

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

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

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**APPLICATION FOR REHEARING  
OF INDUSTRIAL ENERGY USERS-OHIO**

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**APPLICATION FOR REHEARING OF  
INDUSTRIAL ENERGY USERS-OHIO**

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Pursuant to R.C. 4903.10 and Rule 4901-1-35, Ohio Administrative Code (“OAC”), Industrial Energy Users-Ohio (“IEU-Ohio”) respectfully submits this Application for Rehearing of the Opinion and Order approving an Electric Security Plan (“ESP”) for Duke Energy Ohio, Inc. (“Duke”) issued by the Public Utilities Commission of Ohio (“Commission”) on April 2, 2015 (“ESP Order”) for the following reasons:

1. **The ESP Order is unlawful because it authorizes a nonbypassable generation-related rider, the Power Stabilization Rider (“PSR”), which is not included in the list of permissive ESP provisions authorized by R.C. 4928.143(B)(2).**
2. **The ESP Order is unlawful because it authorizes a procedure by which Duke may seek to increase its compensation for wholesale**

generation-related electric service, which exceeds the Commission's jurisdiction under Ohio law.

3. The ESP Order is unlawful because authorization to establish a placeholder rider, the PSR, and to seek cost recovery in a future filing, violates the requirements of R.C. 4928.143(B), which limits the terms that may be authorized as terms of an ESP, and R.C. 4928.143(C)(1), which provides that the Commission may approve or modify and approve an ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, if the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.
4. The ESP Order is unlawful and unreasonable because Duke did not satisfy the burden of proof to demonstrate that the PSR is a limitation on customer shopping and the Commission's finding that the PSR is a limitation on customer shopping is not supported by the record as required by R.C. 4903.09 and is not supported by the manifest weight of the evidence.
5. The ESP Order is unlawful and unreasonable because the Commission's finding that the PSR "in theory, has the effect of stabilizing or providing certainty regarding retail electric service" is not supported by the manifest weight of the evidence and is directly contradicted by the Commission's finding that Duke failed to demonstrate that the PSR would promote rate stability.
6. The ESP Order is unlawful because the Commission authorized a placeholder rider, the PSR, by which Duke may seek to recover anticompetitive subsidies flowing from noncompetitive retail electric services to competitive wholesale electric service, or vice versa, in violation of R.C. 4928.02(H).
7. The ESP Order is unlawful and unreasonable because the Commission authorized a placeholder rider, the PSR, by which Duke may seek to recover generation-related revenue through a distribution-like rate in violation of R.C. 4928.02(H).
8. The ESP Order is unlawful and unreasonable because the Commission, by authorizing a placeholder rider, the PSR, by which Duke may seek to recover generation-related revenue through a distribution-like rider, failed to respect its own prior decision denying authorization of the recovery of generation-related costs through a distribution-like rider and failed to adequately explain why it was departing from its prior decision, and the new course is not lawful or reasonable.

9. **The ESP Order is unlawful and unreasonable because the Commission authorized the PSR as a placeholder rider by which Duke may seek to recover generation-related transition revenue or its equivalent in violation of R.C. 4928.38 and the bar to recovery of transition revenue or its equivalent resulting from Duke’s Electric Transition Plan Stipulation.**
10. **The ESP Order is unlawful and unreasonable because, under the Supremacy Clause of the United States Constitution, the Commission is preempted by the Federal Power Act from authorizing a rider such as the PSR that may authorize Duke to increase its compensation for wholesale generation-related services in an amount exceeding that authorized by the Federal Energy Regulatory Commission.**
11. **The ESP Order is unlawful and unreasonable because the Commission engaged in rulemaking without complying with the requirements of Chapter 119 of the Revised Code as a means of authorizing an application process that would permit Duke to seek to recover above-market wholesale generation-related costs.**
12. **The ESP Order is unlawful and unreasonable because the Commission identified “factors” and a review process to address a future filing by Duke if it seeks to increase its compensation for generation-related services that are void for vagueness under the Due Process Clauses of the United States Constitution and the Ohio Constitution.**
13. **The Commission should grant rehearing and clarify (1) that the “factors” that it will consider in a “future filing” if Duke seeks to increase its compensation for generation-related services include a requirement for Duke to propose a “least-cost” hedge and a requirement that the hedge be secured by a competitive bidding process and (2) that Duke will be required to demonstrate that the resulting ESP, if the Commission approves generation cost recovery in a future filing, will satisfy the requirement of R.C. 4928.143(C)(1), which provides that the Commission may approve or modify and approve an ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, if the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142.**

As discussed in the Memorandum in Support attached hereto, IEU-Ohio respectfully requests that the Commission grant this Application for Rehearing.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF THE APPLICATION FOR  
REHEARING OF INDUSTRIAL ENERGY USERS-OHIO**

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**I. INTRODUCTION**

In its Application, Duke Energy Ohio, Inc. (“Duke”) sought authorization of an Electric Security Plan (“ESP”) for the period of June 1, 2015 to May 31, 2018.<sup>1</sup> As a term of the ESP, the Application proposed a new nonbypassable rider, the Price Stabilization Rider (“PSR”), which would recover above-market generation-related

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<sup>1</sup> Duke Ex. 1 at 1. Duke also sought authority to terminate the ESP one year early unilaterally. *Id.* at 16-17.

wholesale costs associated with Duke's retained interest in generation plants operated by Ohio Valley Electric Corporation ("OVEC").<sup>2</sup>

In the ESP Order, the Commission found that Duke had failed to demonstrate the proposed PSR would provide customers the stability benefits, the so-called "hedge," that Duke claimed, but still authorized Duke to establish a PSR as a placeholder with an initial rate of zero.<sup>3</sup> Further, the Commission left open the door for Duke to make a "future filing" for authorization to recover generation-related costs and directed Duke to address at least four "factors" if it sought cost recovery.<sup>4</sup>

The ESP Order is unlawful and unreasonable for several reasons.

- The Commission's finding that it may authorize the PSR as a term of an ESP is unlawful because R.C. 4928.143(B)(2)(d) does not provide authorization for a nonbypassable generation-related rider.
- The Commission's finding that it may increase Duke's compensation for wholesale generation-related electric services is unlawful because the finding exceeds the Commission's jurisdiction under Ohio law.
- The Commission's finding that it can authorize Duke to collect above-market wholesale generation-related costs through a separate filing would permit Duke to unlawfully evade the requirements of R.C. 4928.02(B) and R.C. 4928.143(C)(1).
- Duke did not satisfy the burden of proof to demonstrate that the PSR is a limitation on customer shopping, and the Commission's finding that the PSR

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<sup>2</sup> *Id.* at 13-14.

<sup>3</sup> ESP Order at 46-47. All other parties opposed Duke's proposed PSR. One party, Ohio Energy Group ("OEG"), recommended a substantially modified version. OEG Ex. 1.

<sup>4</sup> ESP Order at 47.

is a limitation on customer shopping is not supported by the manifest weight of the evidence.

- The Commission’s finding that the PSR may have the effect of providing certainty or stability in the provision of retail electric service is not supported by the manifest weight of the evidence and is expressly contradicted by the Commission’s determination that the PSR would not provide rate stability.
- The Commission’s finding that it may authorize Duke to bill and collect above-market wholesale generation-related costs is unlawful because the authorization would violate R.C. 4928.02(H).
- The Commission’s finding that R.C. 4928.02(H) does not bar the authorization of the PSR is unlawful because it departed from prior precedent without a reasoned explanation and the finding that the PSR does not violate the section is neither lawful nor substantively reasonable.
- The Commission’s authorization of the PSR is unlawful because the Commission may not authorize, in practice or theory, the recovery of transition revenue or its equivalent.
- The Commission’s authorization for Duke to establish a PSR is preempted by the Federal Power Act (“FPA”).
- The Commission’s establishment of a “rule” defining a future filing to secure authorization of generation-related cost recovery violated the requirements applicable to the Commission for rulemaking under Chapter 119 of the Revised Code and was not a lawful adoption of a “rule” by adjudication.

- The “factors” and “process” the Commission identified for addressing a “future filing” by Duke to recover above-market generation-related costs are void for vagueness.

Because the Commission’s orders concerning the PSR and a “future filing” are unlawful and unreasonable, the Commission should grant rehearing and reverse those orders.

If the Commission does not reverse the orders authorizing the rider and future filing, it should grant rehearing and clarify the “factors” it will consider in a future filing and include requirements that the “hedge” which customers are required to pay for be “least-cost” and that Duke be required to seek competitive bids for the product that it alleges will serve as a “hedge.” Further, the Commission should require Duke to demonstrate that the resulting ESP will satisfy the requirements of R.C. 4928.143(C)(1).

## **II. AUTHORIZATION OF THE PSR IS UNLAWFUL AND UNREASONABLE**

The Commission refused to authorize Duke to begin to bill and collect the above-market generation-related wholesale costs of its interest in OVEC because “the evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the rider’s intended purpose as a hedge against market volatility.”<sup>5</sup> Based on the record, the Commission was “not persuaded that the PSR proposal put forth by Duke in the present proceedings would, in fact, promote rate stability, as Duke claims, or that it is in the public interest.”<sup>6</sup>

Even though Duke was not authorized to bill and collect from customers the above-market wholesale generation-related costs of OVEC, the Commission authorized

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<sup>5</sup> *Id.* at 46.

<sup>6</sup> *Id.*

Duke to establish a PSR for the term of the ESP.<sup>7</sup> To support the authorization, the Commission found that the PSR, in theory, satisfied the requirements of R.C. 4928.143(B)(2)(d) because it would be a charge that was a limitation on customer shopping that had the effect of stabilizing or providing certainty regarding retail electric service.<sup>8</sup> The Commission ordered that the initial rate be set at zero<sup>9</sup> and that the PSR be nonbypassable.<sup>10</sup>

If Duke seeks authorization to bill and collect above-market wholesale generation-related costs from retail customers, it must make a filing to justify any requested cost recovery.<sup>11</sup> In a filing, Duke must address at a minimum several “factors” including the financial need of the generating plant, the necessity of the generation facility, in light of future reliability concerns, a description of how the generating plant is compliant with all pertinent environmental regulations and a plan for compliance with pending environmental regulations, and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within Ohio.<sup>12</sup> The Commission also directed that Duke include provisions that provide for rigorous Commission oversight of the PSR, an alternative plan for allocating the financial risk of the rider, and a severability clause so that the ESP would continue if the PSR is invalidated by a court. Additionally, the Commission reserved the option of requiring an independent third party study of the reliability and pricing issues

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<sup>7</sup> *Id.* at 47.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 44-45.

<sup>10</sup> *Id.* at 45 & 47.

<sup>11</sup> *Id.* at 47.

<sup>12</sup> *Id.*

as they relate to an application seeking cost recovery.<sup>13</sup> The Commission then will balance, but not be bound, by those factors in deciding whether to approve Duke's request for cost recovery.<sup>14</sup>

For the following reasons, the Commission should grant rehearing and reverse its authorization of the PSR.

**1. The ESP Order is unlawful because it authorizes a nonbypassable generation-related rider, the PSR, which is not included in the list of permissive ESP provisions authorized by R.C. 4928.143(B)(2)**

In the ESP Order, the Commission held that it could authorize a nonbypassable generation-related rider, the PSR, under R.C. 4928.143(B)(2)(d).<sup>15</sup> Because that Section does not allow the Commission to "establish" or authorize a nonbypassable generation-related rider, the ESP Order's authorization of the PSR as a nonbypassable rider is unlawful.

