BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke Energy Ohio for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications and Tariffs for Generation Service.	)	Case No. 14-841-EL-SSO
In the Matter of the Application of Duke Energy Ohio for Authority to Amend its Certified Supplier Tariff, PUCO. No. 20.	)	Case No. 14-842-EL-ATA

APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER AND THE OHIO ENVIRONMENTAL COUNCIL

Pursuant to Ohio Revised Code ("R.C.") 4903.10 and Ohio Admin. Code 4901-1-35, the Environmental Law & Policy Center and the Ohio Environmental Council hereby file this application for rehearing of the April 2, 2015 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission") in this proceeding. The Commission's Order approved an Electric Security Plan ("ESP") proposed by Duke Energy Ohio, Inc. ("Duke" or "Company") pursuant to R.C. 4928.143.

The Order is unlawful and unreasonable for the following reasons, as further explained in the accompanying Memorandum in Support:

1. The Order erroneously concluded that the Commission has authority under R.C. 4928.143(B)(2)(d) to approve a Price Stability Rider ("PSR") proposed by Duke that would allow the Company to require its customers to subsidize Duke's ownership interest in competitive generation.

2. The Order unreasonably approved imposition of the PSR as a non-bypassable charge on both shopping and non-shopping customers.

3. The Order set forth factors for the Commission's consideration of whether to allow recovery of the costs of any future power purchase agreements proposed in connection with the PSR, but those factors do not adequately reflect the relevant statutory and legal considerations.

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Respectfully submitted,

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MEMORANDUM IN SUPPORT OF APPLICATION FOR REHEARING BY THE ENVIRONMENTAL LAW & POLICY CENTER AND THE OHIO ENVIRONMENTAL COUNCIL

I. INTRODUCTION

The Environmental Law & Policy Center and the Ohio Environmental Council (collectively, "Environmental Advocates") seek rehearing of the April 2, 2015 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this case. The Commission's Order approved an Electric Security Plan ("ESP") proposed by Duke Energy Ohio, Inc. ("Duke" or "Company") pursuant to R.C. 4928.143.

The Commission rightly refused to allow Duke to require the Company's customers to pay the costs of a power purchase agreement ("PPA") for electricity from two Ohio Valley Electric Corporation ("OVEC") plants in which Duke itself has an ownership interest. Duke is bound by a contract that entitles the Company to 9 percent of the energy and capacity from OVEC but requires Duke to pay corresponding fixed and variable plant costs.[1] In other words, Duke and its shareholders effectively own 9 percent of the OVEC plants for the term of this

[1] Order at 15.

contract. In return for bearing the OVEC entitlement costs under the proposed Price Stability Rider ("PSR"), customers would receive only the benefit of a credit of the net proceeds of Duke's sale of its OVEC power on the wholesale market. The Commission recently rejected a similar arrangement proposed by American Electric Power ("AEP") with respect to its own OVEC interest, based primarily on the dubious benefits of such a PPA for ratepayers.[2] Similarly, the Commission correctly held that the "considerable uncertainty" regarding the magnitude of any wholesale market proceeds precluded a conclusion "that Duke's PSR proposal would provide customers with sufficient benefit from the rider's financial hedging mechanism or any other benefit that is commensurate with the rider's potential cost."[3]

While the Environmental Advocates support this ultimate conclusion, we believe that the Order is unlawful and unreasonable for the same reasons that we have sought rehearing in the AEP case. As an initial matter, the Order erroneously concluded that the Commission has legal authority to approve the PSR in principle, even though it operates as an anticompetitive subsidy from Duke's distribution customers to Duke's generation interest in the OVEC plants. Even if the Commission had such authority, the Order is unlawful and unreasonable in two additional respects: first, in concluding that PSR costs should be imposed as a non-bypassable charge on shopping customers, thereby depriving them of the opportunity to seek an alternative hedge or decline to accept any hedge; and second, in setting forth factors for the consideration of future PPAs proposed for cost recovery under the PSR that do not adequately reflect the relevant statutory and legal considerations.

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[2] *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 No. 13-2385-EL-SSO, Opinion and Order at 25 (Feb. 25, 2015).
[3] Order at 46.

