated for their demand response capabilities, as OEG implies. OEG witness Baron testified that interruptible customers may participate in other demand response programs through Duke, a CRES provider, CSP providers, or directly through PJM and be compensated for their participation.[174] However, if Duke's program is discontinued, other customers will not be asked to continue to pay for costs related to the interruptible programs through Rider ECF. The benefits that have inured to those four customers have been funded by other Duke customers.

OEG contends that interruptible programs are important to "reduce strains on the electric grid during peak times,"[175] and that, if discontinued, there are no realistic market alternatives for customers that currently participate in the program,[176] because the PJM base residual auctions (BRA) for planning years 2015/2016, 2016/2017, and 2017/2018, into which these customers may have been able to bid their demand response resources, have already occurred.[177] However, as OEG acknowledges, there is an alternative available for affected customers: they may bid their interruptible load into PJM incremental auctions.[178] Interruptible customers may participate in PJM's demand response programs either on their own, through a third-party curtailment service provider, or through a CRES provider.[179] OEG notes that the payments for capacity in PJM incremental auctions have "historically been unpredictable, and often significantly lower than the standard RPM capacity prices produced by the annual BRAs."[180] OEG therefore implies that the benefits that may be received through participation in PJM programs are not

[174] See Tr. Vol. VIII at 2326.
[175] OEG Br. at 17.
[176] OEG Br. at 20.
[177] OEG Br. at 19.
[178] Tr. Vol. VIII at 2326-288.
[179] Id; OEG Br. at 19.
[180] OEG Br. at 19.

significant enough, and that, accordingly, Duke's interruptible program should be modified and continued.[181]

As explained previously, these benefits, and the resultant discounted rates participating companies have received, have been wholly funded by other Duke ratepayers, at a significant cost. The suggestion that the benefits Duke's interruptible customers will receive under another demand response program, which will compensate these companies for their interruptible load without forcing other ratepayers to fund such compensation, are not great enough seems unreasonable to those Duke customers who have subsidized the benefits received under Duke's interruptible program.[182] OEG claims that "[i]f customers with interruptible load choose not to participate in the PJM demand response programs due to insufficient compensation or unpredictability regarding the level of compensation they would receive, then the potential benefits of that interruptible load to all customers would be lost."[183]

Additionally, the necessity for interruptible customers to participate solely in PJM incremental auctions to monetize their demand response capabilities is a short-term issue. Customers previously taking service under the interruptible program may begin bidding incremental load into PJM BRAs commencing with planning year 2018/2019.[184]

If the Commission finds that there is a benefit associated with a distribution utility offering a demand response program for economic development purposes, as stated by OEG,[185] then the Commission should continue the existing program established in Duke's last rate

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[181] OEG Br. at 20.
[182] OEG Br. at 20.
[183] OEG Br. at 20.
[184] The reference to the recent D.C. Circuit decision is misplaced, as that decision did not address demand response as a capacity resource participating in PJM's demand response programs and did not prohibit or limit participation of demand resources in PJM's capacity markets. OEG Br. at 23. Instead, the decision addressed PJM's incentive compensation for demand resources in energy markets and the effect of those incentives on retail energy markets, which are under the states' exclusive jurisdiction. See *Electric Power Supply Assoc. v. FERC*, D.C. Circuit Case No. 11-1486 (May 23, 2014).
[185] OEG Br. at 18; OEG Ex. 2 at 12.

case.[186] As OEG asserts in its Brief and as the Commission ordered the Company to do in AEP's ESP II Case, Duke should be required to bid the interruptible load as a capacity resource into PJM's capacity auctions.[187] If the existing interruptible program continues, the Commission should also require any revenue received from participating in PJM's capacity auctions to be credited back to customers through Rider ECF.[188] As OEG witness Baron recognizes, any revenues received from bidding the interruptible load into the capacity market should offset the cost of providing any IRP program and should be flowed through to customers.[189] Such crediting will reduce the cost of the program to non-participating customers.

