BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, 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 Application of Duke Energy Ohio, Inc. for Authority to Amend its Certified Supplier Tariff, P.U.C.O. No. 20.	))))	Case No. 14-842-EL-ATA

APPLICATION FOR REHEARING OF IGS ENERGY
PUBLIC

TABLE OF CONTENTS

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APPLICATION FOR REHEARING OF IGS ENERGY

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Pursuant to R.C. 4903.10 and Rule 4901-1-35, Ohio Administrative Code ("O.A.C."), intervenor Interstate Gas Supply, Inc. ("IGS") hereby applies for rehearing from the Opinion and Order issued by the Public Utilities Commission of Ohio ("Commission") on April 2, 2015 (the "Order"), whereby the Commission approved, subject to certain modifications, the electric security plan ("ESP") proposed by Duke Energy Ohio, Inc. ("Duke") in its application in this proceeding. As grounds for rehearing, IGS respectfully submits that the Order is unreasonable and unlawful in the following respects:

A. **The Order is unlawful and unreasonable because it prohibited competitive retail electric service ("CRES") providers and third parties from utilizing the consolidated utility bill to invoice and collect charges related to products and service other than retail electric service ("non-commodity") while, at the same time, allowing Duke's affiliate, Duke Energy One, Inc. ("Duke Energy One") to utilize the consolidated utility bill to invoice and collect such charges.**
    1. **The Order is unlawful and unreasonable inasmuch as it authorized Duke to provide an undue preference or advantage to its affiliate, Duke Energy One and to discriminate against CRES providers and third parties in violation of R.C. 4905.35, R.C. and 4928.03. The Order denies CRES providers and third parties comparable and nondiscriminatory access to the utility bill, a non-competitive retail electric service.**
    2. **The Order is unlawful and unreasonable inasmuch as it authorized Duke to evade its corporate separation requirements by providing an undue preference and competitive advantage to its affiliate, Duke Energy One, in violation of R.C. 4928.17(A)(2) and (3) and OAC 4901:1-37-04(D)(10)(c).**
    3. **The Order is unlawful and unreasonable inasmuch as it is against the manifest weight of the evidence. The Order did not rely upon credible record evidence regarding Duke's ability to separate non-commodity charges from its purchase of receivables ("POR") program.**
    4. **The Order is unlawful and unreasonable inasmuch as it is arbitrary and against the manifest weight of the evidence. The Order arbitrarily, unjustly, and unreasonably prohibited CRES providers and third parties that do not participate in the POR program from utilizing the utility bill to invoice and collect**

charges related to non-commodity products and services. The Order's reasoning is not applicable to this class of providers.

B. **The Order erred in authorizing Duke Ohio to establish a placeholder PSR.**
    1. **The Order would unlawfully set the level of compensation Duke would receive for wholesale energy and capacity because the Federal Power Act preempts the Commission from regulating the price of wholesale energy and capacity.**
    2. **The Order erred in finding that the PSR may be authorized under R.C. 4928.143(B)(2)(d).**
    3. **The Order's authorization of the PSR is against the manifest weight of the evidence. Even under the Order's flawed legal reasoning, the PSR does not serve as a hedge against rising electricity prices.**
    4. **The Order erred in authorizing Duke to establish the PSR because the PSR provides Duke with an anticompetitive subsidy in violation of R.C. 4928.02(H), which prohibits the Commission from providing guaranteed cost recovery for a competitive service or product and service other than retail electric service.**
    5. **The Order erred in authorizing Duke to establish the PSR because approval of the PSR allows Duke to evade the corporate separation requirements contained in R.C. 4928.17 by providing an undue preference and a competitive advantage to Duke in the form of a guaranteed cost recovery for an unregulated service and because approval of the rider facilitates the abuse of market power**

Pursuant to Rule 4901-1-35(A), OAC, a memorandum in support more fully explaining these grounds for rehearing is attached hereto.

WHEREFORE, IGS respectfully requests that the Commission grant its application for rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

In an Order issued on April 2, 2015, the Commission modified and approved Duke's application to establish an ESP. On the cusp of true competition, the Order took a step backward in two respects.

The Order prohibited CRES providers from placing non-commodity charges on the consolidated bill. This prohibition severely limits CRES providers' ability to offer bundled products and services that may reduce customers' usage and lower their electric bill. While the Order wisely rejected Duke's request to make consumers involuntary investors in its inefficient generating assets, the Order approved a placeholder PSR to leave the door open for Duke to take a second bite at the apple in the future. These aspects of the Order represent bad policy—and they violate the law.

