

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR.	) ) )	Case No. 17-872-EL-RDR
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Rider PSR.	) ) )	Case No. 17-873-EL-ATA
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	) ) )	Case No. 17-874-EL-AAM

---

**MOTIONS OF INDUSTRIAL ENERGY USERS-OHIO, THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL, OHIO PARTNERS FOR AFFORDABLE ENERGY, THE  
KROGER CO., AND OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP FOR  
AN ORDER DISMISSING THE APPLICATION OR IN THE ALTERNATIVE STAYING THE  
PROCEEDING  
AND  
MEMORANDUM IN SUPPORT  
PUBLIC VERSION**

---

Frank P. Darr (Reg. No. 0025469)  
(Counsel of Record)  
Matthew R. Pritchard (Reg. No. 0088070)  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17<sup>TH</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 469-8000  
Telecopier: (614) 469-4653  
fdarr@mwncmh.com  
(willing to accept service by e-mail)  
mpritchard@mwncmh.com  
(willing to accept service by e-mail)

**ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**

Bruce Weston (Reg. No. 0016973)  
Ohio Consumers' Counsel

William J. Michael (Reg. No. 0070921)  
Counsel of Record  
Jodi Bair (Reg. No. 0062921)  
Kevin Moore (Reg. No. 0089228)  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
Telephone [Michael]: (614) 466-1291  
Telephone [Bair]: (614) 466-9559  
Telephone [Moore]: (614) 387-2965  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[Jodi.bair@occ.ohio.gov](mailto:Jodi.bair@occ.ohio.gov)  
[Kevin.moore@occ.ohio.gov](mailto:Kevin.moore@occ.ohio.gov)  
(all will accept service via email)

**ON BEHALF OF THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Colleen L. Mooney (Reg. No. 0015668)  
PO Box 12451  
Columbus, OH 43212-2451  
Telephone: 614-488-5739  
[cmooney@ohiopartners.org](mailto:cmooney@ohiopartners.org)  
(will accept service via email)

**ON BEHALF OF OHIO PARTNERS FOR AFFORDABLE ENERGY**

Kimberly W. Bojko (Reg. No. 0069402) (Counsel of Record)  
James D. Perko, Jr. (Reg. No. 0093312)  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
(614) 365-4100  
[Bojko@carpenterlipps.com](mailto:Bojko@carpenterlipps.com)  
[Perko@carpenterlipps.com](mailto:Perko@carpenterlipps.com)  
(will accept service via email)

**ON BEHALF OF OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

Angela Paul Whitfield (0068774) (Counsel of Record)  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300

Columbus, Ohio 43215  
Telephone: (614) 365-4100  
Email: [paul@carpenterlipps.com](mailto:paul@carpenterlipps.com)  
(will accept service via email)

**ON BEHALF OF THE KROGER Co.**

## TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	7
II. DUKE HAS REPACKAGED ITS REJECTED REQUEST FOR ABOVE-MARKET GENERATION-RELATED WHOLESALE COSTS.....	8
III. THE COMMISSION SHOULD DISMISS AN APPLICATION WHEN THE APPLICATION AND SUPPORTING MATERIALS DEMONSTRATE THAT THE COMMISSION IS WITHOUT AUTHORITY TO GRANT THE RELIEF REQUESTED .....	10
IV. DUKE’S APPLICATION SHOULD BE DISMISSED BECAUSE THE COMMISSION LACKS AUTHORITY UNDER STATE AND FEDERAL LAW TO GRANT THE RELIEF REQUESTED .....	13
A. The Commission is without authority to establish a mechanism for the recovery of Duke’s above-market generation-related wholesale costs of OVEC .....	14
1. The general jurisdiction and traditional rate setting statutes do not extend the Commission’s jurisdiction to the pricing of wholesale electric generation services.....	14
2. The Commission’s assertion of jurisdiction to price capacity service of AEP-Ohio does not provide a rationale for the Commission to assert jurisdiction to protect Duke from the losses it incurs under the ICPA .....	16
3. Duke’s Application fails to demonstrate a basis for the Commission to assert jurisdiction to increase Duke’s compensation to cover its losses associated with OVEC.....	18
B. The Commission is without authority under its general jurisdiction or its traditional rate making authority to establish a recovery mechanism for a service that has been declared competitive.....	18
C. The Commission is without authority to authorize transition revenue or its equivalent.....	21
D. The Commission is prohibited from authorizing Duke to recover an anticompetitive subsidy or generation-related revenue through a distribution-like rate in violation of R.C. 4928.02(H).....	23
E. A Commission order authorizing a wholesale rate other than that approved by FERC is preempted by federal law.....	25
F. Duke seeks an untimely rehearing of the <i>Duke ESP III</i> Opinion and Order.....	27

G.	Because the Application and supporting materials fail to demonstrate a basis for relief from the Commission, the Commission should dismiss the Application .....	29
V.	DUKE’S APPLICATION SHOULD BE STAYED UNTIL THE COMMISSION AND THE SUPREME COURT OF OHIO HAVE REVIEWED THE COMMISSION’S ORDER AUTHORIZING THE PSR AS A TERM OF DUKE’S ESP .....	30
VI.	CONCLUSION.....	32

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR.	)	Case No. 17-872-EL-RDR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Rider PSR.	)	Case No. 17-873-EL-ATA
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 17-874-EL-AAM
	)	

---

**MOTIONS OF INDUSTRIAL ENERGY USERS-OHIO, THE OFFICE OF THE OHIO CONSUMERS' COUNSEL, OHIO PARTNERS FOR AFFORDABLE ENERGY, THE KROGER CO., AND OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP FOR AN ORDER DISMISSING THE APPLICATION OR IN THE ALTERNATIVE STAYING THE PROCEEDING**