Operating as a definitional section, R.C. 4928.143(B) limits the terms of an ESP to those specified in the Section.<sup>16</sup> R.C. 4928.143(B)(2) provides only two instances in which the Commission may authorize a nonbypassable generation-related rider, divisions (b) and (c). Under those two divisions, a nonbypassable charge is available to recover costs if the electric utility demonstrates that generating facilities were under construction or constructed after January 1, 2009 and satisfies other statutory requirements. R.C. 4928.143(B)(2)(d) does not similarly provide that a rider approved under that division may be nonbypassable.

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 45.

<sup>16</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 520 (2011).

By authorizing generation-related nonbypassable riders in only two instances, the General Assembly precluded the Commission from authorizing a nonbypassable generation-related rider under R.C. 4928.143(B)(2)(d).

As a general rule of statutory construction, the specific mention of one thing implies the exclusion of another. This principle is especially pertinent where, as in the cases *subjudice*, the statute involved is a definitional provision. Had the General Assembly intended to allow the utilities to recapture other types of expenses through this rate, it would have expanded the definitions.<sup>17</sup>

Despite the limitations on the Commission's authority to authorize nonbypassable generation-related riders, the Commission unlawfully authorized the PSR as a nonbypassable rider. Because the Commission is without authority to authorize a term of an ESP unless it is among the terms listed under R.C. 4928.143(B)(2), the Commission's order is unlawful and should be reversed.

**2. The ESP Order is unlawful because it authorizes a procedure by which Duke may seek to increase its compensation for wholesale generation-related electric service, which exceeds the Commission's jurisdiction under Ohio law**

In its findings concerning the PSR, the Commission concluded that the rider recovered or credited "Duke's margins from its OVEC contractual entitlement."<sup>18</sup> Those margins would be the difference between the wholesale costs Duke is charged by OVEC under the Federal Energy Regulatory Commission ("FERC")-approved wholesale contract and the wholesale revenue Duke receives under PJM Interconnection L.L.C.

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<sup>17</sup> *Montgomery County Bd. of Comm'rs v. Pub. Util. Comm'n of Ohio*, 28 Ohio St.3d 171, 175 (1986) (citations omitted).

<sup>18</sup> ESP Order at 44.

("PJM") tariffs.<sup>19</sup> Thus, the PSR is a charge or credit that increases or decreases Duke's compensation for wholesale capacity and energy services.

The Commission, however, is without authority to adjust the compensation of an electric distribution utility ("EDU") for wholesale electric services. The services of a public utility subject to the Commission's jurisdiction are established through the definitional sections in Chapters 4905 and 4928 of the Revised Code. R.C. 4905.02 provides that a "public utility" includes every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code." R.C. 4905.03 then provides a list of the types of public utilities subject to the Commission's jurisdiction:

As used in this chapter, any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

...  
(C) An electric light company, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission.

The same definition extends to the Commission's jurisdiction under Chapter 4928 to EDUs.<sup>20</sup> This definition specifically limits the Commission's jurisdiction over electric light companies, including EDUs, to instances in which a retail service is being provided, *i.e.*, electricity is being supplied "to consumers." By definition, therefore, the jurisdiction of the Commission does not extend to wholesale generation-related electric services.

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<sup>19</sup> *Id.*

<sup>20</sup> See, *e.g.*, R.C. 4928.01(A)(6) & (7) & R.C. 4928.05(A) (defining the Commission's jurisdiction to supervise and regulate competitive and noncompetitive retail electric service supplied by an electric utility).

Although the Commission indicated in the ESP Order that the implementation details of the rider would be addressed in a future proceeding, it did not reject that portion of the Application by which Duke seeks to increase its compensation for wholesale generation-related services. In the application before the Commission, the balance, or margin, collected under the proposed rider from retail customers is the difference between the wholesale costs Duke is charged by OVEC under the FERC-approved wholesale contract and the wholesale revenue Duke received under PJM tariffs.<sup>21</sup> Because Ohio law limits the Commission's jurisdiction to set charges for a service of an electric light company to electricity services being supplied to consumers in Ohio, the Commission's jurisdiction does not extend to establishing a charge or credit to adjust Duke's compensation for wholesale generation-related electric services. Accordingly, the Commission is without authority under Ohio law to authorize the PSR.

Because the Commission erred in authorizing a rider that would allow Duke to seek to recover increased compensation for wholesale generation-related services, the Commission should grant rehearing and reverse its order authorizing Duke to establish the PSR.

- 3. The ESP Order is unlawful because authorization to establish a placeholder rider, the PSR, and to seek cost recovery in a future filing, violates the requirements of R.C. 4928.143(B), which limits the terms that may be authorized as terms of an ESP, and R.C. 4928.143(C)(1), which provides that the Commission may approve or modify and approve an ESP, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, if the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142**

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<sup>21</sup> ESP Order at 42.

The Commission, as a creature of statute, has no authority to act beyond its statutory powers.<sup>22</sup> R.C. 4928.143(B) states the terms that the Commission may authorize as a provision of an ESP, and none authorizes a placeholder rider. Further, the Commission may approve or modify and approve an application for an ESP only if it determines that the ESP is more favorable in the aggregate than a Market Rate Offer ("MRO") ("ESP v. MRO Test").<sup>23</sup> By approving a placeholder rider as a term of Duke's next ESP,<sup>24</sup> the Commission has permitted Duke to evade application of the ESP v. MRO Test if the Commission approves cost recovery in a "future filing." Because the PSR cannot be authorized as a placeholder rider under either Section 4928.143(B) or (C)(1), the Commission's authorization of the PSR as a placeholder rider is unlawful.

The items that may be approved as part of an ESP are limited to those authorized by R.C. 4928.143(B)(1) and (2).<sup>25</sup> R.C. 4928.143(B)(1) authorizes the Commission to include provisions in the ESP relating to the supply and pricing of retail generation service. Any other provision may be authorized only if it meets the requirements of one of the nine enumerated provisions of R.C. 4928.143(B)(2).<sup>26</sup>

Each provision of R.C. 4928.143(B)(1) or (2) specifically provides that the Commission may authorize the recovery of various costs, either immediately or through a phase-in. None authorizes either a placeholder rider or the two-step process that would result from the establishment of a placeholder rider and subsequent initiation of a

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<sup>22</sup> *Discount Cellular, Inc. v. Pub. Util. Comm'n of Ohio*, 112 Ohio St.3d 360, 373 (2007).

<sup>23</sup> R.C. 4928.143(C)(1).

<sup>24</sup> ESP Order at 47.

<sup>25</sup> R.C. 4928.143(A) further provides that the Commission is directed to authorize an ESP "as prescribed under division (B) of this section."

<sup>26</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d at 520.

charge through a separate filing unrelated to a deferral and its recovery. Accordingly, R.C. 4928.143(B) does not authorize the Commission to authorize Duke to establish a placeholder rider.

Additionally, R.C. 4928.143(C)(1) requires the Commission to find that it is without authority to approve a placeholder rider. Before the Commission may approve or modify and approve an application for an ESP, the Commission must find that the ESP, “so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code.”<sup>27</sup> Thus, the Commission can approve a rider as a term of the ESP only if it addresses all the expected charges that will be imposed by the ESP, including those deferred for future recovery, and finds that the result is better than the expected results of an MRO.

In this case, the Commission determined that the ESP was quantitatively more favorable than an MRO. The Commission, however, has provided that Duke may seek to recover above-market wholesale generation-related costs through a “future filing.”<sup>28</sup> The Commission, however, did not require Duke to demonstrate whether the ESP would continue to pass the ESP v. MRO Test if Duke is authorized to begin additional cost recovery. Thus, if Duke pursues authorization and secures the collection of the above-market costs of wholesale generation services of OVEC or another generation plant, Duke will evade its burden of proof to demonstrate that the ESP, including those

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<sup>27</sup> R.C. 4928.143(C)(1).

<sup>28</sup> ESP Order at 47.

additional generation-related costs, passes the ESP v. MRO Test in violation of the requirement of R.C. 4928.143(C)(1).

In summary, a placeholder rider is not authorized as a term of an ESP, and its authorization permits the EDU to evade review of the effect of the placeholder rider on the ESP v. MRO Test if the Commission subsequently allows Duke to recover costs through approval of a “future filing.” Accordingly, the Commission should grant rehearing and reverse its authorization of the placeholder PSR.

- 4. The ESP Order is unlawful and unreasonable because Duke did not satisfy the burden of proof to demonstrate that the PSR is a limitation on customer shopping and the Commission’s finding that the PSR is a limitation on customer shopping is not supported by the record as required by R.C. 4903.09 and is not supported by the manifest weight of the evidence**

Duke sought authorization of the PSR under R.C. 4928.143(B)(2)(d). That section requires Duke to demonstrate that the PSR is “[t]erm[], condition[], or charge[] relating to limitations on customer shopping for retail electric generation service, bypassability, standby, back-up, or supplemental power service, default service, carrying costs, amortization periods, and accounting or deferrals, including future recovery of such deferrals, as would have the effect of stabilizing or providing certainty regarding retail electric service.” To support its claim that the PSR could be approved under R.C. 4928.143(B)(2)(d), Duke asserted that the rider may be approved because it is nonbypassable.<sup>29</sup> The Commission correctly concluded that “since nearly any charge

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<sup>29</sup> Merit Brief of Duke Energy Ohio, Inc. at 18 (Dec. 15, 2015).

may be bypassable or nonbypassable, 'bypassability' alone is insufficient to fully meet the second criterion of R.C. 4928.143(B)(2)(d)."<sup>30</sup>

Although Duke failed to demonstrate a lawful basis for approving the rider, the Commission nevertheless determined that the PSR could be approved because it was a "financial limitation on customer shopping,"<sup>31</sup> citing the brief and testimony of an intervenor.<sup>32</sup> In its Application, testimony supporting the Application, and its testimony at hearing, however, Duke took the position that the PSR was not a limitation on customer shopping.<sup>33</sup> Moreover, the testimony cited by the Commission to support its finding does not address whether the PSR would operate as a limitation on customer shopping. Thus, Duke failed to carry the burden of proof to establish that the PSR is a limitation on shopping, and the manifest weight of the evidence contradicts that finding.

R.C. 4928.143(C)(1) provides that "[t]he burden of proof in [an ESP] proceeding shall be on the electric distribution utility." The burden of proof created by R.C. 4928.143(C)(1) places on the EDU "the necessity of establishing the existence of a certain fact or set of facts by evidence which preponderates to the legally required extent."<sup>34</sup>

Duke filed an application seeking a standard service offer ("SSO") in the form of an ESP. Having chosen to file for an ESP, Duke was required to comply with the requirements of Rule 4901:1-35-03 of the Ohio Administrative Code ("OAC"). The rule

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<sup>30</sup> ESP Order at 45.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Duke Ex. 1 at 13; Duke Ex. 6 at 15 (PSR is "competitively neutral"); Tr. Vol. II at 470.