Therefore, the Commission should grant this application for rehearing and correct the errors identified herein.

II. ARGUMENT

A. The Order is unlawful and unreasonable because it prohibited CRES providers and third parties from utilizing the consolidated utility bill to invoice and collect charges related to non-commodity services while, at the same time, allowing Duke's affiliate, Duke Energy One to utilize the consolidated utility bill to invoice and collect such charges.

The Order authorized Duke to amend its tariff to prohibit CRES providers from using the bill-ready function to bill for non-commodity products and services. The Order did so despite the fact that Duke is currently including non-commodity charges for its affiliated company on the consolidated EDU bill. The Order held that Duke's request is reasonable because Duke does not have the capability to separate CRES-related non-commodity charges from its POR program, stating:

> Because all customers must bear the cost of unpaid bills, and because the evidence in these cases reflects that Duke does not have the technology to separate commodity and noncommodity charges, the Commission does not find it reasonable to allow various noncommodities to be added to the bills.[1]

The Order also determined that Duke Energy One is not a CRES provider; thus, it is not "parallel to a CRES provider", stating:

> In regards to the Company's affiliate, Duke Energy One, the Commission points out that, because it does not provide retail electric service, the entity is not parallel to a CRES provider. For the above reasons, the Commission finds that Duke's request to amend the tariff is reasonable.[2]

Moreover, the Order refrained from addressing claims that Duke's proposal would allow it to evade corporate separation requirements by providing an undue

[1] Order at 89.

[2] *Id*.

preference and competitive advantage to its affiliate. Rather, the Order alluded that CRES providers should file a complaint if they have concerns regarding Duke's compliance with its corporate separation plan, stating, "[r]egarding IGS' s and RESA' s concerns, the Commission affirms that, as discussed further below, this is not the proper forum to address those issues."[3]

As discussed below, the Order is unlawful and unreasonable and should be reversed on rehearing.

1. **The Order is unlawful and unreasonable inasmuch as it authorized Duke to provide an undue preference or advantage to its affiliate, Duke Energy One and to discriminate against CRES providers and third parties in violation of R.C. 4905.35, R.C. and 4928.03. The Order denies CRES providers and third parties comparable and nondiscriminatory access to the utility bill, a non-competitive retail electric service.**
2. **The Order is unlawful and unreasonable inasmuch as it authorized Duke to evade its corporate separation requirements by providing an undue preference and competitive advantage to its affiliate, Duke Energy One, in violation of R.C. 4928.17(A)(2) and (3) and OAC 4901:1-37-04(D)(10)(c).**

The Order prohibits CRES providers from billing non-commodity charges on the EDU bill while granting Duke's unregulated affiliate access to the EDU bill. The Order violates several Ohio laws and Commission rules and thus should be reversed on rehearing.

R.C. 4905.35(A) provides that "no public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality." OAC 4901:1-37-04(D)(10)(c) also states that an "electric utility *shall not*, through a tariff

[3] Order at 83. The Order does not appear to contain any additional discussion regarding the Commission's recommended forum to address issues regarding Duke's compliance with corporate separation.

provision, a contract, or otherwise, *give its affiliates* or customers of affiliates *preferential treatment or advantages over nonaffiliated competitors* . . . to *any product and/or service*." (emphasis added). R.C. 4928.03 states, "each consumer in this state and the suppliers to a consumer shall have comparable and nondiscriminatory access to noncompetitive retail electric services of an electric utility in this state . . . ." And, R.C. 4928.04 identifies billing as a non-competitive service.[4] Further, R.C. 4928.17(A)(2) requires a corporate separation plan to prevent an "unfair competitive advantage", and R.C. 4928.17(A)(3) prohibits a utility from extending any "undue preference or advantage to any affiliate." In short, the Ohio Legislature and the Commission have, under no uncertain terms, made clear that a utility *shall not* grant preferential treatment to any market participant, and, especially not to an affiliate.

Duke is currently billing for non-commodity products and services for its affiliate Duke Energy One, but it refuses bill similar non-commodity charges for CRES providers.[5] Specifically, Duke is billing for StrikeStop service which is an insurance service that provides coverage for damage caused to the customer's home from electric surges.[6] Duke is also billing for Underground Protection service which is an insurance service that covers damage to the customer's underground electric lines.[7] Thus, Duke is currently utilizing the billing assets of distribution customers to place non-commodity charges for its unregulated affiliate on the EDU bill.

[4] *See also* Tr. Vol. XI at 3323.

[5] IGS Ex. 10 at 8; IGS Ex. 11 (Int 40 and 41); Tr Vol. XIV 3929-28.