II. ARGUMENT

A. The PSR Allows an Anticompetitive Subsidy in Contravention of R.C. 4928.02(H) by Authorizing Duke to Force All Distribution Customers to Cover the Costs of Its Own Generating Plants Even If Those Plants Are Uneconomic on the Competitive Market.

The Order held that the Commission has authority to approve the PSR under R.C. 4928.143(B)(2)(d), which provides that an ESP may include:

> Terms, conditions, or charges 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.

Specifically, the Commission reasoned that Rider PSR would qualify as a "charge," operating as "a financial limitation on customer shopping," that "would, in theory, have the effect of stabilizing or providing certainty regarding retail electric service."[4]

However, the Commission still lacked authority to approve the PSR because it provides an anticompetitive subsidy from Duke's distribution customers to its generation service. That result is irreconcilable with R.C. 4928.02(H), which provides that it is state policy to:

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

R.C. 4928.06 requires the Commission to "ensure that the policy specified in section 4928.02 of the Revised Code is effectuated," and therefore the Commission's approval of the PSR in contravention of R.C. 4928.02(H) was unlawful and unreasonable regardless of the scope of its authority under R.C. 4928.143(B)(2)(d).

[4] *Id.* at 43-45.

The Order stated that the PSR was permissible under R.C. 4928.02(H) because it "would not permit the recovery of generation-related costs through distribution or transmission rates."[5] But while the statutes prohibits anticompetitive subsidies "including by . . . the recovery of any generation-related costs through distribution or transmission rates," the word "including" demonstrates that this is not the *only* mechanism that might constitute an anticompetitive subsidy. Rather, it is *one specific example* of a type of anticompetitive subsidy barred by state policy. The relevant inquiry should therefore center on whether the PSR effects an invalid anti-competitive subsidy by other means when it allows the transfer of money from a noncompetitive retail electric service to support the competitive generation services provided by OVEC. The Commission failed to undertake such an inquiry, simply stopping with the premise that R.C. 4928.02(H) is not relevant where a charge is not formally designated as a distribution or transmission rate.

Here, the Commission has approved application of the PSR to Duke's customers, both shopping and non-shopping, without the possibility for CRES providers to offer competing options to address price volatility.[6] As Duke witness Wathen testified, this non-bypassable rider would be assessed on the distribution and transmission bills of Duke customers.[7] Thus, the PSR's purported financial hedging service constitutes a "noncompetitive retail electric service" supplied to all Duke ratepayers.[8] Under the rider as approved, Duke will then direct the revenue from that noncompetitive service to cover its share of the costs of the OVEC plants – plants that would otherwise have to compete in the free market as a source of generation for retail

[5] *Id.* at 48.
[6] *Id.* at 44-45.
[7] Tr. II at 416.
[8] Although Duke cited reliability concerns as an alternative basis for the PSR, the Order approved the rider as "a generation-related hedging service," Order at 44, not as a tool to ensure system reliability.

customers.[9] Duke will provide this economic support to the OVEC plants without any competitive process to ensure that they provide the best service to ratepayers at the least cost.[10] Accordingly, the PSR does operate as an anticompetitive subsidy from a noncompetitive retail electric service to a competitive retail electric service. The question of whether this recovery of generation costs from all of a utility's distribution customers is formally categorized as a distribution rate or rider is irrelevant to this conclusion.

Notably, the Ohio Supreme Court did not dwell on the precise labels for particular rate mechanisms in *Elyria Foundry Co. v. PUCO*, where it applied a prior version of R.C. 4928.02(H) (at that time codified at R.C. 4928.02(G)) that similarly established a state policy of ensuring "effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa."[11] In that case, the Court rejected a FirstEnergy[12] proposal to collect increases in generation-related fuel costs through its distribution rates as violating this policy, citing the requirement for each utility service component "to stand on its own" after Ohio's transition to unbundled electric service.[13] It is that substantive goal – ensuring that competitive and non-competitive retail electric services each "stand on their own" – that must drive the Commission's

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[9] *See* Tr. IV at 920 (Duke witness Hollis confirming that generation service is a competitive service). Additionally, even if the PUCO does not consider Duke's generation interest in the OVEC plants to be a component of competitive retail electric service, R.C. 4928.02(H) bars an anticompetitive subsidy to any "competitive retail electric service *or to a product or service other than retail electric service*."