<sup>34</sup> *Martin v. City of Columbus*, 101 Ohio St. 1, 9 (1920); *Broadway Christian Church v. Williams*, 59 Ohio App. 2d 243, 254 (8th Dist. Ct. App. 1978) (same).

specifically provides that Duke, if it is seeking a term, condition, or charge that operates as a limitation on customer shopping, to include in its Application “[a] listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service.”<sup>35</sup>

In its Application, Duke did not advance the claim that the PSR would operate as a limitation on customer shopping. In fact, its Application and supporting testimony stated exactly the opposite. Duke’s Application alleged, “This proposal [the PSR] will not interfere with CRES providers’ ability to compete for customers, as the nonbypassable rider will neither reward nor penalize customers’ decisions regarding choice.”<sup>36</sup> In the supporting testimony by Mr. Wathen attached to the Application, Duke continued to assert that the PSR did not limit shopping. Mr. Wathen testified, “As Duke Energy Ohio’s entitlement share of energy and capacity from the OVEC generating stations will continue to be sold into wholesale markets, this proposal will not impact the competitive retail electric market that is active in Duke Energy Ohio’s service territory. In other words, no CRES provider is impacted in any way by the approval of the rider.”<sup>37</sup> On cross-examination, Mr. Wathen continued to assert that the PSR would not operate as a limitation on customer shopping:

Q: And it’s also your view that the PSR does not limit customer shopping; is that correct?

A: That’s correct.<sup>38</sup>

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<sup>35</sup> Rule 4901:1-35-03(C)(9)(c)(i), OAC.

<sup>36</sup> Duke Ex. 1 at 13.

<sup>37</sup> Duke Ex. 6 at 15.

<sup>38</sup> Tr. Vol. II at 470.

Based on the record before the Commission, therefore, Duke, the party with the burden of proof to provide evidence to demonstrate that the PSR would operate as a limitation on customer shopping, testified that it would not.

The Commission, however, “agrees” with a position not advanced by Duke that the PSR would operate as a limitation on shopping.<sup>39</sup> In support of that conclusion, the Commission relies on the brief and testimony provided by OEG. The Commission’s reliance on the OEG testimony is unwarranted for two reasons.

First, the testimony cited in OEG’s brief on which the Commission bases its finding that the PSR operates as a limitation on customers shopping states only that Mr. Taylor, OEG’s witness, believes that the PSR is permitted under Amended Substitute Senate Bill 221 (“SB 221”) because it may stabilize prices. Responding to a question regarding whether physical assets would be added in Ohio if the Commission authorized the PSR, Mr. Taylor responded that there is no current proposal to add such facilities. He then digressed and stated that he “see[s] this entire PSR process as something where, my understanding of Senate—of Senate Bill 221 in Ohio was to create a hybrid market and make sure that customers weren’t 100-percent dependent upon marginal cost pricing, and the PSR is really in line with that in ensuring there is some avenue for the Commission to try and stabilize prices.”<sup>40</sup> Simply put, the quoted portion of Mr. Taylor’s statement that the Commission relies upon to support its finding that the PSR is a limitation on customer shopping, does not discuss that issue.

Second, the Commission cannot lawfully rely on the testimony of OEG to solve Duke’s evidentiary problem. Duke has the burden of proof to establish the lawfulness

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<sup>39</sup> ESP Order at 45.

<sup>40</sup> Tr. Vol. VII at 1875.

and reasonableness of the ESP and its terms.<sup>41</sup> Because it has the burden of proof, it also initially must advance some evidence to support its claims because it has the “burden of proceeding.” “[T]he burden of proceeding is ... the duty of proceeding with evidence at the beginning or at any subsequent stage of the trial in order to make or meet a prima facie case.”<sup>42</sup> Failure to meet that burden requires a finding adverse to the party that fails to meet the burden of proceeding.<sup>43</sup>

Based on the record in this case, Duke failed to meet the burden of proceeding with evidence to support the Commission’s finding that the PSR operated as a limitation on shopping and the finding is contrary to the manifest weight of the evidence. As noted above, Duke’s Application and supporting testimony stated that the PSR would not limit customer shopping. As also noted above, its witness stated without qualification that the PSR was not a restriction on shopping. In short, Duke did not assert the rider may be approved because it is a restriction on shopping or provide any evidence to support that finding. Since Duke did not advance any support for a finding and no other record evidence supports it, there is no reasonable basis for the Commission to “agree” that the PSR should be authorized.<sup>44</sup>

By relying on the OEG testimony as a basis for approving the PSR (particularly testimony that does not address the issue), the Commission also has created an unfair disadvantage for those opposing Duke’s request for authority to implement the PSR.

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<sup>41</sup> R.C. 4928.143(C)(1).

<sup>42</sup> *Broadway Christian Church v. Williams*, 59 Ohio App. 2d at 254.

<sup>43</sup> *Reeves v. Healy*, 192 Ohio App. 3d 769, 783 (10th Dist. Ct. App. 2011) (failure to establish the standard of care is fatal to a prima facie case of medical malpractice); *Hart v. Somerford Twp. Bd. of Trustees*, 2008 WL 1704244 (12th Dist. Ct. App. Apr. 14, 2008) (trial court decision that cause of action challenging constitutionality of zoning ordinance failed because appellant failed to meet his burden of proof affirmed).

<sup>44</sup> *Broadway Christian Church v. Williams*, 59 Ohio App. 2d at 254.

The opposing parties may not rely upon the Application and supporting testimony to identify the issues they must address at hearing. Instead, they must defend against any party's contrivance that might be supportive of Duke's proposal, no matter how far-fetched or contrary to the record.

Further, authorization of the PSR when there is no factual support for the Commission's conclusion that the PSR operates as a limitation on customer shopping is a violation of R.C. 4903.09. Under that section, the Commission "shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." "The commission cannot decide cases on subjective belief, wishful thinking, or folk wisdom."<sup>45</sup> On the record in this case, there was no evidence that the PSR operated as a limitation on shopping. Thus, the Commission erred when it found that the PSR would operate as a limitation on customers shopping.

Even if the Commission were permitted to speculate on whether the PSR would operate as a limitation on shopping, the Commission's rules do not provide a basis for construing the rider as a limitation on customer shopping. According to the Commission rules, limitations on customer shopping "would include, but are not limited to, terms and conditions relating to shopping or to returning to the standard service offer and any unavoidable charges."<sup>46</sup> According to Duke, the PSR does not affect customer shopping. Since the rider does not change the relationship of a customer to Duke (other than increase the amount all customers may be required to pay for retail electric

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<sup>45</sup> *Consumers' Counsel v. Pub. Util. Comm.*, 61 Ohio St.3d 396, 406 (1991) (Brown, J., dissenting).

<sup>46</sup> Rule 4901:1-35-03(C)(9)(c)(i), OAC.

service), no reasoned reading of the record supports a finding that the rider operates as a limitation on customer shopping.

In summary, Duke has failed to carry its burden of proof, and the “manifest weight of the evidence contradicts the commission’s conclusion.”<sup>47</sup> Further, the Commission’s decision does not comply with the requirements of R.C. 4903.09. Therefore, the Commission should grant rehearing and reverse its authorization of the rider.

**5. The ESP Order is unlawful and unreasonable because the Commission’s finding that the PSR “in theory, has the effect of stabilizing or providing certainty regarding retail electric service” is not supported by the manifest weight of the evidence and is directly contradicted by the Commission’s finding that Duke failed to demonstrate that the PSR would promote rate stability**

In its discussion of the PSR, the Commission noted that Duke sought approval of the PSR because it would provide “a financial hedge against market volatility and temper[] the prices customers will see in generation rates.”<sup>48</sup> Based on Duke’s “theory,” the Commission concluded “there is no question that the PSR would produce a credit or charge based on the difference between wholesale market prices and OVEC’s costs, offsetting, to some extent, the volatility in the wholesale market.”<sup>49</sup> The Commission then finds that “Duke has demonstrated that the proposed PSR would, in theory, have the effect of stabilizing or providing certainty regarding retail electric service.”<sup>50</sup>

The record, however, did not support the theory. Even though the Commission found that the PSR may reduce wholesale market volatility in theory, it nonetheless

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<sup>47</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d at 519.

<sup>48</sup> ESP Order at 42.

<sup>49</sup> *Id.* at 44.

<sup>50</sup> *Id.*

refused to authorize Duke to collect its above-market wholesale generation-related costs of OVEC from retail customers because the Commission agreed “with OCC, IEU, and other intervenors that the evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the rider’s intended purpose as a hedge against market volatility.”<sup>51</sup> As a result of the lack of record support for Duke’s theory, the Commission was “not persuaded that the PSR proposal put forth by Duke in the present proceedings would, in fact, promote rate stability.”<sup>52</sup>

Despite this explicit finding that the proposed rider does not satisfy the requirement of R.C. 4928.143(B)(2)(d) that it have the effect of stabilizing retail electric service, the Commission authorized Duke to establish a placeholder PSR with an initial rate of zero and permitted Duke to file a new application to seek to collect above-market wholesale generation-related costs. This authorization is inconsistent with the Commission’s determination that the PSR as proposed does not provide retail rate stability. Accordingly, the Commission had no reasoned basis to approve the establishment of a placeholder rider.

Moreover, the decision to approve a placeholder PSR is inconsistent with the Commission’s holding concerning the North American Reliability Corporation (“NERC”) Compliance and Cybersecurity Rider (“NCCR”), a nonbypassable rider AEP-Ohio proposed that would authorize expedited recovery of significant increases in capital and operation and maintenance costs for NERC compliance and cybersecurity.<sup>53</sup> Based on

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<sup>51</sup> *Id.* at 46.

<sup>52</sup> *Id.*

<sup>53</sup> *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.*, AEP-Ohio Ex. 1 at 11-12. The Commission modified and approved the application on February 25, 2015. *Id.*, Opinion and Order (Feb. 25, 2015) (“AEP-Ohio ESP III Order”).

the record, the Commission concluded that AEP-Ohio had failed to carry its burden of proof, in part because “the types of investments for which AEP Ohio would seek recovery and the magnitude of such investments is not presently known.”<sup>54</sup> Because AEP-Ohio had failed to carry its burden of proof and demonstrate that the rider would allow recovery of reasonable costs, the Commission denied authorization of the rider.<sup>55</sup>

The precedent established in the AEP-Ohio ESP III Order regarding the treatment of the NCCR requires that the Commission deny authorization of the PSR, also. Duke was required to demonstrate that authorization of the PSR was lawful and reasonable. The Commission, however, found Duke had failed to persuade the Commission that the PSR would promote rate stability; additionally, the Commission found that it could not determine the rate impact of the rider.<sup>56</sup> Having determined that Duke had failed to demonstrate that the PSR would have the effect of stabilizing rates and was reasonable in amount, simple consistency with the refusal to authorize the NCCR required the Commission to hold that authorization of the PSR is not lawful or reasonable.

In addition to the legal problems with the authorization, a fundamental problem with the Commission’s decision approving the PSR is factual: the rider has nothing to do with rate stability. The only stability provided by the PSR is the assurance it provides Duke that the financial risk it would otherwise face is transferred to retail customers. For retail customers, however, the PSR will alter fixed-price contracts and inject price instability into the SSO. The PSR is the antithesis of what Duke asserts.

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<sup>54</sup> AEP-Ohio ESP III Order at 62.

<sup>55</sup> *Id.*

<sup>56</sup> ESP Order at 46.