[6] IGS Ex. 10 at 8-9.

[7] *Id.*

As IGS witness Matthew White testified, it is a tremendous advantage for Duke's affiliate to be able to bill for its non-commodity charges on the EDU bill. Not only is there cost savings associated with utilizing the EDU bill, there is a great convenience given to the EDU affiliate customers to have a single bill for electric distribution and generation service, along with non-commodity charges.[8] As Mr. White notes, customer do not want separate bills for each individual component of a bundled electric product and customers often want a bundled all in price.[9] Thus, "in order for CRES providers to offer value added products and services that customers prefer it is important to have billing flexibility for electric service."[10]

By prohibiting CRES providers from utilizing the utility bill to invoice and collect for non-commodity charges, the Order authorized Duke to grant preferential treatment to its affiliate company. Given the directive of Ohio law to prohibit such preferential treatment, the Order is unlawful and unreasonable.

The Order's claim that Duke Energy One and CRES providers are not the same type of entities does not save the Order. CRES providers offer the same products and services as Duke Energy One. Duke cannot use its billing assets to provide Duke Energy One a competitive advantage or preference. Moreover, CRES providers, too, have affiliates that offer non-commodity products and services. These companies are no different than Duke Energy One. But the Order does not allow such companies to

[8] IGS Ex. 10 at 15.

[9] *Id.* at 15.

[10] *Id.*

utilize the utility bill for non-commodity products. Thus, the Order unlawfully authorizes Duke to provide a competitive advantage to one competitor in the market.

The Order will also work against innovation. As Mr. White notes in his testimony, "one of the major benefits of competition is that it encourages the development of innovative products and services that add value to customers beyond the electric commodity."[11] Mr. White also explains that in competitive electric markets throughout the country CRES providers are beginning to offer sophisticated products and services such as "electricity bundled with energy efficiency, demand response, direct load control, smart thermostats, distributed solar generation and other forms of on-site generation, micro-grids, battery storage technology, products bundled with loyalty rewards and products bundled with home protection, to name a few."[12] The Order forecloses the ability to offer these bundled products to customers.

Rather than restrict and hamper the development of the market for bundled products and services, the Commission should reverse its Order and direct Duke to allow CRES providers to utilize the utility bill to invoice and collect for non-commodity charges. Otherwise, as the Order suggests, CRES and their affiliates will have no other option than to file a complaint and request damages.[13] Additional litigation, however, is unnecessary and should be avoided. The record has already been developed in this proceeding and the inequity and illegality of Duke's conduct is undeniable.

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[11] IGS Ex. 10 at 6.

[12] *Id.* at 6-7.

[13] Under R.C. 4928.18(D)(1), the Commission may "[i]mpose a forfeiture on the utility or affiliate of up to twenty-five thousand dollars per day per violation."

3. The Order is unlawful and unreasonable inasmuch as it is against the manifest weight of the evidence. The Order did not rely upon credible record evidence regarding Duke's ability to separate non-commodity charges from its POR program.

The Order justifies discriminating against CRES providers on the basis that Duke cannot currently separate non-commodity charges from its POR program. To support this conclusion, the Order relies upon pages 96-100 of Duke's Reply Brief. But that portion of Duke's brief does not contain even one citation to any part of the record. The Commission is required to issue orders based upon the record. R.C. 4903.09. Thus, its determination is unlawful and based upon conjecture.

Further, IGS and RESA presented evidence on the record that Duke can in-fact separate the non-commodity charges from its POR program. IGS witness White presented testimony that Duke currently is already separating out non-commodity charges for its affiliates Duke Energy One and not including those charges in an uncollectible expense rider.[14] Mr. White also explained that there are other utilities are currently allowing competitive suppliers to bill for non-commodity charges on the utility bill.[15] Further, given that Duke has bill ready functionality, which allows CRES providers to line item separate charges on the Duke bill, it would not be difficult for Duke to create a mechanism that flags non-commodity charges that are billed by CRES suppliers.

Even assuming Duke could not distinguish from CRES provider non-commodity charges and commodity charges (which is a dubious), Duke could simply require the non-commodity services that it bills be provided by a separate affiliate of a CRES provider, instead of the CRES provider directly. CRES providers have affiliates just like

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[14] Tr. Vol. XI at 3298.

[15] *See Id.* at 3211.

Duke, thus there is no reason why Duke could not bill for CRES affiliates in the same manner Duke bills for Duke Energy One.