[10] Tr. II at 470-471, 591-592; Tr. III at 627-628; Tr. X at 2741-2744.

[11] *Elyria Foundry Co. v. Pub. Util. Comm.*, 114 Ohio St.3d 305, 2007-Ohio-4164, 871 N.E.2d 1176, ¶ 48.

[12] "FirstEnergy" refers collectively to the distribution utilities Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company.

[13] *Elyria* (citing *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St.3d 451, 2004-Ohio-3924, 812 N.E.2d 955, ¶ 4).

application of the statute. In this case, regardless of whether the PSR is denominated as a distribution or generation charge, it effectively allows Duke to treat its distribution customers as a captive audience forced to pay for a purported financial hedge resting only on generation business in which Duke has an ownership interest. The resulting market distortions and disruption to Ohio's deregulation efforts are the same however the PSR is labeled, and violate the substantive policy of R.C. 4928.02(H).

The amendments to R.C. 4928.02(H) after *Elyria* do not alter this conclusion. In 2008, Senate Bill 221 added the following language to that provision's bar on anticompetitive subsidies between competitive and noncompetitive retail electric service: "including prohibiting the recovery of any generation-related costs through distribution or transmission rates." As noted above, the use of the term "including," along with the retention of the existing, broader language, shows that this addition was designed to expand the policy against cross-subsidization through an absolute bar on a particular type of cross-subsidy, not to restrict the expansive scope of R.C. 4928.02(H) as applied in *Elyria*.

Despite the broad scope of R.C. 4928.02(H), the Commission never confronted the fact that, as long as the PSR is structured an unavoidable charge effectively requiring Duke's distribution customers to subsidize generation that would otherwise be left to compete on the free market – with no competitive process to determine whether that is the best deal for ratepayers – it is a mechanism for anticompetitive subsidies from noncompetitive retail electric service to a competitive retail electric service. The Order thus failed to carry out the Commission's obligation to "ensure that the policy specified in section 4928.02 of the Revised Code is effectuated."[14] Accordingly, the Commission must reconsider its holding that it has statutory authority to approve the PSR.

B. The Order Did Not Adequately Justify the Approval of the PSR as Non-Bypassable.

In the Order, the Commission cursorily concluded that the PSR should be non-bypassable because "both shopping and SSO customers may benefit from the PSR because it would have a stabilizing effect on the price of retail electric service, irrespective of whether the customer is served by a CRES provider or the SSO."[15] This rationale does not justify forcing ratepayers to accept a purported hedge against price volatility sourced only from Duke's OVEC entitlement, in contravention of Ohio law favoring an open retail market. That is especially true given that the Commission itself has concluded that "there are already existing means, such as the laddering and staggering of SSO auction products and the availability of fixed price contracts in the market, that provide a significant hedge against price volatility."[16] Although Duke failed to show in this case that there is any customer demand for additional volatility hedges, the existence of these arrangements shows that where there is such demand, it can be met through competitive products chosen by customers on an open market.

As an unavoidable charge, the PSR would deprive a customer of the option to choose not to hedge against volatile electricity prices in order to gain the full benefit of lower market prices when they do exist. And if a customer did wish to seek price stability through a financial hedge or fixed price arrangement with a CRES provider, being saddled with the PSR would force that customer to pay twice for the same service, and would potentially interfere with the overall effectiveness of either hedge. Indeed, that problem is likely to occur given that, as the

[14] R.C. 4928.06(A).
[15] Order at 44-45.
[16] *Id.* at 46.

Commission has recognized, shopping customers are already utilizing hedging mechanisms such as fixed price contracts.[17]

There is no reason the PSR must be non-bypassable. Instead, it could be offered as part of Duke's default service, leaving customers the option to shop if they wish to seek an alternative hedging mechanism or simply do not wish to hedge at all. This approach would promote Ohio policy as codified in R.C. 4928.02 in multiple respects. First, it would "[e]nsure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options *they elect* to meet their respective needs."[18] Second, making the PSR avoidable would likewise "[e]nsure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers," as provided in R.C. 4928.02(C), allowing customers to seek and choose alternative financial hedging options from CRES providers rather than being stuck with Duke's chosen mechanism and all the risks it entails. Third, allowing customers to choose whether to accept Duke's financial hedging approach would "[e]ncourage innovation and market access for cost-effective supply- and demand-side retail electric service" by leaving room for CRES providers to offer alternative hedge options with different risks or other design features.