Authorization of the PSR would also require all customers to pay for a product that they do not need (and have repeatedly stated in this proceeding they do not want). Although the PSR is framed to address the volatility of wholesale energy prices, customers are not exposed to the volatility of the daily wholesale energy markets.<sup>57</sup> Further, they can exercise choice and select the combination of terms and prices that best reflect their desire to fix prices during the term of the ESP. For non-shopping customers, Duke will be providing generation service through a full requirements auction process that will ladder and stagger the auctions used to secure generation service. The laddering and staggering will smooth the volatility of the forward retail generation prices resulting from the auctions.<sup>58</sup> Alternatively, customers may secure generation service from competitive retail electric service ("CRES") providers, many of which are offering service under long term fixed contracts.<sup>59</sup> As the Commission correctly found, customers have available to them products by which they can manage retail price changes.<sup>60</sup> They neither need nor want a PSR which will only serve to inject additional price volatility into their bills.

The finding that the PSR will in theory produce rate stabilizing effects also ignores that the PSR introduces a new risk for customers that does not exist currently. Duke has not included the cost it incurs for its interest in OVEC in past SSO rates, but seeks to include above-market costs it cannot recover in the wholesale market for

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<sup>57</sup> Tr. Vol. XII at 3446.

<sup>58</sup> Duke Ex. 3 at 8; Staff Ex. 3 *passim*; Tr. Vol. XII at 3445.

<sup>59</sup> Tr. Vol. II at 472-73. *See, also*, the Commission's Apples to Apples Chart applicable to Duke viewed at <http://energychoice.ohio.gov/ApplesToApplesCategory.aspx?Category=Electric>.

<sup>60</sup> ESP Order at 47.

generation-related wholesale services,<sup>61</sup> even when those costs are far in excess of OVEC's estimates or when those costs are the result of mistakes OVEC has made.<sup>62</sup>

As the Court has admonished the Commission, “[r]uling on an issue without record support is an abuse of discretion and reversible error.”<sup>63</sup> As the Commission explicitly determined, the PSR would not have the effect of stabilizing retail electric service. Because the Commission authorized the PSR when the Commission's own findings do not support the conclusion that the rider will have the effect of stabilizing or providing certainty regarding retail electric service, the Commission erred. Accordingly, it should grant rehearing and reverse its authorization to Duke to establish the PSR.

- 6. The ESP Order is unlawful because the Commission authorized a placeholder rider, the PSR, by which Duke may seek to recover anticompetitive subsidies flowing from noncompetitive retail electric services to competitive wholesale electric service, or vice versa, in violation of R.C. 4928.02(H)**
- 7. The ESP Order is unlawful and unreasonable because the Commission authorized a placeholder rider, the PSR, by which Duke may seek to recover generation-related revenue through a distribution-like rate in violation of R.C. 4928.02(H)**
- 8. The ESP Order is unlawful and unreasonable because the Commission, by authorizing a placeholder rider, the PSR, by which Duke may seek to recover generation-related revenue through a distribution-like rider, failed to respect its own prior decision denying authorization of the recovery of generation-related costs through a distribution-like rider and failed to adequately explain why it was departing from its prior decision, and the new course is not lawful or reasonable**

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<sup>61</sup> Tr. Vol. III at 690 (Duke has not included OVEC-related costs in retail rates); Duke Ex. 6 at 11-12 (difference in OVEC related costs and PJM revenue recovered through PSR).

<sup>62</sup> IEU-Ohio Ex. 6 at 13 (Sponsoring Parties expected to pay liquidated damages incurred by OVEC for coal transportation contract breach).

<sup>63</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d at 519.

R.C. 4928.02(H) states the state policy to ensure effective competition in the provision of retail electric service. The first clause of the division provides that it is the policy of the State to ensure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a CRES or a product or service other than retail electric service or vice versa. The second clause prohibits the recovery of any generation-related costs through distribution or transmission rates.<sup>64</sup> In its Initial Brief, IEU-Ohio argued that the PSR would also violate both clauses.<sup>65</sup> In support of the claim that the rider would violate R.C. 4928.02(H), IEU-Ohio relied upon the Commission's prior refusal to allow AEP-Ohio to recover generation-related closure costs through a nonbypassable rider in the *Sporn* case.<sup>66</sup> In response to arguments that the PSR could not be authorized because it would violate both clauses of R.C. 4928.02(H), the Commission determined that authorization of the PSR does not violate that division because it is a "generation rate."<sup>67</sup> It also did not apply its prior holding in *Sporn* to deny the authorization of the PSR.<sup>68</sup> The Commission's decision that the authorization of the PSR does not violate R.C. 4928.02(H) is unlawful for several reasons.

As IEU-Ohio demonstrated in its brief, authorization of the PSR will result in an anticompetitive subsidy to or from a noncompetitive retail electric service from or to a

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<sup>64</sup> See *Elyria Foundry Co. v. Pub. Util. Comm'n of Ohio*, 114 Ohio St.3d 305 (2007).

<sup>65</sup> Initial Brief of Industrial Energy Users-Ohio at 12-14 (Dec. 15, 2014) ("IEU-Ohio Initial Brief").

<sup>66</sup> *Id.* at 13-14. The prior Commission order denying recovery of generation closure costs is *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 (Jan. 11, 2012) ("*Sporn*").

<sup>67</sup> ESP Order at 47-48.

<sup>68</sup> Although the issue was squarely presented, IEU-Ohio Initial Brief at 13-14, the Commission fails to address the application of *Sporn* in the findings of ESP Order related to the PSR. ESP Order at 42-48.

service other than retail electric service. As approved, the rider would require all retail distribution customers to incur a charge or credit designed to collect the difference of Duke's costs and wholesale revenue for a generation-related service if the Commission approves a future filing. When the difference is a charge, Duke would recover the above-market wholesale costs that exceed the market prices for the generation, a subsidy to Duke. When the difference is a credit (as unlikely as that may be), retail customers would receive a subsidy of any wholesale revenue that exceeds Duke's costs. In either case, the result runs afoul of Ohio's pro-competitive policies and the law stated in the first clause of R.C. 4928.02(H).

The authorization of the PSR also violates the purpose of the second clause of R.C. 4928.02(H). Although the Commission has characterized the rider as a "generation rate,"<sup>69</sup> it also authorized the charge to be nonbypassable. Because the charge is unavoidable, it operates in exactly the same manner as a distribution charge: all distribution customers of Duke would be required to pay the charge. Thus, the Commission erred because the authorization of the PSR violates the second clause as well as the first.

The Commission also erred when it did not apply its prior decision in the *Sporn* case to deny authorization of recovery of generation-related costs through a nonbypassable rider because the Commission failed to "respect its own precedents in its decisions to assure the predictability which is essential in all areas of the law,

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<sup>69</sup> ESP Order at 48.

including administrative law"<sup>70</sup> or demonstrate that the new course is substantively reasonable and lawful.<sup>71</sup>

In this instance, “respect for its own precedent” requires a Commission finding that the PSR cannot be lawfully authorized under R.C. 4928.02(H). In *Sporn*, AEP-Ohio sought a nonbypassable charge to collect plant closure costs.<sup>72</sup> In the Finding and Order dismissing the application, the Commission concluded that no provision of R.C. 4928.143 authorized a rider to recover the plant closure costs and held that “[a]pproval of such a charge would effectively allow [AEP-Ohio] to recover competitive, generation-related costs through its noncompetitive, distribution rates, in contravention of [R.C. 4928.02(H)].”<sup>73</sup> The Commission further found that the policy expressed in R.C. 4928.02(H) “requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail service.”<sup>74</sup> In this case, the authorization of the PSR would produce the same financial result as the one the Commission concluded Ohio law precluded in *Sporn*: Duke would be permitted to recover generation-related costs through a nonbypassable rider. Consistent application of *Sporn* thus requires the Commission to deny Duke’s request for authorization of the PSR unless the Commission’s new course is substantively reasonable and lawful.

The “new course” on which the Commission strays, however, is not substantively reasonable or lawful. As discussed above, the authorization of the PSR not only violates the state policy expressed in R.C. 4928.02(H), but also exceeds the

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<sup>70</sup> *Cleveland Electric Illuminating Co. v. Pub. Util. Comm’n of Ohio*, 42 Ohio St.2d 403, 431 (1975).

<sup>71</sup> *In re Columbus S. Power Co.*, 128 Ohio St.3d at 523.

<sup>72</sup> *Sporn*, Finding and Order at 1-2 (Jan. 11, 2012).

<sup>73</sup> *Id.* at 19.

<sup>74</sup> *Sporn*, Finding and Order at 19.

Commission's jurisdiction and is not supported by findings of fact required by R.C. 4928.143(B)(2)(d). Further, as discussed below, the authorization violates the limitation on the Commission's authority to approve the recovery of transition revenue or its equivalent and is preempted by the FPA. Because the failure to follow *Sporn* does not produce a result that is lawful and reasonable, the Commission erred.

R.C. 4928.02(H) states a legal requirement for the Commission to ensure effective competition in the provision of retail electric service. The authorization of the PSR fails to advance that policy and is an unwarranted break from precedent. Because authorization of the PSR violates law, policy, and precedent, the Commission should grant rehearing and reverse its authorization of the rider.

**9. The ESP Order is unlawful and unreasonable because the Commission authorized the PSR as a placeholder rider by which Duke may seek to recover generation-related transition revenue or its equivalent in violation of R.C. 4928.38 and the bar to recovery of transition revenue or its equivalent resulting from Duke's Electric Transition Plan Stipulation**

The Commission authorized Duke to establish the PSR as a placeholder rider over the objection that the rider would violate R.C. 4928.38 and permit Duke to violate the terms of its agreement in 2000 to forgo all generation-related transition revenue.<sup>75</sup> The Commission concluded that the rider would not permit Duke to collect untimely transition revenue because "the PSR constitutes a rate stability charge ... authorized pursuant to R.C. 4928.143(B)(2)(d)."<sup>76</sup> The Commission did not address whether the authorization of the rider violated the terms of the 2000 settlement. Because the Commission cannot authorize transition revenue or its equivalent under any

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<sup>75</sup> IEU-Ohio Initial Brief at 15-18.

<sup>76</sup> ESP Order at 48.

circumstances except those expressly provided by R.C. 4928.31 to R.C. 4928.40, the Commission erred.

The procedures for asserting a one-time claim set out in R.C. 4928.31 to R.C. 4928.40 specifically limited Duke to seek recovery of transition revenue in its electric transition plan filing in 1999. Any lawful recovery of either generation-related transition revenue or regulatory assets could not continue after they were scheduled to terminate under those plans.<sup>77</sup> Following the Market Development Period (“MDP”), moreover, the Commission cannot lawfully “authorize the receipt of transition revenues or any equivalent revenues by an electric utility.”<sup>78</sup> “With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market.”<sup>79</sup>

R.C. 4928.143(B)(2)(d) does not carve out an exception to the statutory bar on the authorization of the billing and collection of transition revenue or its equivalent. When the General Assembly adopted SB 221, it rejected in R.C. 4928.141 the continuation of any further recovery of transition revenue beyond that previously authorized under R.C. 4928.31 to R.C. 4928.40. Further, the General Assembly did not repeal the prohibition on the authorization and recovery of transition revenue or its equivalent found in R.C. 4928.38. Thus, the Commission remains bound by the prohibition found in R.C. 4928.38.

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<sup>77</sup> R.C. 4928.141 & R.C. 4928.40(A).