Finally, even assuming Duke cannot *currently* separate non-commodity charges from its POR program, the Commission could order Duke to make the necessary modifications to its billing system to allow for the separation of non-commodity charges from the POR program. Duke clearly made these system upgrades to allow for its affiliate to bill for non-commodity charges. Thus, the Commission should reject the notion that Duke cannot, and could never, separate non-commodity charges from the POR program. Duke would be able to develop the systems to allow CRES providers to bill for non-commodity charges if the Commission ordered Duke to do so.

At a minimum, the Commission should open a separate docket to take additional evidence regarding Duke's current ability to separate non-commodity charges from its POR program. In that docket, the Commission should direct Duke to file testimony explaining its ability to separate non-commodity charges from its POR program. And, to the extent that Duke does not have that capability, Duke should include an estimate of the cost of updating its billing systems in order to separate non-commodity charges from POR. This result would be substantially more reasonable than the Order's holding, which is not based upon record evidence.

Duke undeniably has an incentive to claim that it is unable to bill for non-commodity charges for CRES suppliers. Duke wishes to protect its competitive affiliates from competition. The Commission though should not accept Duke's unsupported excuses as a reason to allow Duke to continue to offer unlawful preferential treatment to its affiliate. Rather, the Commission should exercise its authority and require Duke to allow CRES providers (or their affiliates) to bill for non-commodity charges on the Duke bill. To do otherwise would stifle the development of many of the innovative energy products and services that are currently being developed in the marketplace that are beneficial to customers.

4. The Order is unlawful and unreasonable inasmuch as it is arbitrary and against the manifest weight of the evidence. The Order arbitrarily, unjustly, and unreasonably prohibited CRES providers and third parties that do not participate in the POR program from utilizing the utility bill to invoice and collect charges related to non-commodity products and services. The Order's reasoning is not applicable to this class of providers.

As discussed above, the Order relied upon Duke's unsupported claim that it could not separate non-commodity charges from its POR program. But, not all CRES providers participate in the POR program. Indeed, the Order specifically holds that CRES providers may utilize consolidated billing but elect to opt-out of the POR program. In that case, there is no basis to prohibit a CRES provider from including non-commodity charges on the consolidated utility bill.

Moreover, CRES provider affiliates may offer non-commodity services. These companies do not participate in the POR program. The Order identified no justifiable basis to discriminate against these companies that compete directly with Duke Energy One.

Therefore, the Order contains overly broad prohibitions against non-commodity billing, which are not supported by the record evidence. On rehearing, at a minimum, the Commission should reverse its Order and direct Duke to allow CRES providers and their affiliates to place their non-commodity charges on the consolidated utility bill to the extent that they do not participate in the POR program.

B. The Order erred in authorizing Duke Ohio to establish a placeholder PSR.

1. **The Order would unlawfully set the level of compensation Duke would receive for wholesale energy and capacity because the Federal Power Act preempts the Commission from regulating the price of wholesale energy and capacity.**

In its Order, the Commission declined to address intervenor arguments that approval of the PPA would violate federal law, stating, "(t)he Commission declines 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."[16] IGS does not dispute that the Commission does not have authority to decide constitutional questions, but this is, by no means, a case of first impression. Moreover, the Commission most certainly has the authority, and, indeed, the responsibility, to determine whether it has jurisdiction to approve a proposal advanced in a Commission proceeding. Here, the Commission knows from abundant, longstanding precedent that it does not have jurisdiction over the pricing of wholesale energy and capacity, a matter that is unquestionably subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC").[17]

The PSR, in any form, would require the Commission to regulate the wholesale price of capacity and energy and would undermine Reliability Pricing Model ("RPM") approved by the FERC.[18] The federal courts have struck down arrangements in other

[16] Order at 48.

[17] "A wealth of case law confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce, including the justness and reasonableness of the rates charged." *PPL Energy Plus v. Nazarian*, Case Nos. 13-2419, 13-2424 at 7 (4th Cir. Ct. Appeals) (2014) (citing Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988)).

[18] IGS Ex. 12 at 8; IGS Ex. 13.

states that are very similar to the placeholder PSR authorized in the Order, holding that such arrangements undermine FERC's authority to establish a wholesale competitive pricing mechanism and that, accordingly, state regulatory commissions are preempted by federal law from approving mechanisms of this type.[19]

PJM's RPM sets a uniform price for electric generation at various locations throughout the PJM footprint. Such prices are set by competitive processes. In its order approving the RPM, FERC stated "in a competitive market, all suppliers will be paid the same price,"[20] and that "(i)n a competitive market, prices do not differ for new and old plants or for efficient and inefficient plants."[21] Thus, RPM rewards efficient sellers and drives inefficient sellers out of business.[22] The RPM Order also specifically holds that cost-of-service regulation is contrary to RPM because it does not provide incentives to minimize costs or maximize revenue, noting that "sellers *[of cost based generation]* have far weaker incentives to minimize costs under cost-of-service, because regulation forces a seller to reduce its prices when the seller reduces its cost."[23]

Moreover, the purpose of *uniform* locational electric pricing is to support infrastructure investment throughout PJM's footprint. The uniform clearing price is

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[19] *PPL Energy Plus v. Nazarian*; *PPL Energy Plus v. Soloman*, p. 28 Case No. 13-4330 (3rd Cir.) (Sep. 11, 2014).