More fundamentally, the Commission has already recognized that it undercuts the "development of the competitive market for generation" to require customers to pay twice for a generation-related service like the PSR.[19] In a stipulation offered by Duke in a previous

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[17] *Id.*

[18] R.C. 4928.02(B) (emphasis added).

[19] *In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Pub. Util. Comm. No. 03-93-EL-ATA, 2007 Ohio PUC LEXIS 703, at 83 (Oct. 24, 2007).

proceeding regarding its SSO pricing, Duke sought Commission approval of an unavoidable charge designed to recover generation-related costs stemming from its provider of last resort obligation from all of its customers, including costs of compliance with environmental, tax, and other laws.[20] The Commission concluded that this proposal "would result in shoppers paying for this category of expenses [legal compliance costs] twice" since the generation service they obtained from CRES providers would also incorporate compliance costs for the underlying plants.[21] Therefore, the Commission held that, "in order to continue encouraging the development of the competitive market for generation, . . . the environmental compliance, tax, and homeland security aspects of Duke's proposed POLR charge should be avoidable."[22] The same approach seems necessary here to ensure that price stability services remain part of the competitive retail market in Ohio, consistent with Senate Bills ("S.B.") 3 and 221.

The Commission approved the PSR as non-bypassable without ever addressing the many ways in which that approach is inconsistent with state policy and common sense. The Commission must revisit this issue on rehearing and offer some adequate explanation as to why the PSR should be unavoidable for shopping customers despite the significant problems that would result.

C. The Factors Identified by the Commission for Its Consideration of Future PPAs Do Not Adequately Reflect the Relevant Statutory Considerations.

A key component of the Order is the Commission's description of factors that it will consider in future proceedings regarding potential implementation of the PSR to include specific generation resources:

[20] *Id.* at 82.
[21] *Id.* at 83.
[22] *Id.*

> 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.[23]

The Commission also required any future proposal to provide for "rigorous Commission oversight of the rider" and "full information sharing with the Commission and its Staff," and to "include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers."[24]

These factors and considerations replicate those outlined by the Commission in its recent order in AEP's ESP case.[25] As we did in our application for rehearing of that order, we urge the Commission to add two additional factors to ensure that future proposals from Duke or other utilities are supported by the evidence necessary to show that they are consistent with the applicable statutory provisions. First, the Commission must fully implement its obligation to determine whether a utility has met its burden of proof under R.C. 4928.143(C)(1) by requiring the utility to address not only the "necessity of the generating facility, in light of future reliability concerns,"[26] but also the necessity of the proposed PPA to address any other issues relating to retail electric service stability or certainty, such as the price volatility concerns cited by Duke. Second, the Commission must consider in future proceedings whether a utility's proposal for "stabilizing or providing certainty regarding retail electric service" is the result of a competitive procurement process that ensures a just and reasonable outcome for the utility's customers.

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[23] Order at 47.
[24] *Id.*
[25] *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 No. 13-2385-EL-SSO, Opinion and Order at 25 (Feb. 25, 2015).
[26] Order at 47.

1. The Factors Must Require a Utility to Meet Its Burden of Proof to Provide Evidence to Support a Price Volatility Justification for a Proposed PPA, Not Only a Reliability Rationale.

R.C. 4928.143(C)(1) provides that "[t]he burden of proof in the [ESP] proceeding shall be on the electric distribution utility." The second factor listed in the Order appropriately implements that provision by requiring the utility to come forward with evidence about the "necessity of the generating facility, in light of future reliability concerns."[27] However, the same burden should apply when a utility argues that a PPA is necessary to address price volatility concerns, as Duke has in this proceeding. The Commission acknowledged the importance of analyzing both reliability and price volatility claims closely when it "reserve[d] 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."[28] On rehearing, the Commission should therefore amend the second factor in the Order to broadly require any utility to provide evidence regarding why its proposed PPA is necessary to address whatever concern regarding instability or uncertainty in retail electric service that the utility has offered as justification for its proposal.