<sup>78</sup> R.C. 4928.38.

<sup>79</sup> *Id.*

More specifically, contrary to recent assertions by EDUs,<sup>80</sup> R.C. 4928.143(B)(2)'s "notwithstanding" clause does not carve out an exception to the prohibition of recovery of transition revenue or its equivalent under R.C. 4928.38 because the exception would violate legislative intent. The "paramount concern in construing a statute is legislative intent."<sup>81</sup> "Notwithstanding" clauses such as that in R.C. 4928.143(B)(2), therefore, must be read in light of the "paramount concern" of the legislation.<sup>82</sup> In this instance, the clause must be read in light of the clear legislative intent to maintain the prohibitions of transition revenue. As noted above, R.C. 4928.141 contained an explicit bar on authorization of additional transition revenue under a standard service offer and R.C. 4928.38 was not repealed. Thus, the clear legislative intent expressed in SB 221 is that R.C. 4928.143(B) does not carve out an exception to the bar on authorization of transition revenue or its equivalent.

The Commission's prior decisions confirm that it understands R.C. 4928.143(B)(2) does not carve out an exception to the bar on recovery of anticompetitive transition revenue. For example, Dayton Power and Light Company ("DP&L") sought approval of a "Switching Tracker" that would allow it to recover lost generation-related revenue associated with customer switching. The Commission

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<sup>80</sup> See, e.g., *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Sup. Ct. Case No. 2014-1505, Brief of Cross-Appellant The Dayton Power and Light Company at 17-18 (Jan. 20, 2015).

<sup>81</sup> *Ohio Neighborhood Finance, Inc. v. Scott*, 139 Ohio St.3d 536 (2014).

<sup>82</sup> *Id.*; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569, ¶ 37 (quoting *State v. Cook*, 83 Ohio St.3d 404, 416(1998)) ("A cardinal rule of statutory interpretation is that '[a] court must look to the language and purpose of the statute in order to determine legislative intent."); *Kewalo Ocean Activities and Kahala Catamarans v. Ching*, 243 P.3d 273 (Haw. Ct. App. 2010); *Yates v. U.S.*, 574 U.S. \_\_\_, 2015 WL 773330 at \*6 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (term "tangible object" in Sarbanes-Oxley Act did not include fish because "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.").

found that the proposed rider violated state policy because it “insulate[d] DP&L from market risk” and denied authorization.<sup>83</sup> In *Sporn*, the Commission rejected AEP-Ohio’s request to recover generation-related closure costs in part because the authorization would violate R.C. 4928.02(H).<sup>84</sup> In each instance, the Commission looked to other provisions of Ohio law to guide its application of R.C. 4928.143(B)(2). Likewise, the Commission should not read R.C. 4928.143(B)(2)(d) as an exception to the bar on the authorization of recovery of transition revenue or its equivalent contained in R.C. 4928.141 and R.C. 4928.38. Such a reading is plainly inconsistent with prior Commission orders requiring “the utility [to] be on its own in the competitive market.”<sup>85</sup>

Based on both the legislative intent expressed in SB 221 and the Commission’s prior holdings, therefore, the Commission cannot authorize a “rate stability charge” under R.C. 4928.143(B)(2)(d) if doing so permits the EDU to secure transition revenue or its equivalent in violation of R.C. 4928.38.

Despite the bar on the authorization of a charge to collect transition revenue or its equivalent, the Commission’s authorization of the PSR provides Duke the opportunity to seek to collect transition revenue or its equivalent.<sup>86</sup> As presented in the current case, Duke seeks authorization to charge customers the difference between what Duke receives from PJM for wholesale energy and capacity and the amounts billed to it by OVEC under the ICPA.<sup>87</sup> The PJM revenues are determined by the market-based

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<sup>83</sup> *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Case Nos. 12-426-EL-SSO, *et al.*, Opinion and Order at 30 (Sept. 4, 2013).

<sup>84</sup> *Sporn*, Finding and Order at 19.

<sup>85</sup> R.C. 4928.38.

<sup>86</sup> ESP Order at 47.

<sup>87</sup> Duke Ex. 6 at 13-14.

prices established by the PJM tariffs. When the generation-related costs exceed the market-based revenue, the difference is “the costs ... unrecoverable in a competitive market.”<sup>88</sup> The PSR, thus, would permit Duke to recover transition revenue or its equivalent.

The time by which the authorization of transition revenue or its equivalent may be authorized and collected, however, has expired. The MDP ended no later than December 31, 2005. The period for recovery of regulatory assets ended no later than December 31, 2010. Because the PSR would allow Duke to seek to recover a claim for transition revenue or its equivalent that is barred by statute, the Commission erred when it authorized Duke to establish a PSR.

Additionally, authorization of the PSR is barred by Duke’s 2000 settlement of its electric transition plan (“ETP”) case. In that case, The Cincinnati Gas and Electric Company, Duke’s predecessor, sought to recover transition revenue under Senate Bill 3 (“SB 3”) when it filed its ETP in 1999.<sup>89</sup> The application was resolved by a stipulation (“ETP Stipulation”), and the “transition plan stipulation provide[d] CG&E with no GTC recovery and place[d] the electricity market price risk entirely on CG&E.”<sup>90</sup>

Although IEU-Ohio raised the bar of the ETP Stipulation as an additional basis for denying authorization of the PSR,<sup>91</sup> the Commission does not address the bar of the ETP Stipulation on authorization of the PSR in its findings.

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<sup>88</sup> R.C. 4928.39(C).

<sup>89</sup> *In the Matter of the Application of The Cincinnati Gas and Electric Company for Approval of its Electric Transition Plan and for Authorization to Collect Transition Revenues*, Case Nos. 99-1658-EL-ETP, *et al.*, Application at 14-17 (Dec. 28, 1999).

<sup>90</sup> *Id.*, Opinion and Order at 23 (Aug. 31, 2000).

<sup>91</sup> IEU-Ohio Initial Brief at 17-18.

The Commission erred when it failed to address and find that the ETP Stipulation barred authorization of the PSR. Although IEU-Ohio raised the bar of the ETP Stipulation to transition revenue recovery in brief, the Commission does not address its reason for not enforcing the terms of the stipulation in its discussion authorizing the PSR.<sup>92</sup> Because the issue was squarely raised, the Commission must “respond to contrary positions, and support its decision with appropriate evidence.”<sup>93</sup> On rehearing, therefore, the Commission should address the effect of the ETP Stipulation and find that the ETP Stipulation bars authorization of the PSR because the rider would permit Duke to recover transition revenue or its equivalent.

**10. The ESP Order is unlawful and unreasonable because, under the Supremacy Clause of the United States Constitution, the Commission is preempted by the Federal Power Act from authorizing a rider such as the PSR that may authorize Duke to increase its compensation for wholesale generation-related services in an amount exceeding that authorized by the Federal Energy Regulatory Commission**

In the ESP Order, the Commission declined “to address constitutional issues raised by the parties in these proceedings, as, under the specific facts and circumstances of these cases, such issues are best reserved for judicial determination.”<sup>94</sup> The issue of preemption, however, is squarely presented to the Commission in this proceeding, and the Commission should have found that it is preempted from approving a rider that will increase Duke’s compensation for wholesale generation-related electric services.

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<sup>92</sup> The references to the recovery of transition revenue or its equivalent in the ESP Order are limited to a discussion of the effect of R.C. 4928.38. ESP Order at 48.

<sup>93</sup> *In re Columbus S. Power Co.*, 512 Ohio St.3d at 519.

<sup>94</sup> ESP Order at 48.

Previously, the Commission has not been reluctant to address whether it is preempted from acting on a request for an order. It has repeatedly addressed whether it is preempted by federal law, both to find that it is preempted and not preempted based on the relevant statutes. In a rulemaking proceeding, for example, the Commission noted that federal law preempted all state laws relating to the price, route, or service of any motor carrier when engaged in intrastate transportation and rescinded rules in conflict with federal law.<sup>95</sup> Similarly, the Commission concluded it was preempted from reviewing transmission costs incurred by AEP-Ohio that were the subject of a pending FERC application.<sup>96</sup> In another recent case, AEP-Ohio sought and received authority for an above-market wholesale “capacity charge.” In that case, the Commission likewise did not defer and instead determined, incorrectly, that it had the authority to increase AEP-Ohio’s compensation for wholesale capacity service.<sup>97</sup> In this case, the Commission has not offered any reason for deferring to a court of appropriate jurisdiction, and there is no reason for the Commission to refrain in this instance from finding that the FPA preempts the Commission from authorizing the PSR.

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<sup>95</sup> *In the Matter of the Rescission of Chapter 4901:2-3, Ohio Administrative Code*, Case No. 00-663-TR-ORD, Entry at 2 (Nov. 30, 2000).

<sup>96</sup> *In the Matter of the Application of Ohio Power Company to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, 1986 Ohio PUC Lexis 49 at \*80 (July 10, 1986).

<sup>97</sup> *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Case No. 10-2929-EL-UNC, Opinion and Order at 13 (July 2, 2012). The Opinion and Order is currently on appeal. *In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company*, Sup. Ct. Case No. 2013-0228, Notice of Appeal of Appellant Industrial Energy Users-Ohio (Feb. 6, 2013). The appeal presents to the Court the Commission’s erroneous determination that it is not preempted by the Federal Power Act from increasing Duke’s compensation in violation of the terms of the Reliability Assurance Agreement, a federally approved tariff. *Id.* at 2.

Under the Supremacy Clause of the United States Constitution,<sup>98</sup> federal law preempts state legislation and regulating authority (1) if Congress, in enacting a federal statute, has expressed a clear intent to preempt state law; (2) if it is clear, despite the absence of explicit preemptive language, that Congress has intended, by legislating comprehensively, to occupy an entire field of regulation and has left no room for the states to supplement the federal law; or (3) if compliance with both state and federal law is impossible or when compliance with state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal policies embodied in the laws at issue.<sup>99</sup>

Two recent federal district court decisions demonstrate that an attempt by a state to increase the compensation of a generation owner for wholesale capacity and energy services is preempted because it invades a field of regulation within the exclusive authority of FERC. In the first decision, *PPL Energyplus, LLC v. Nazarian*,<sup>100</sup> a federal district court in Maryland reviewed an order of the Maryland Public Service Commission ("Maryland Commission") that increased compensation for the provision of wholesale electric services of an entity that was seeking to construct a generation plant ("Generation Owner"). In the challenged order, the Maryland Commission directed the incumbent local electric utilities to enter into contracts with the Generation Owner. The contracts would have required the local electric utilities to pay the Generation Owner the difference between what the Generation Owner received for market-based sales of capacity and energy to PJM and a contract price established by the Maryland

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<sup>98</sup> U.S. Const., Art. VI.

<sup>99</sup> *Marketing Research Services, Inc. v. Pub. Util. Comm'n of Ohio*, 34 Ohio St.3d 52, 55 (1987).

<sup>100</sup> 974 F. Supp. 2d 790 (D. Md. 2013) ("*PPL I*"), *aff'd*, 753 F.3d 467 (4th Cir. 2014).