[20] ER05-1410-001, Order Denying Rehearing and Approving Settlement Subject to Conditions Entry at 32 (Dec. 22, 2006) (hereinafter "RPM Order").

[21] RPM Order at 57.

[22] *Id.*

[23] *Id.*

intended to provide a transparent price signal three years in advance in order for market participants to respond.[24]

Indeed, federal courts have held that arrangements such as Duke's proposed PPA Rider undermine the RPM construct and are preempted by federal law. The Third and Fourth Circuits recently determined that state commissions cannot approve purchased power contracts between distribution utilities and wholesale generators that ensure that the generator receives a set amount of compensation that differs from that which the generator can obtain from market-based wholesale revenues.[25] The courts aptly named such arrangements "contracts for differences" because the contracts require the distribution utility to pay the difference between the wholesale market revenue and the cost-based revenue requirement.[26]

As the Third Circuit stated, a contract for difference is unlawful because it "supplements what the generators receive from PJM with an additional payment financed by payments from electric distribution companies . . . Because electricity distribution companies do not participate in PJM's capacity auction, and because PJM still pays generators the auction clearing price [the contract for differences] artfully steps around the capacity transactions facilitated by PJM."[27] The court further stated that "[I]f

[24] *Id.* at 59.

[25] *PPL Energy Plus v. Nazarian* at 7-10 ("The scheme thus effectively supplants the rate generated by the auction with an alternative rate preferred by the state . . . . The fact that it does not formally upset the terms of a federal transaction is no defense, since the functional results are precisely the same."); *PPL Energy Plus v. Solomon* at 24-29, Case No. 13-4330 (3rd Cir. Ct. Appeals) (2014).

[26] *PPL Energy Plus v. Nazarian* at 6; *PPL Energy Plus v. Soloman* at 24.

[27] *PPL Energy Plus v. Soloman* at 28.

FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject."[28]

The PPA rider is no different than the contracts for differences that were rejected by the Third and Fourth Circuits. The PPA rider compensates Duke for the difference between generation assets' market-based wholesale revenues and a cost-based revenue requirement. Such arrangements replace the amount of compensation that the market participant is intended to receive under RPM.

Moreover, even if the Commission is not directly preempted from approving the PPA, FERC could very well require that any ratepayer subsidy be deducted from the capacity revenues received from the OVEC generation. In a recent decision, FERC determined that subsidies provided for demand response must be included when bidding demand response into the New York Independent Operator ("NYISO") capacity markets.[29] FERC stated, "where the [resource] has agreed to accept a percentage of the market clearing price with a guarantee of a minimum monthly payment in return for a capacity obligation, that minimum payment, **coupled with other benefits or subsidies, is a reasonable proxy for the SCR's net cost of providing that capacity, which would be difficult to determine, and thus is a reasonable Offer Floor**."[30]

The above reasoning may apply to the PPA at issue in this proceeding. Requiring PPA-related generation resources to include subsidies in their offer floor

[28] *Id.* (quoting Miss. Power & Light Co. v Miss. ex rel. Moore, 487 U.S. 354, 377 (1988) (Scalia, J., concurring)).

[29] *New York Independent System Operator, Inc.*, FERC Docket Nos. EL07-39-006, *et al.*, 150 FERC ¶ 61,208, Order on Clarification, Rehearing, and Compliance Filing at 14-15 (Mar. 18, 2015).

[30] *Id.* at 11 (quoting New York Independent System Operator, Inc., FERC Docket Nos. *et. al.*, EL07-39-006, 131 FERC ¶ 61,170, Order, at 133 (May 20, 2010) (emphasis added)).

would make it much more likely that the generation resources do not clear in capacity auctions. Thus, it is possible that the Commission could place customers on the hook for a cost-based revenue requirement without a market-based capacity revenue stream to offset it. The prospect of saddling customers with such a one-sided deal is not in the public interest.