2. The Commission Must Include a Factor Addressing the Method of Procurement of the Generation Resources in a Proposed PPA To Ensure that the Resulting Rate Does Not Violate Ohio Law.

It is notable that Duke as well as two other Ohio distribution utilities, AEP and FirstEnergy, have all proposed arrangements like the PSR that rest on agreements to purchase power from plants that they own.[29] The Commission did not address this aspect of the PSR in its

[27] *Id.*
[28] *Id.*
[29] *See* Case Nos. 13-2385-EL-SSO (AEP proposal for PPA rider covering its interest in the OVEC plants), 14-1693-EL-RDR (AEP proposal to include additional PPAs under the PPA rider), 14-1297-EL-SSO (FirstEnergy proposal for rider to cover PPA for purchase of power from two plants owned by its generation affiliate and its generation affiliate's interest in the OVEC plants).

Order given its conclusion that the OVEC PPA would not provide the benefits asserted by Duke. However, a number of intervenors in this case have raised the concern that approval of a PPA sourced solely from generating plants in which Duke has an ownership interest, without any competitive process to evaluate other means of providing the desired price stability and reliability services, would contravene applicable Ohio law in multiple respects.

Given this substantial concern relevant to several pending cases (including one, Case No. 14-1297, where the evidentiary hearing is scheduled to commence in June 2015 and the attorney examiner has ordered supplemental discovery specifically relating to the considerations discussed in the Order in this case[30]), the Commission should utilize the opportunity on rehearing to clarify that future proposals must provide evidence directly addressing the question of whether the utility evaluated alternatives through a competitive procurement process. Such evidence is necessary for the Commission to weigh whether future proposals are consistent with R.C. 4928.02, R.C. 4928.17, and R.C. 4905.22.

a. A competitive procurement process based on a consideration of all relevant resources is necessary to realize state policy of ensuring that customers receive reasonably priced retail electric service.

As discussed above, any ESP provision must be consistent with the state policies set forth in R.C. 4928.02, including "[e]nsur[ing] the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service."[31] The burden of proof on the utility under R.C. 4928.143(C)(1) to show that its ESP complies with this policy is even greater where a PPA raises the prospect of self-dealing that might sacrifice the interests of a

[30] *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*, Pub. Util. Comm. No. 14-1297-EL-SSO, Entry at 1-3 (Mar. 23, 2015).
[31] R.C. 4928.02(A).

distribution utility's customers in favor of its shareholders. With respect to the sort of intra-company transaction proposed by Duke and other Ohio utilities, the best safeguard to ensure that consumers are receiving stable and certain retail electric service at a reasonable price is through a competitive process involving the evaluation of alternative means to achieve those goals. Ideally, that would involve a request for proposals seeking the necessary resources (including, if suitable, energy efficiency and demand reduction resources) at the best price and with the best terms possible.

The General Assembly recognized the power of market forces to provide customers with reasonably priced retail electric service in enacting S.B. 3 and S.B. 221, and there is no reason for the Commission to retreat from that approach here. In this situation, a competitive procurement process will ensure a proposed PPA offers the best outcome for customers, for two reasons. First, if the utility is willing to undertake a PPA or similar arrangement even if the benefit of subsidizing its own generation outside the competitive marketplace is removed, that will reinforce the credibility of the utility's arguments that the PPA is truly needed for stability or certainty of retail electric service. Second, even more importantly, a competitive procurement process offers a utility the opportunity to review alternative bids to identify the one with the terms and prices most beneficial to its customers, and also to leverage other offers in negotiating for the best possible deal.