Commission based on the cost of construction and operation of the plant for twenty years. Any loss or gain that the local electric utilities incurred under the contracts ordered by the Maryland Commission was to be passed on to Maryland ratepayers by the local electric utilities.<sup>101</sup> The federal court concluded that the Maryland Commission's order fixed the monetary value of wholesale generation-related capacity and energy services provided by the Generation Owner.<sup>102</sup> Based on the Court's determination that FERC has exclusive authority in that field and has fixed the price for wholesale energy and capacity sales in the PJM markets as the market-based price produced by the auction processes approved by FERC and utilized by PJM, the Court declared the action of the Maryland Commission to be preempted.<sup>103</sup> In the opinion affirming the decision of the district court, the Fourth Circuit Court of Appeals agreed that the Maryland Commission was preempted because the field of wholesale energy prices was exclusively within the jurisdiction of FERC.<sup>104</sup>

In *PPL Energy Plus, LLC v. Hanna*,<sup>105</sup> a federal district court in New Jersey reached the same result, concluding that state legislation that attempted to encourage the construction of new generation plants by guaranteeing a price of capacity to the builder was preempted. In the New Jersey case, the state legislature passed legislation "to provide a transaction structure that would result in new power plants being

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<sup>101</sup> *Id.* at 830-33.

<sup>102</sup> *Id.* at 833.

<sup>103</sup> *Id.* at 840.

<sup>104</sup> *PPL Energy Plus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014). It also found that the Maryland Commission's order was preempted because it conflicted with the accomplishment of federal policies.

<sup>105</sup> 977 F. Supp. 2d 372, 393 (D. N.J. 2013), *aff'd*, *PPL Energy Plus LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014).

constructed in the PJM territories that benefit New Jersey.”<sup>106</sup> The law authorized the New Jersey Board of Public Utilities ("Board") to issue a standard service offer capacity agreement and directed the State’s four electric distribution companies to enter into contracts with generators to pay any difference between the Reliability Pricing Model-Based Price (“RPM-Based Price”) and the development costs of the generators that the Board approved.<sup>107</sup> Like the Maryland federal court, the New Jersey federal court found that the New Jersey legislation was preempted because the FPA occupied the field of wholesale electricity sales, including the price at which electricity is sold at wholesale.<sup>108</sup> Based on its finding that the state law was preempted, the federal court declared the statute under which the Board had authorized above-market payments to the generator “null and void.”<sup>109</sup>

Holding that “the Federal Power Act, as administered by FERC, preempts and, therefore, invalidates, state intrusions into the field” of wholesale electricity pricing, the Third Circuit Court of Appeals affirmed the New Jersey district court’s decision.<sup>110</sup> The Court of Appeals noted that FERC had set the wholesale capacity price in PJM through the RPM auction process.<sup>111</sup> “At the same time,” however, the New Jersey law provided certain generators “an additional amount” of compensation in excess of the wholesale market price.<sup>112</sup> “Because FERC has exercised control over the field of interstate

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<sup>106</sup> *Id.* at 393.

<sup>107</sup> *Id.* at 393-94.

<sup>108</sup> *Id.* at 406-12.

<sup>109</sup> *Id.* at 412.

<sup>110</sup> *PPL Energy Plus LLC v. Solomon*, 766 F.3d 241, 253 (3d Cir. 2014).

<sup>111</sup> *Id.* at 252.

<sup>112</sup> *Id.*

capacity prices, and because FERC's control is exclusive, New Jersey's efforts to regulate the same subject matter cannot stand."<sup>113</sup>

The order approving the PSR, likewise, is preempted by federal law because it invades a field within the exclusive jurisdiction of FERC. Under the terms of the ESP Order, Duke may seek to recover the above-market wholesale generation-related costs that it does not recover through its sales into PJM's markets under the placeholder rider through another filing. If the Commission approves a future filing to authorize Duke to increase its compensation, Duke would be guaranteed a recovery of its above-market wholesale generation-related costs. Through the same sort of mechanisms the Maryland and New Jersey courts held were void under field preemption, the PSR would increase the compensation for wholesale generation-related capacity and energy services Duke receives.

The PSR does not avoid preemption because it is collected from retail customers. The mechanisms that were found to be preempted in the Maryland and New Jersey cases also provided that the electric utilities could recover the above-market costs of generation they paid the generation owners from retail customers through retail charges.<sup>114</sup> As the District Court of Maryland correctly noted, the same principles that prevent a state utility commission from trapping federally approved costs when it sets retail rates prevent the commission from increasing the compensation of Duke above the federally approved wholesale price.<sup>115</sup> Accordingly, recovery of above

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<sup>113</sup> *Id.* at 253.

<sup>114</sup> *PPL EnergyPlus, LLC v. Nazarian*, 974 F. Supp.2d at 822; *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d at 246.

<sup>115</sup> *PPL Energy Plus, LLC v. Nazarian*, 974 F. Supp.2d at 831 ("The Court does not perceive, for purposes of field preemption, any meaningful difference between state actions directed to the demand side and those directed to the supply side of the wholesale energy market. The foundation that FERC has

market wholesale costs through retail rates does not immunize the preemptive effect of the FPA on the Commission's authorization of the PSR.

The preemption analysis also does not turn on whether Duke is volunteering to pass its above market costs to customers. The correct analysis is one that looks to the jurisdiction of the state and federal agencies to establish compensation for a wholesale generation-related electric service.<sup>116</sup> With regard to Duke's compensation for wholesale generation-related services, FERC has exclusive jurisdiction under the FPA.<sup>117</sup> The Commission's jurisdiction is not enlarged because Duke is asking the Commission to increase its compensation for wholesale generation-related services.

Finally, Duke cannot hide behind OVEC and argue that OVEC is the generation owner and the amounts Duke is paying OVEC are not changed by authorization of the PSR. Duke is a shareholder of OVEC.<sup>118</sup> As a shareholder, it is both an owner and affiliate.<sup>119</sup> Because Duke is an owner, the financial consequence of the PSR would operate in exactly the same way as that found to be preempted by the New Jersey and Maryland courts: the PSR would increase the compensation of Duke for the capacity and energy resources of its ownership share of the OVEC generating facilities in excess of the amount authorized under the federally-approved PJM tariff. The Commission,

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exclusive authority to determine the reasonableness of wholesale rates and that, therefore, state regulation of such matters is void under the Supremacy Clause, holds firm whether the rate or price in question is that received by a generation facility for wholesale sales or is that paid by an LSE for wholesale purchases.”)

<sup>116</sup> *Oneok, Inc. v. Learjet, Inc.*, Slip Op. at 11 (U.S. Sup. Ct. Apr. 21, 2015) (the target at which the state law aims determines whether the state law is field preempted).

<sup>117</sup> *PPL Energy Plus, LLC v. Nazarian*, 974 F. Supp.2d at 831. See, also, *New York v. FERC*, 535 U.S. 1, 21-22 (2002).

<sup>118</sup> IEU-Ohio Ex. 5 at 1; IEU-Ohio Ex. 6 at 1.

<sup>119</sup> Rule 4901:1-37-01(A), OAC.

however, is preempted from authorizing Duke or any other co-owner from increasing its wholesale compensation in excess of the amounts provided under the PJM tariffs.

The Commission has also included at least one “factor” to address in a future filing that triggers federal preemption. A future filing must address the “necessity of the generating facility, in light of future reliability concerns, including supply diversity.”<sup>120</sup> The regulation of interstate transmission and bulk power system reliability, however, is within the exclusive jurisdiction of FERC.<sup>121</sup> In particular, FERC has jurisdiction under Section 215 of the FPA for approving reliability standards of the bulk power system.<sup>122</sup> Under FERC rules, moreover, the Regional Transmission Organization (“RTO”) is given exclusive authority for maintaining the short-term reliability of the grid it operates.<sup>123</sup>

A recent FERC decision, *New York Independent System Operator, Inc.*,<sup>124</sup> sets out FERC’s controlling authority regarding the reliability of the bulk power market. FERC had received two applications seeking approval of above-market compensation for the sale of wholesale generation-related services in the region under the supervision of the New York Independent Service Operator, Inc. (“NYISO”) after the New York Public Service Commission had determined that facilities scheduled for mothballing were needed for reliability. FERC determined that the tariffs of NYISO were not just and reasonable and ordered NYISO to file a tariff and pro forma agreement for a reliability must-run agreement. The Commission determined that the tariff changes were necessary to prevent undue discrimination and to “ensur[e] the continued reliable and

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<sup>120</sup> ESP Order at 47.

<sup>121</sup> FPA § 201(a), 16 U.S.C. § 824(a).

<sup>122</sup> FPA § 215, 16 U.S.C. § 824o; 18 C.F.R § 39.2.

<sup>123</sup> 18 C.F.R § 35.34.

<sup>124</sup> 150 FERC ¶61,116 (Feb. 19, 2015).

efficient operation of the grid, and of NYISO's markets."<sup>125</sup> Having determined that the NYISO should file the must-run tariff, FERC then required that the tariff address the process for identifying a plant that should be considered for must-run status, the independent studies to be performed to determine if the plant should be treated as a must-run unit, and the evaluation of alternatives.<sup>126</sup> Further, the tariff must set out the compensation mechanism, including how payments may be recovered if the plant becomes economic after it is declared a must-run facility.<sup>127</sup>

FERC recently reiterated its authority to address the rates, terms, and conditions for securing the continued operation of a generation plant for the purposes of reliability in New York until such time that transmission upgrades would be completed or other reliability remedies are identified and implemented.<sup>128</sup> FERC concluded that it had jurisdiction to address rates, terms, and conditions under the agreement as governed by the FPA.<sup>129</sup> Moreover, any future reliability need would be addressed by FERC under the standards to be adopted by the NYISO pursuant to FERC's decision in *New York Independent System Operator, Inc.*, discussed above.<sup>130</sup>

Section 215 and these FERC orders demonstrate that FERC has and has exercised exclusive authority over the reliability of the bulk electric market including the review of contracts to provide above-market wholesale compensation to the generation owner to compensate the owner for satisfying a reliability need. Because Congress has

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<sup>125</sup> *Id.*, para. 3.

<sup>126</sup> *Id.*, paras. 12-15.

<sup>127</sup> *Id.*, paras. 17-21.

<sup>128</sup> *R.E. Ginna Nuclear Power Plant, LLC*, 151 FERC ¶ 61,023 at para. 40 (Apr. 14, 2015).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

demonstrated the intent to occupy the field of reliability in the bulk electric market, this exercise of federal authority preempts the Commission's unlawful attempt to provide a procedure to address a request for additional wholesale generation-related compensation for Duke based on consideration of grid reliability.

Although all parties to this proceeding share the Commission's concern for system reliability, the authority to address wholesale generation-related pricing and the reliability of the transmission grid rests exclusively with FERC. Because FERC has exclusive jurisdiction, this Commission is preempted from authorizing additional compensation now or in the future and cannot legally address bulk market reliability in a future filing.<sup>131</sup> Accordingly, the authorization of the PSR was in error, and the Commission should grant rehearing and reverse that authorization.

**11. The ESP Order is unlawful and unreasonable because the Commission engaged in rulemaking without complying with the requirements of Chapter 119 of the Revised Code as a means of authorizing an application process that would permit Duke to seek to recover above-market wholesale generation-related costs**

In the AEP-Ohio ESP III Order, the Commission authorized a future filing by which AEP-Ohio may seek to recover its above-market generation-related wholesale costs of OVEC and other affiliated unregulated generation plants.<sup>132</sup> The Commission subsequently directed that the Ohio Edison Company, Cleveland Electric Illuminating Company, and the Toledo Edison Company ("FirstEnergy EDUs") may file supplemental testimony concerning the factors established in the AEP-Ohio ESP III Order to support

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<sup>131</sup> As noted above, Ohio law does not authorize the PSR. The Commission can avoid the preemptive effect of federal law by correctly determining that it is without authority to authorize the rider under R.C. 4928.143(B)(1) or (2).