Rather than sidestepping the fundamental jurisdictional issue as it did in the Order, the Commission should squarely address this question on rehearing. Because the PSR would require the Commission to regulate wholesale prices exclusively within the jurisdiction of FERC, or otherwise saddle customers with significant and excessive above-market costs, the Commission, on rehearing, should order Duke to remove the PSR from its tariff.

2. The Order erred in finding that the PSR may be authorized under R.C. 4928.143(B)(2)(d).

As the Commission correctly recognized in its Order, the PSR can only be included as a provision of the Duke ESP if it is authorized by R.C. 4928.143(B)(1) or B(2). R.C. 4928.143(B)(1), which mandates the inclusion of "provisions relating to the supply and pricing of electric generation service," is not applicable because the PSR was proposed simply as hedging mechanism. As such, the PSR would have no effect on either the physical supply of generation service or on the price of such service; notwithstanding that it would obviously affect the amount both shopping and non-shopping customers would pay each month. Thus, the Commission ultimately supported its decision to approve the placeholder PSR with R.C. 4928.143(B)(2)(d), which permits inclusion in an ESP of:

> 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.

The Order then parsed R.C. 4928.143(B)(2)(d) to identify three separate criteria that the PSR had to satisfy to qualify for inclusion in the ESP under this provision. The Commission concluded (1) that the PSR was a "charge," (2) that it "related to limitations on customer shopping for retail electric generation service," and (3) that it "would have the effect of stabilizing or providing certainty regarding retail electric service."[31] Although no one would dispute that the PSR is a charge, this section does not authorize the Commission to establish a non-bypassable charge, and, even if it did, the Order failed to satisfy the other two criteria.

Initially, R.C. 4928.143(B)(2)(d) does not authorize the Commission to approve the PSR. R.C. 4928.143 provides only two instances in which the Commission may authorize non-bypassable generation-related riders: divisions (B)(2) (b) and (c). Under those two divisions, a non-bypassable charge is available to recover costs associated with generating facilities *under construction or constructed after 2009* that meet additional statutory requirements. The General Assembly's specific directive that a non-bypassable generation-related charge may be authorized under these two sections indicates a lack of authority to authorize such a charge in any other circumstances. The Supreme Court has stated:

> 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 *sub judice*, the statute involved is a definitional

[31] Order at 43-45.

> 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.

Montgomery County Bd. of Comn'rs v. Pub. Util. Comm'n of Ohio, 28 Ohio St.3d 171, 175 (1986) (citations omitted). Because the PSR does not pertain to the construction of new generation or otherwise satisfy the criteria of divisions (b) and (c), it cannot be lawfully authorized in an ESP. Therefore, on rehearing the Commission should reject it.

Even assuming that R.C. 4928.143(B)(2)(d) allows for a non-bypassable charge, the Order failed to satisfy the three part test. With respect to the second criterion, the Order concedes that the PSR would impose no physical constraint on shopping, which is plainly the type of constraint the legislature had in mind when providing for the inclusion of terms and conditions related to limiting customer shopping for retail generation service.[32] However, the Order then goes on to find that the PSR constitutes a "financial limitation" on shopping. This tortured interpretation of "limitation" has no basis in logic. Because PSR is non-bypassable, it will apply to both shopping and non-shopping customers. Thus, it is no more a limitation on shopping than it is a limitation on default service.

On the other hand, if by "financial limitation" the Order means that the PSR would have a chilling effect on shopping, that may well be true, but that is plainly not a permissible objective under any reading of the statute and would be contrary to the state policy of promoting a robustly competitive electric market. Indeed, under the Order's theory, any charge could be described as a "financial limitation," which would make a mockery of the statutory criteria governing terms that can be included in an

[32] Order at 45.

ESP. The Supreme Court of Ohio has already rejected similar interpretations of R.C. 4928.143(B)(2), stating, the Commission's "interpretation would remove any substantive limit to what an electric security plan may contain, a result we do not believe the General Assembly intended."[33]

The Commission's conclusion that the PSR will have the effect of stabilizing or providing certainty regarding retail electric service is also fatally flawed. First, the PSR does not relate to retail electric service in any way. It relates to a wholesale contract with a generating facility. By no means does the PSR provide retail electricity to any consumer in Duke's service territory. Coupled with the Commission's financial limitation reasoning, the Commission's reasoning would hold that it could approve *any* rider that leads to a charge or credit that may be related to market fundamentals. For example, the Commission could approve an investment in a risky hedge fund that is anticipated to make money when energy prices are high and lose money when they are low. While this type of gambling with consumer funds is clearly unlawful, it is no different than what the Order approved.