F. The Company's proposed ESP is less favorable in the aggregate for customers than an MRO.

Before approving an ESP, the Commission must determine that the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under an MRO ("the MRO test").[190] Duke has the burden of demonstrating that its proposed ESP is, in fact, more favorable in the aggregate than an MRO.[191]

Duke's analysis failed to consider the effects of many provisions contained in its ESP.[192] Duke's MRO test did not consider the effects of Rider PSR on customers, which is projected to be a net charge to customers during the term of the ESP.[193] As OCC witnesses Wilson and Hixon explain, the net cost of Rider PSR in Duke's projection reaches $29 million by the end of

[186] See OEG Ex. 2 at 16-18; OEG Brief at 18 (citing to Case No. 11-346-EL-SSO).
[187] OEG Br. at 25-26.
[188] OEG Br. at 25-26.
[189] OEG Ex. 2 at 19.
[190] Section 4928.143(C)(1), Revised Code; 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, Opinion and Order at 48 (September 4, 2013).
[191] Id.
[192] OCC Br. at 55-73.
[193] Tr. Vol. II at 409.

2018, with a projected net cost during the ESP term of $22 million.[194] Any costs or projected costs associated with Rider PSR during the term of the ESP must be considered in the MRO test as quantifiable costs as these are costs customers would not pay under an MRO scenario.[195] As Staff witness Turkenton recognized, if you consider the net cost to customers of the PSR of $22 million over the term of the ESP, "under a quantitative benefit, the [MRO] test would fail." [196]

Duke also failed to include the costs associated with Rider DCI in its MRO test analysis.[197] The new Rider DCI will result in a net rate increase to customers compared to current rates, and is not available under the MRO statute.[198] While the Company alludes to benefits associated with the proposed DCI, Duke does not quantify such benefits and the Commission has previously determined that no such quantifiable benefits exist between recovering distribution investment through a rider rather than a base distribution rate case.[199] Additionally, Duke has not committed to refrain from filing a distribution rate case during the term of the proposed ESP.[200]

Despite Duke's claims to the contrary, the Company's MRO test fails to provide sufficient non-quantifiable benefits.[201] As explained previously, the proposed Rider PSR does not increase price stability or certainty for customers as the projected costs associated with Rider PSR during the three-year term outweigh any claimed benefits. The only benefit provided by Rider PSR is to Duke, as an owner of the entitlement to the output of the generating facilities. Rider PSR will allow Duke to recover all costs associated with its OVEC (or future generator)

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[194] OCC Ex. 43 at 17; OCC Ex. 48 at 4.
[195] OCC Ex. 48 at 5, 7-8.
[196] Tr. Vol. XIII at 3780.
[197] Tr. Vol. II at 445.
[198] Id. at 445, 447.
[199] *In the Matter of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 12-1230-EL-SSO, Opinion and Order at 55-56 (July 18, 2012)).
[200] Tr. Vol. XIII at 3784-85.
[201] OCC Ex. 48 at 13-15.

entitlement. Several witnesses, as cited above, also recognize that Rider PSR does not provide any additional reliability benefits for Ohio customers.[202]

Further, as stated previously, Rider DCI and Duke's unilateral early termination right also do not provide any qualitative benefits.

Given these factors, the ESP, as filed, is not more favorable in the aggregate than an MRO.[203] As explained by Staff Witness Turkenton, the ESP, as proposed (as filed), does not satisfy the MRO test.[204] Only with Staff's proposed modifications, including the rejection of Rider PSR, does Staff believe the ESP becomes more favorable in the aggregate than an MRO.[205] Similarly, several intervenor witnesses testified that the Commission should modify the Company's proposed ESP to eliminate Rider PSR and Rider DCI, both of which cannot be obtained under Section 4928.142, Revised Code. Numerous intervenor and Staff witnesses agree that, as proposed and without significant modifications, the ESP is not more favorable in the aggregate than an MRO and cannot be approved.

In the event, however, that the Commission finds it necessary to modify the ESP to render it more favorable in the aggregate than an MRO, OMA respectfully requests that the Commission adopt the recommendations set forth above, as well as in OMA's Initial Brief, incorporated fully herein by reference.

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[202] OCC Ex. 48 at 13.
[203] OCC Ex 48 at 5; Staff Ex. 2 at 3; Tr. Vol. XIII at 3783.
[204] Tr. Vol. XIII at 3783 .
[205] Tr. Vol. XIII at 3783; Staff Ex. 2 at 3.

III. CONCLUSION

As established in its Initial Brief and in the foregoing arguments, OMA respectfully requests that the Commission find that the proposed ESP is unlawful and unreasonable, and accordingly reject it. If, however, the Commission sees fit to modify the proposed ESP to render it compliant with Ohio law, OMA recommends that it modify Duke's ESP as provided for herein.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on December 29, 2014.

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