<sup>132</sup> AEP-Ohio ESP III Order at 25-26.

their request for a “stability rider.”<sup>133</sup> Then, the Commission directed that Duke may assert a claim to recover above-market generation-related wholesale costs if it complies with the “rule” the Commission promulgated in the AEP-Ohio ESP III Order.<sup>134</sup> As demonstrated by the Commission’s efforts in the three decisions, the Commission has adopted a “rule” having a general and uniform operation and enforcement by the Commission in its evaluation of the provisions of an ESP. By failing to comply with the rulemaking process for the adoption and amendment of rules provided by Ohio law, the Commission erred.

The Commission is an agency subject to the requirements of Chapter 119.<sup>135</sup> Although “[t]he decision whether to proceed by rule or adjudication generally is for an administrative agency in the first instance,”<sup>136</sup> that discretion does not apply when the Commission is subject to a statutory requirement to issue rules to carry out particular actions.<sup>137</sup> With regard to the approval of an ESP, the Commission is under a mandatory requirement to issue rules. Under R.C. 4928.06(A), “[t]o the extent necessary, the commission shall adopt rules to carry out [Chapter 4928].”

As mandated by R.C. 4928.06(A), the Commission has adopted a rule governing the filing and review of an application seeking to implement an SSO in the form of an

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<sup>133</sup> *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, Entry at 2 (Mar. 23, 2015) (“FE Entry”).

<sup>134</sup> ESP Order at 47.

<sup>135</sup> R.C. 119.01(l); *New Par v. Pub. Util. Comm’n of Ohio*, 98 Ohio St.3d 277, 280 (2002).

<sup>136</sup> *Duff Truck Line v. Pub. Util. Comm’n of Ohio*, 46 Ohio St.2d 186, 193 (1976).

<sup>137</sup> *Wayne County Comm’rs v. McAvoy*, 1980 WL 353586 at \*3 (10th Dist. Ct. App. July 29, 1980) (Ohio EPA could not issue permit prior to adoption of rules required by statute; *Duff* distinguished because the Commission did not have a mandatory requirement to make rules and regulations governing motor transportation companies under R.C. 4921.04 and R.C. 4921.07).

ESP.<sup>138</sup> In particular, the rule addresses the information that an EDU must include in its application seeking a rider under R.C. 4928.143(B)(2)(d). Rule 4901:1-35-03(C)(9)(c), OAC, provides:

Division (B)(2)(d) of section 4928.143 of the Revised Code authorizes an electric utility to include terms, conditions, or charges related to retail shopping by customers. Any application which includes such terms, conditions or charges, shall include, at a minimum, the following information:

(i) A listing of all components of the ESP which would have the effect of preventing, limiting, inhibiting, or promoting customer shopping for retail electric generation service. Such components would include, but are not limited to, terms and conditions relating to shopping or to returning to the standard service offer and any unavoidable charges. For each such component, an explanation of the component and a descriptive rationale and, to the extent possible, a quantitative justification shall be provided.

(ii) A description and quantification or estimation of any charges, other than those associated with generation expansion or environmental investment under divisions (B)(2)(b) and (B)(2)(c) of section 4928.143 of the Revised Code, which will be deferred for future recovery, together with the carrying costs, amortization periods, and avoidability of such charges.

(iii) A listing, description, and quantitative justification of any unavoidable charges for standby, back-up, or supplemental power.

The rule does not contain a provision for a post-approval filing to set a charge to recover above-market generation-related wholesale costs (nor could the Commission assert jurisdiction to issue such a rule because cost recovery of the above-market generation wholesale costs is not permitted under R.C. 4928.143(B)(2)(d), for the reasons discussed above).

In the AEP-Ohio ESP III Order, the Commission substantially expanded the opportunity for an EDU to seek to recover above-market generation-related costs in an

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<sup>138</sup> Rule 4901:1-35-03, OAC.

ESP. First, it created the opportunity to make such a filing.<sup>139</sup> Second, it laid down filing requirements the EDU must comply with if it seeks to recover the above-market costs through a rider approved under R.C. 4928.143(B)(2)(d). As stated in the AEP-Ohio ESP III Order, the filing must address the following matters:

financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state. The Commission also reserves the right to require a study by an independent third party, selected by the Commission, of reliability and pricing issues as they relate to the application. AEP Ohio must also, in its PPA rider proposal, provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit; commit to full information sharing with the Commission and its Staff; and include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers. Finally, AEP Ohio must include a severability provision that recognizes that all other provisions of its ESP will continue, in the event that the PPA rider is invalidated, in whole or part at any point, by a court of competent jurisdiction.<sup>140</sup>

The Commission subsequently directed that the same review process be applied to applications seeking the recovery of above-market generation-related wholesale costs by Duke and the FirstEnergy EDUs.<sup>141</sup>

By establishing a uniform filing requirement and process for an EDU to seek recovery of above-market generation-related wholesale costs, the Commission has adopted a rule within the meaning of R.C. 119.01. The “future filing” requirements and review process described by the Commission and quoted above are a “standard, having a general and uniform operation, adopted, promulgated, and enforced” by the

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<sup>139</sup> AEP-Ohio ESP III Order at 26.

<sup>140</sup> *Id.* at 25-26.

<sup>141</sup> ESP Order at 47; FE Entry at 2.

Commission.<sup>142</sup> The new requirements are a statement of the “agency position which has legal consequences”<sup>143</sup> for EDUs and intervenors in proceedings in addition to this proceeding to establish an ESP for Duke.

The Commission’s orders, moreover, are more than an explanation of the existing rules. “[The orders] do[] more than simply aid in the interpretation of existing rules or statutes. Instead, [they] prescribes a legal standard that did not previously exist.”<sup>144</sup> With regard to a filing to authorize collection of above-market costs of generation, the AEP-Ohio, FirstEnergy, and Duke orders “significantly broadened” the current rules.<sup>145</sup>

Because the Commission was engaged in a rulemaking amending its current rules governing an application seeking an ESP to include requirements authorizing and defining filing requirements and a review process, the Commission was required to comply with the requirements of R.C. 119.03: “In the adoption, amendment, or rescission of any rule, an agency shall comply with the ... procedure” set out in that section requiring notice, hearing, publication, and filing and agency and legislative review. The Commission, however, did not comply with any of those mandatory procedures to amend the Commission’s rules governing applications for an ESP.

Having failed to comply with the procedural requirements of R.C. 119.03, the rule is not valid. “Every agency authorized by law to adopt, amend, or rescind rules shall comply with the procedure prescribed in sections 119.01 to 119.03, inclusive, of the

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<sup>142</sup> R.C. 119.01(C).

<sup>143</sup> *Appalachian Power Co. v. U.S. Environmental Protection Agency*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

<sup>144</sup> *Fairfield County Bd. of Comm’rs v. Nally*, Slip Op. No. 2015-Ohio-991 at ¶29 (Ohio Sup. Ct. Mar. 24, 2015).

<sup>145</sup> *Appalachian Power Co. v. U.S. Environmental Protection Agency*, 208 F.3d at 1028.

Revised Code, for the adoption, amendment, or rescission of rules. Unless otherwise specifically provided by law, the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule.”<sup>146</sup>

The reason for requiring compliance with the rulemaking procedures of R.C. 119.03 is to assure openness and fairness.<sup>147</sup> “The rulemaking requirements of R.C. Chapter 119 are mandatory protections against the arbitrary imposition of regulatory requirements. They are fundamental to the administrative process and apply broadly to any action by an agency that functions as a rule.”<sup>148</sup> “Requiring [an agency] to undertake rulemaking procedures before applying the new standard ... ensures that all stakeholders ... have an opportunity to express their views on the wisdom of the proposal and to contest its legality if they so desire.”<sup>149</sup>

The need for a full and fair rulemaking process is particularly apparent in this case. As discussed above, authorization of the recovery of above-market generation-related wholesale costs exceeds the Commission’s jurisdiction under both state and federal law. As discussed below, the “rule” the Commission issued is vague and incomplete. Further, the rule exposes customers to potentially substantial above-market generation-related wholesale costs. Thus, the Commission’s failure to properly expose its proposed “rule” to a valid rulemaking process has produced an illegal and unreasonable result with serious and unnecessary financial consequences to customers.

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<sup>146</sup> R.C. 119.02.

<sup>147</sup> *Fairfield County Bd. of Comm’rs v. Nally*, Slip Op. No. 2015-Ohio-991 at ¶36; *Condee v. Lindley*, 12 Ohio St.3d 90, 93 (1984).

<sup>148</sup> *Fairfield County Bd. of Comm’rs v. Nally*, Slip Op. No. 2015-Ohio-991 at ¶36.

<sup>149</sup> *Id.* at ¶30.

The Commission rationalizes the process of authorizing a placeholder rider and by implication the future filing on the basis that it has adopted placeholder riders in the past,<sup>150</sup> but the Commission's prior practice of adopting placeholder riders in ESP orders does not excuse the Commission from complying with the rulemaking requirements of R.C. 119.03. As noted above, the practice of adopting placeholder riders itself is not lawful. It is no justification for the violation of R.C. 119.03 in this case to say that the Commission has previously engaged in an unlawful practice.

Moreover, the Commission's use of an adjudication to adopt a rule does not excuse the Commission from complying with the requirements of R.C. 119.03. The Commission is an agency for purposes of Chapter 119 and, therefore, is subject to its requirements.<sup>151</sup> Under R.C. 4928.06(A), the requirement to issue rules is mandatory; the Commission "shall" issue rules to implement the provisions of Chapter 4928. As a result of this legislative directive, the Commission cannot bypass the rulemaking requirements and implement through adjudication new standards for authorizing a term of an ESP.<sup>152</sup>

Additionally, the Commission cannot justify its action in this case as a standard application of the adjudication process. In the situations in which an agency may adopt a "rule" by adjudication, "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."<sup>153</sup> As demonstrated above, the Commission is without authority to

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<sup>150</sup> ESP Order at 47.

<sup>151</sup> R.C. 119.01(l).

<sup>152</sup> *Wayne County Comm'rs v. McAvoy*, 1980 WL 353586 at \*3 (10th Dist. Ct. App. July 29, 1980).

<sup>153</sup> *SEC v. Chenery*, 318 U.S. 80, 95 (1943).

authorize Duke to bill and collect above-market wholesale generation-related revenue. Thus, the Commission cannot lawfully adopt a “rule” by adjudication to accomplish that same result.

Moreover, an agency hearing is not legally sufficient when the standard adopted by the agency affects the rights of persons that are not parties to the proceeding:

[T]hose who will be affected have not been provided with the full panoply of rights afforded by R.C. Chapter 119. Without the benefit of the procedure prescribed by that chapter, affected persons are denied access to the process that the General Assembly intended them to have, i.e., the early, informed, and meaningful opportunity to challenge the legality of the standards ... and the underlying assumptions, data, logic, and policy choices that [the agency] made in developing those standards.<sup>154</sup>

Because “affected persons” not involved in the Duke case have been denied access to the rulemaking process that Ohio law requires, the hearing on Duke’s Application is not legally sufficient as a basis for the Commission to adopt “factors” to be addressed in a “future filing.”