The PSR's complete disconnection from retail electric service aside, the Order expressly acknowledged that "the impact of the proposed PSR cannot be known to any degree of certainty" and 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."[34] How, then, can the Commission say in the next breath that the rider will have the effect of stabilizing or providing certainty regarding retail electric service?

[33] *In re Application of Columbus Southern Power*, 128 Ohio St. 3d 512, 521 (2011).

[34] Order at 46.

Because it is impossible to know in advance whether rider will result in a charge or a credit, there is no basis for this conclusion. In fact, the customer that enters into a long-term fixed-price contract with a competitive provider because he/she values stability and certainty would, under the PSR, no longer have the ability to budget.[35] Thus, the PSR eliminates a customer's ability to obtain certainty and stability from a fixed-price product.

Moreover, approval of the PPA will inject uncertainty and instability into the retail electric market. Requiring customers to subsidize uneconomic generation will discourage market entry and development of the competitive market.[36] This negative market signal will reverberate into both the wholesale and retail electric markets.[37] The Commission should grant rehearing on this ground.

3. The Order's authorization of the PSR is against the manifest weight of the evidence. Even under the Order's flawed legal reasoning, the PSR does not serve as a hedge against rising electricity prices.

The Order held that an appropriately structured PPA may provide a hedge for customers against volatile electric prices. In addition to the various legal concerns identified above, the PSR simply will not provide any value for customers.

The Order's finding that the PSR may serve as a hedge is based upon the unsupported conclusion in the testimony of witnesses Wathen and Henning. The Order accepted their bald claim that when energy prices are low, it will be a charge, but when they are high, it will be a credit. But neither witness performed any analysis to test their

[35] *See generally* Tr. Vol. II at 472-73.

[36] IGS Ex. 12 at 19.

[37] *Id.*

claim.[38] And, Mr. Henning conceded that the PSR would only be a hedge if market prices rise faster than OVEC's cost of production.[39] But, if market prices rise at the same pace, or slower, than OVEC's cost of production, then the PSR would cause customers to experience even more price volatility.[40] In addition to the PSR being a cash flow drain to customers, Duke's cash flow analysis indicated that the PSR is not in fact a hedge.

Duke's own cash flow projection predicts that as market prices [redacted] OVEC's costs.[41] Specifically, Duke projects that there will be a large market price [redacted] as [redacted] carbon regulations coupled with an [redacted] in OVEC's cost of production.[42] Because these [redacted] will lead to no additional margin for the OVEC units, the PSR will *not* credit additional revenues to customers in the face of [redacted]. Thus, based upon Duke's own projections, the PSR does not provide a hedge. Indeed, subsequent to the hearing in this case, Duke's 2014 Q4 FERC FORM 1 reflected that Duke took a $94 million economic impairment on its OVEC investment because proposed environmental rules could increase the costs that OVEC must pay:

> At December 31, 2013, the most significant of the Other non-consolidated VIEs was Duke Energy Ohio's 9 nine percent ownership interest in OVEC. Through its ownership interest in OVEC, Duke Energy Ohio has a contractual arrangement to buy power from OVEC's power plants through June 2040. The initial carrying value of this contract was recorded as an

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[38] Tr. Vol. II at 643.

[39] Tr. Vol. I at 223.

[40] Tr. Vol. I at 225-226; see also Tr. Vol. XII at 3398-99.

[41] Tr. Vol IX CONFIDENTIAL at 2517-18.

[42] IGS Ex. 12 at 13-14 and TH-7.

> intangible asset when Duke Energy acquired Cinergy in April 2006. Proceeds from the sale of power by OVEC to its power purchase agreement counterparties are designed to be sufficient to meet its operating expenses, fixed costs, debt amortization and interest expense, as well as earn a return on equity**. Accordingly, the value of this contract is subject to variability due to fluctuations in power prices and changes in OVEC's costs of business, including costs associated with its 2,256 MW of coal-fired generation capacity.** ***Proposed environmental rulemaking could increase the costs of OVEC, which would be passed through to Duke Energy Ohio. In 2014, Duke Energy recorded a $94 million impairment related to OVEC.***[43]

Given Duke's own negative projections regarding its OVEC interest, it is apparent that the PSR is not a hedge against rising electric prices. Therefore, the Order should be reversed because it is against the manifest weight of the evidence.

4. The Order erred in authorizing Duke to establish the PSR because the PSR provides Duke with an anticompetitive subsidy in violation of R.C. 4928.02(H), which prohibits the Commission from providing guaranteed cost recovery for a competitive service or a product and service other than retail electric service.