The need for a competitive procurement approach to effectuate the intent underlying the policies laid out in R.C. 4928.02 is supported by the provisions of R.C. 4928.143 that address the procurement of electricity resources as part of an ESP. Both R.C. 4928.143(b) and (c) allow a utility to recover costs related to procurement of generation through an ESP: subsection (b) provides that a utility may recover "[a] reasonable allowance for construction work in progress for any of the electric distribution utility's cost of constructing an electric generating facility or for an environmental expenditure for any electric generating facility of the electric distribution utility, provided the cost is incurred or the expenditure occurs on or after January 1, 2009," while section (c) permits "[t]he establishment of a nonbypassable surcharge for the life of an electric generating facility that is owned or operated by the electric distribution utility . . . and is newly used and useful on or after January 1, 2009."[32] In both cases, construction of the facility in question must have been "sourced through a competitive bid process."[33] It is thus clear that, even though the General Assembly authorized utilities to apply for an ESP option differing in some respects from a market rate offer, it still intended that generation procurement would be governed by a competitive process.

The Order already draws on these provisions, whether intentionally or not, in requiring Duke to address "the necessity of the generating facility [included in a PPA], in light of future reliability concerns, including supply diversity."[34] That factor echoes the mandate in R.C. 4928.143(b) and (c) that an ESP cannot provide for recovery of costs related to the relevant generating facility "unless the commission first determines in the proceeding that there is need for the facility based on resource planning projections submitted by the electric distribution utility."[35] The Order's incorporation of this principle in evaluating the PSR shows that the Commission recognizes the importance of rigorous evaluation of the need for a proposal to depart from a market-based approach by allowing a distribution utility to recover generation costs outside of its SSO. It only makes sense to extend this approach to the analysis of the merits

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[32] R.C. 4928.143(b), (c).
[33] *Id.*
[34] Order at 47.
[35] R.C. 4928.143(b), (c).

of future proposed PPAs, through a factor addressing whether a utility has adhered to a competitive process to ensure that customers obtain the service sought at a reasonable price.

b. A competitive procurement process based on a consideration of all relevant resources will ensure compliance with the statutory requirement for just and reasonable rates.

R.C. 4905.22 requires that any utility charge approved by the Commission be "just and reasonable":

> All [utility] charges made or demanded for any service rendered, or to be rendered, shall be just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission, and no unjust or unreasonable charge shall be made or demanded for, or in connection with, any service, or in excess of that allowed by law or by order of the commission.

As with the state policy mandating reasonably priced retail electric service, the Commission should implement this requirement by making clear that any charge proposed by a utility along the lines of the PSR should include only services that have been obtained through an appropriate competitive procurement process, in order to prevent a distribution utility from favoring the interests of its shareholders at the expense of its customers.

The Federal Energy Regulatory Commission ("FERC") has explained the importance of such measures in ensuring just and reasonable wholesale electric prices, in a decision considering whether to approve a proposed wholesale power purchase contract between a load-serving entity, Boston Edison Company, and its generation subsidiary, Edgar Electric Energy Company:

> In previous affiliate cases, which have involved the potential of unduly preferentially low market rates from the seller to its affiliate, the Commission has found that the mere opportunity for this type of affiliate abuse will lead to rejection of the proposed agreement. The same analysis applies to the facts here, where the rate may not be just and reasonable because the buyer potentially may have unduly favored the rates offered by its affiliate seller over lower rates offered by other nonaffiliate sellers. . . .

> Because the potential for self-dealing . . . is critical here, the Commission must ensure that the buyer has chosen the lowest cost supplier from among the options presented, taking into account both price and nonprice terms (i.e., that it has not preferred its affiliate without justification).
>
> Under the market value standard there may be several ways in which a utility could demonstrate lack of affiliate abuse. . . . One type of evidence that Boston Edison could offer would be evidence of direct head-to-head competition between Edgar and competing unaffiliated suppliers either in a formal solicitation or in an informal negotiation process.[36]

Similarly, in order to ensure the PSR represents a just and reasonable charge, the Commission must consider whether any candidate PPA results from a process incorporating adequate protections against affiliate self-dealing. The only way to ensure that a utility-affiliate PPA is the best deal for customers is through an open procurement process that allows non-affiliates a level playing field to compete.

c. A competitive procurement process based on a consideration of all relevant resources will prevent anticompetitive subsidies in contravention of Ohio law.