By authorizing a future filing and establishing factors to be addressed in that filing, the Commission has engaged in rulemaking outside the mandatory requirements of Chapter 119. Because the Commission has engaged in unlawful and unreasonable rulemaking, it should grant rehearing and reverse its finding authorizing Duke to make an additional filing as described by the Commission.

- 12. The ESP Order is unlawful and unreasonable because the Commission identified “factors” and a review process to address a future filing by Duke if it seeks to increase its compensation for generation-related services that are void for vagueness under the Due Process Clauses of the United States Constitution and the Ohio Constitution**

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<sup>154</sup> *Fairfield County Bd. of Comm’rs v. Nally*, Slip Op. No. 2015-Ohio-991 at ¶47.

As discussed above, the Commission engaged in an unlawful rulemaking process and issued a rule that identified several factors that Duke must include in a future filing to recover above-market generation-related costs through the PSR.<sup>155</sup> The Commission also stated that the list of “factors” is the minimum that Duke must address and that the Commission will not be bound by these factors in deciding whether to approve a request to recover above-market generation-related costs.<sup>156</sup> Based on the lack of definition of either the factors the Commission may consider or the weight those factors will be given, the Commission’s attempt to define the basis for approving a future filing is void for vagueness.

An agency may issue rules that trigger a due process violation<sup>157</sup> because they are vague.<sup>158</sup> The void-for-vagueness doctrine addresses the right to notice of the standards that will be fairly applied.<sup>159</sup> A statute or rule denies due process if it is so vague and indefinite that it sets forth no standard or if it is substantially incomprehensible.<sup>160</sup> Vague laws or rules are offensive because they fail to give notice of the conduct that will be proscribed and delegate policy matters to decision makers for *ad hoc* and subjective determinations with the attendant danger of arbitrary and discriminatory enforcement.<sup>161</sup> To avoid a finding that a statute or rule is void for vagueness, the statute or rule must provide sufficient notice of its proscriptions to

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<sup>155</sup> ESP Order at 47.

<sup>156</sup> *Id.*

<sup>157</sup> U.S. Const., Amend. V & Amend. XIV; Ohio Const., Art. 1, § 16.

<sup>158</sup> *State Racing Comm’n v. Robertson*, 111 Ohio App. 435 (10th Dist. Ct. App. 1960).

<sup>159</sup> *In re Columbus S. Power Co.*, 134 Ohio St.3d 392, 396 (2012) (internal citations and quotation marks omitted).

<sup>160</sup> *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 131 (2008).

<sup>161</sup> *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972).

facilitate compliance by persons of ordinary intelligence<sup>162</sup> and be specific enough to prevent official arbitrariness or discrimination in enforcement.<sup>163</sup> If the statute or rule either does not provide sufficient notice of the behavior it proscribes or is not specific enough to prevent arbitrariness or discrimination in enforcement, it is unconstitutionally vague.<sup>164</sup>

The rule adopted by the Commission is void for vagueness on its face since it is impermissibly vague in all its applications.<sup>165</sup> The “rule” the Commission has “promulgated” in the ESP Order provides the Commission with unlimited discretion on what and how it addresses a request in a future filing to recover above-market generation-related costs. Although the Commission identifies four factors that must be included in a future filing, these factors are the “minimum.” Other factors may be relevant or even determinative, but the Commission provides no notice of what those may be. This lack of definition carries over to the Commission’s decision making. Even if the parties address the factors identified by the Commission, the Commission refuses to be “bound by” the evidence regarding those factors. Further, while it states that it will “balance” the factors, the Commission offers no indication of how it will strike the balance.<sup>166</sup>

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<sup>162</sup> *State v. Williams*, 88 Ohio St.3d 513, 532 (2000) (a statute or rule is unconstitutionally vague if it “does not supply a definitive standard by which to determine what conduct is included and what conduct is excluded.”).

<sup>163</sup> *City of Norwood v. Horney*, 110 Ohio St.3d 353, 379 (2006).

<sup>164</sup> *Carney v. Shockley*, 2014-Ohio-5829 at ¶ 18 (7th Dist. Ct. App. 2014).

<sup>165</sup> *In re Columbus S. Power Co.*, 134 Ohio St.3d at 397.

<sup>166</sup> As discussed above, the lack of objective criteria for decision making presents a separate basis for reversing the authorization of the PSR because the Commission cannot engage in subjective decision making. *Consumers' Counsel v. Pub. Util. Comm'n of Ohio*, 61 Ohio St.3d at 406.

Further, the “rule” must bear a “direct” relationship to matters within the authority of the agency to regulate.<sup>167</sup> In this instance, the Commission seeks to address matters wholly outside its jurisdiction including environmental compliance, grid reliability, and wholesale price issues.<sup>168</sup> Thus, there is no direct relationship between the factors and the Commission’s jurisdiction that prevents a finding that the loosely-drawn rule is not void for vagueness.

At its core, the “rule” the Commission announced in the ESP Order regarding a hearing and decision on a “future filing” fails to supply a definitive standard of what the Commission will consider in an application to approve the recovery of above-market generation-related wholesale costs and allows the Commission to engage in an arbitrary process. Neither an EDU nor a customer can determine the factors the Commission will use to either approve or deny an application or how those factors will be balanced. On its face, therefore, the Commission’s new rule governing applications seeking to recover above-market generation-related wholesale costs is unconstitutionally vague. Accordingly, the Commission should grant rehearing and reverse its order authorizing a future filing based on a “rule” that is void for vagueness.

- 13. The Commission should grant rehearing and clarify (1) that the “factors” that it will consider in a “future filing” if Duke seeks to increase its compensation for generation-related services include a requirement for Duke to propose a “least-cost” hedge and a requirement that the hedge be secured by a competitive bidding process and (2) that Duke will be required to demonstrate that the resulting ESP, if the Commission approves generation cost recovery in a future filing, will satisfy the requirement of R.C. 4928.143(C)(1), which provides that the Commission may approve or modify and approve an ESP, including its pricing and all other terms and conditions,**

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<sup>167</sup> *State Racing Comm’n v. Robert*, 111 Ohio App. at 439.

<sup>168</sup> ESP Order at 47.

**including any deferrals and any future recovery of deferrals, if the ESP is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142**

The Commission stated that Duke must address several factors if it seeks cost recovery under the PSR, but noted that the list of factors was the minimum list that Duke should address.<sup>169</sup> If the Commission does not grant rehearing and reverse the authorization of the PSR for the reasons urged in this Application for Rehearing, it should grant rehearing and expand the factors that the Commission will review in a future filing and include requirements that Duke address whether the rider is the “least-cost alternative” for providing a “hedge” and the effect of the rider on the ESP v. MRO Test. Further, the Commission should require Duke to competitively bid any product for which it seeks to recover the costs through the PSR. While these additions to the review will not make the rider lawful under R.C. 4928.143(B)(2)(d), they will advance the reasonable concern of customers that any cost they are required to pay as a result of a Commission order is least-cost and market-tested.

***a. The Commission should impose a requirement that the “hedge” be “least-cost”***

In a “future filing,” the Commission should require Duke to demonstrate that the costs it is seeking to recover are the “least-cost” alternative for securing the “hedge.” The inclusion of a requirement to address whether the PSR would provide a least-cost alternative is consistent with the Commission’s rules. In its rule addressing provisions for automatic adjustments of costs under R.C. 4928.143(B)(2)(a), the Commission

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<sup>169</sup> *Id.* The Commission identifies four factors that Duke must address, at a minimum, if it seeks to charge customers under the PSR. These factors are the financial need of the generating plant, the need of the plant to address reliability concerns, the plant’s compliance with existing environmental regulations and its plan for compliance with pending environmental regulations, and the effect of closure of the plant on electric prices and economic development in the state. *Id.*

provides that the costs incurred and recovered for fuel and purchased power are to be reviewed quarterly and annually and requires the EDU annually to “demonstrate that the costs were prudently incurred ... and, if a significant change in costs has incurred [*sic*], include an analysis comparing the electric utility’s resource and/or environmental compliance strategy with supply and demand-side alternatives.”<sup>170</sup> Simply put, the Commission requires the EDU to address whether less expensive alternatives for generation-related services are available. A similar requirement should apply to the so-called hedge.

State policy also requires the Commission to require Duke to address whether it is proposing a least-cost alternative to supply a “hedge.” R.C. 4928.02(A) provides that it is the state policy to ensure the availability of unbundled retail electric service and to ensure that retail electric service is reasonably priced. A customer looking for a “hedge” would be expected to select a product that is the least costly among similar products. If the Commission is taking over the decision for the customer regarding the amount of “hedging” the customer should have, effectively reducing the value of customer choice, then it should also assure that the charge represents a least-cost option.

***b. The Commission should require that Duke seek competitive bids for the “hedge”***

The Commission also should clarify that Duke should seek competitive bids for the “hedge.” The policy supporting the use of competitive bidding to source a generation service is already embedded in Ohio law. Under R.C. 4928.143(B)(2)(c), for example, the Commission may approve a surcharge as a term of an ESP for a generation facility that is used and useful on or after January 1, 2009, and that is owned

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<sup>170</sup> Rule 4901:1-35-09(C), OAC.

or operated by an EDU, if it was sourced through a competitive bidding process.<sup>171</sup> R.C. 4928.142 also requires a competitive solicitation to set the price of the MRO.<sup>172</sup> Likewise, the Commission has found significant qualitative value in expediting the use of an auction process to establish the price of SSO service in an ESP.<sup>173</sup> In keeping with the Commission's desire to use an auction process to improve outcomes for customers, the Commission should require that any "hedge" be the result of an open, fair, and transparent competitive bidding process.

***c. The Commission should require Duke to demonstrate that the ESP, if the Commission approves recovery of generation-related costs under the PSR, passes the ESP v. MRO Test***

Additionally, the Commission should require Duke to demonstrate the ESP passes the ESP v. MRO Test if the Commission approves the recovery of generation related costs in a future filing. State law requires that the ESP be more favorable in the aggregate than an MRO before the Commission may approve it. Duke should not be permitted to increase its price of the ESP unless the ESP with the new PSR charges continues to be more favorable in the aggregate than an MRO. Accordingly, the Commission should require that Duke support its filing with a demonstration that the ESP will continue to pass the ESP v. MRO Test if the Commission approves the recovery of the requested costs. Further, the Commission should state that an EDU's failure to demonstrate that the ESP with the additional recovery of costs passes the ESP v. MRO Test would result in a rejection of the requested additional recovery.

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<sup>171</sup> R.C. 4928.143(B)(2)(c).

<sup>172</sup> R.C. 4928.142.

<sup>173</sup> *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case Nos. 11-346-EL-SSO, *et al.*, Opinion and Order at 76 (Aug. 8, 2012).

### III. CONCLUSION

For the reasons stated above, the ESP Order is unlawful and unreasonable. Accordingly, the Commission should grant rehearing and modify the ESP Order.

Respectfully submitted,

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In accordance with Rule 4901-1-05, Ohio Administrative Code, the Commission's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Application for Rehearing of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this 4th<sup>th</sup> day of May 2015, *via* electronic transmission.

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