R.C. 4928.02(H) declares that it is the policy of this state to:

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

As recounted by the Commission in its Order, numerous intervenors argued that approval of the PSR would run afoul of this policy by creating an anticompetitive subsidy

[43] Duke Energy Ohio, Inc. FERC Form 1, 2014 Q4, p. 123.128 (Apr. 17, 2015) Accession Number: 20150417-8022 (emphasis added).

that would flow to Duke's OVEC assets and provide a guaranteed cost recovery to Duke's ultimate shareholders, not mention a guaranteed return on its OVEC investment.

The Commission glosses over this argument in its Order, claiming that the PPA is a non-bypassable generation rate and that the statute only prohibits the recovery of generation-related costs through distribution rates.[44] This rationale is wrong on several counts.

First, while the OVEC assets may be generation-related, the PSR does not entail the provision of retail electricity to customers. Rather, the PSR entails a wholesale purchase power agreement that is disconnected from retail electric service. Thus, the PSR relates to a product or service other than retail electric service. R.C. 4928.02(H) prohibits subsidies flowing to such unregulated services.

Second, even assuming that the PSR is generation-related as the Order claims, the Ohio Supreme Court observed, "(p)ursuant to R.C. 4928.03 and 4928.05, electric generation is an unregulated, competitive retail electric service, while electric distribution remains a regulated, noncompetitive service pursuant to R.C. 4928.15(A)."[45] Thus, generation providers are no longer subject to the Commission's economic regulation, and the Commission cannot require customers to guarantee cost recovery and a return on generation assets in any event, whether through distribution rates or amechanism like the PSR. Such a result would plainly be at odds with the state policy codified in R.C. 4928.02(H).

[44] Order at 48.

[45] *Industrial Energy Users-Ohio v. Pub Util. Comm'n*, 2008-Ohio-990 at ¶6.

Third, although the Commission characterized the PSR as a generation-related charge, the PSR is imposed on all Duke distribution customers regardless of their choice of generation supply. Indeed, this charge would not pay for the cost of generation that serves customers, and customers will pay that charge solely as a result of the fact that they are distribution customers of Duke. Thus, as a practical matter the PSR is no different than a charge related to distribution service or any other non-competitive service. It is unthinkable that the General Assembly intended to permit the Commission to create the anticompetitive subsidy that will result from approval of this charge simply based on the manner in which the charge is labeled. In short, it is unlawful for the Commission to require distribution customers to provide out-of-market compensation to support Duke's uneconomic investment in unregulated generation resources.

5. **The Order erred in authorizing Duke to establish the PSR because approval of the PSR allows Duke to evade the corporate separation requirements contained in R.C. 4928.17 by providing an undue preference and a competitive advantage to Duke in the form of a guaranteed cost recovery for an unregulated service and because approval of the rider facilitates the abuse of market power.**

The placeholder PSR contemplates that Duke, an EDU, will enter into a cost-based purchase power agreement utilizing owned generation assets or, potentially, the generation assets of an affiliate. Although the Commision has temporarily excused Duke from its previous commitment to divest itself of its OVEC Entitlement assets, this does not relieve Duke from complying with the corporate separation requirements of R.C. 4928.17. Approval of the PSR would unlawfully allow Duke to evade these requirements.

R.C. 4928.17 provides that a corporate separation plan must prevent an EDU from providing a competitive advantage or preference to an affilate or portion of its business engaging in competitive activities,[46] stating that, among other things, "the plan must satisf(y) the public interest in preventing unfair competitive advantage and preventing the abuse of market power" [R.C. 4928.17(A)(2)] and must be "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." [R.C. 4928.17(A)(3)] R.C. 4928.01(A)(18) defines "market power" as the "the ability to impose on customers a sustained price for a product or service above the price that would prevail in a competitive market." Approval of the PSR violates each of these requirements.

There can be no question that the PSR could provide Duke with above-market compensation for unregulated generation assets. This above-market compensation unlawfully allows Duke to exercise market power and to provide an undue preference and competitive advantage to an unregulated internal business division. This is exactly the type of arrangement that corporate separation requirements are designed to prevent. Thus, rehearing should be granted on this ground.

III. CONCLUSION

For the reasons stated herein, on rehearing the Commission should grant this application for rehearing. In its Entry, the Commission should direct Duke to allow

[46] Rule 4901:1-37-01(A) defines affiliates as "companies that are related to each other due to common ownership or control. The affiliate standards shall also apply to any internal merchant function of the electric utility whereby the electric utility provides a competitive service."

CRES providers to place non-commodity charges on the consolidated utility bill and reverse its authorization of the placeholder PSR.

Respectfully submitted,

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