As discussed above, the Environmental Advocates believe that the Commission lacks authority to approve the PSR because, in its current form, the rider is a channel for anticompetitive subsidies from Duke's distribution customers to its generation interests. This problem would no longer arise if the Commission were to clarify that any PPA included under the rider must result from a competitive procurement process. That result would be consistent with the Commission's established position that a distribution utility's generation affiliate may compete in the competitive bidding process ("CBP") for the utility's SSO, since that competitive

[36] *Boston Edison Company Re: Edgar Electric Energy Company*, 55 FERC ¶ 61,382 (1991).

framework ensures it is participating "in the same fair and nondiscriminatory manner as all other participants" on a level playing field.[37]

d. A competitive procurement process based on a consideration of all relevant resources will avoid the need to revisit Duke's corporate separation plan.

As part of Ohio's restructuring of its electric utility industry, the General Assembly enacted R.C. 4928.17 to address the potential for self-dealing between distribution utilities and their newly separate generation affiliates. Under this provision, no distribution utility:

> shall engage in this state, either directly or through an affiliate, in the businesses of supplying a noncompetitive retail electric service and supplying a competitive retail electric service, . . . unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section, is consistent with the policy specified in section 4928.02 of the Revised Code, and achieves all of the following:
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> (1) The plan provides, at minimum, for the provision of the competitive retail electric service or the nonelectric product or service through a fully separated affiliate of the utility, and the plan includes separate accounting requirements, the code of conduct as ordered by the commission . . ., and such other measures as are necessary to effectuate the policy specified in section 4928.02 of the Revised Code.
>
> (2) The plan satisfies the public interest in preventing unfair competitive advantage and preventing the abuse of market power.
>
> (3) The plan is sufficient to ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service or nonelectric product or service. . . .[38]

Duke's and other Ohio utilities' proposals to award PPAs to their affiliates, to be paid for by their distribution customers through mechanisms such as the PSR, pose significant problems under this provision under all three of these prongs. As outlined above, the PSR as structured

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[37] *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Pub. Util. Comm. No. 12-426-EL-SSO, 2013 Ohio PUC LEXIS 193, at 35 (Sept. 4, 2013).
[38] R.C. 4928.17(A).

directly conflicts with the policies in R.C. 4928.02(A) and (H) because it provides an anticompetitive subsidy for Duke's generation interests and does not include any measures to ensure that self-dealing does not result in unreasonable prices for retail electric service. The limitation of the PSR to Duke's share of the OVEC plants similarly suggests that OVEC is receiving unfair competitive advantage and undue preference because of its relationship with Duke.[39]

The Commission should therefore make clear that in future proceedings it expects to see proposed PPAs that are consistent with R.C. 4928.17, either because they do not provide subsidies to a utility's affiliate or because any such arrangement results from a non-discriminatory competitive procurement process. Otherwise, it seems likely that the Commission will need to revisit the adequacy of Duke's and other utilities' corporate separation plans, since the recurrence of self-dealing rider proposals in this case and Case Nos. 13-2385-EL-SSO, 14-1693-EL-RDR, and 14-1297-EL-SSO suggests that these existing plans are not adequate to comply with the substantive requirements of R.C. 4928.17.[40] While the Commission has held that it will periodically audit utility implementation of corporate separation plans, starting with FirstEnergy this year,[41] the Commission should not neglect the need for additional safeguards in the meantime to ensure that utility conduct remains within the bounds of R.C. 4928.17.

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[39] The Commission's rules implementing R.C. 4928.17 similarly provide that "[c]ross-subsidies between an electric utility and its affiliates are prohibited." Ohio Admin. Code 4901:1-37-04(A)(3).

[40] Under R.C. 4928.17(D), "[a]ny party may seek an amendment to a corporate separation plan approved under this section, and the commission, pursuant to a request from any party or on its own initiative, may order as it considers necessary the filing of an amended corporate separation plan to reflect changed circumstances."

[41] *In the Matter of the Commission's Investigation of Ohio's Retail Electric Service Market*, Case No. 12-3151-EL-COI, Finding and Order at 12, 16-17 (Mar. 26, 2014).

III. CONCLUSION

For the reasons set forth above, the Environmental Advocates respectfully request that the Commission grant rehearing to ensure Duke's ESP complies with all applicable Ohio law.

Dated: May 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Application for Rehearing has been electronically filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on May 4, 2015.

/s/ Justin Vickers
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