---

Under Rule 4901-1-12, Ohio Administrative Code ("O.A.C."), Industrial Energy Users-Ohio ("IEU-Ohio"), the Office of the Ohio Consumers' Counsel ("OCC"), Ohio Partners for Affordable Energy ("OPAE"), The Kroger Co. ("Kroger"), and Ohio Manufacturers' Association Energy Group ("OMAEG") (collectively "Joint Movants") move the Public Utilities Commission of Ohio ("Commission") for an order dismissing the Applications (for purposes of this Motion and the supporting Memorandum in Support, the Applications will be referred to collectively as the Application). In the alternative, Joint Movants move the Commission for an order staying this proceeding until such time as the Commission issues an entry on rehearing in Case Numbers 14-841-EL-SSO, *et al.*, and

appellate review is completed. The reasons supporting these Motions are set out in the accompanying Memorandum in Support.

Respectfully submitted,

/s/ Frank P. Darr

Frank P. Darr (Reg. No. 0025469)  
(Counsel of Record)  
Matthew R. Pritchard (Reg. No. 0088070)  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17<sup>TH</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 469-8000  
Telecopier: (614) 469-4653  
fdarr@mwncmh.com  
(willing to accept service by e-mail)  
mpritchard@mwncmh.com  
(willing to accept service by e-mail)

**On Behalf of Industrial Energy Users-Ohio**

Bruce Weston (Reg. No. 0016973)  
Ohio Consumers' Counsel

/s/ William J. Michael

William J. Michael (Reg. No. 0070921)  
Counsel of Record  
Jodi Bair (Reg. No. 0062921)  
Kevin Moore (Reg. No. 0089228)  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
Telephone [Michael]: (614) 466-1291  
Telephone [Bair]: (614) 466-9559  
Telephone [Moore]: (614) 387-2965  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[Jodi.bair@occ.ohio.gov](mailto:Jodi.bair@occ.ohio.gov)  
[Kevin.moore@occ.ohio.gov](mailto:Kevin.moore@occ.ohio.gov)  
(all will accept service via email)

**ON BEHALF OF THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

/s/ Colleen L. Mooney

Colleen L. Mooney (Reg. No. 0015668)

PO Box 12451  
Columbus, OH 43212-2451  
Telephone: 614-488-5739  
cmooney@ohiopartners.org  
(will accept service via email)

**ON BEHALF OF OHIO PARTNERS FOR  
AFFORDABLE ENERGY**

/s/ Kimberly W. Bojko

---

Kimberly W. Bojko (Reg. No. 0069402)  
(Counsel of Record)  
James D. Perko, Jr. (Reg. No.0093312)  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
(614) 365-4100  
[Bojko@carpenterlipps.com](mailto:Bojko@carpenterlipps.com)  
[Perko@carpenterlipps.com](mailto:Perko@carpenterlipps.com)  
(will accept service by email)

**ON BEHALF OF OHIO MANUFACTURERS'  
ASSOCIATION ENERGY GROUP**

/s/ Angela Paul Whitfield

---

Angela Paul Whitfield (Reg. No. 0068774)  
(Counsel of Record)  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300  
Columbus, Ohio 43215  
Telephone: (614) 365-4100  
Email: [paul@carpenterlipps.com](mailto:paul@carpenterlipps.com)  
(will accept service via email)

**ON BEHALF OF THE KROGER CO.**



**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Modify Rider PSR.	)	Case No. 17-872-EL-RDR
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Amend Rider PSR.	)	Case No. 17-873-EL-ATA
	)	
In the Matter of the Application of Duke Energy Ohio, Inc., for Approval to Change Accounting Methods.	)	Case No. 17-874-EL-AAM
	)	

---

**MEMORANDUM IN SUPPORT**

---

**I. INTRODUCTION**

In the Applications in this case, Duke Energy Ohio, Inc. ("Duke") seeks once again to saddle customers with the wholesale price risk related to Duke's interest in the Ohio Valley Electric Corporation ("OVEC") through 2040. Three years ago, Duke submitted a similar request to the Commission seeking a so called "Price Stabilization Rider" ("PSR") in its electric security plan. Finding that Duke failed to show that such a charge would produce rate stability or be in the public interest under R.C. 4928.143, the Commission denied Duke's request. The lawfulness and reasonableness of that decision is still under review by the Commission.<sup>1</sup>

In what is nothing more than an untimely application for rehearing, Duke now requests authorization to shift the price risk associated with its interest in OVEC from its

---

<sup>1</sup> The Commission granted rehearing to afford itself more time to consider the issues raised by parties.

shareholder to its retail customers through June 30, 2040. Duke claims that the Commission may authorize the PSR based on the Commission's general jurisdiction and traditional rate setting authority. Those claims are legally unsound. Both state and federal law prohibit the Commission from increasing Duke's compensation for a wholesale electric generation service. Because the Application and supporting materials demonstrate that the Commission is without authority to grant the relief Duke is seeking, the Commission should dismiss the Application. Alternatively, the Commission should stay this proceeding until the Commission and Supreme Court of Ohio address the lawfulness of the PSR in Duke's pending ESP case.

## **II. DUKE HAS REPACKAGED ITS REJECTED REQUEST FOR ABOVE-MARKET GENERATION-RELATED WHOLESALE COSTS**

In its 2014 ESP case, Duke sought authorization of a rider that would permit it to recover the net above-market wholesale costs it incurred because of its election to retain an interest in coal-fired generation facilities operated by OVEC. Duke claimed that the rider would "stabilize" retail rates and was a lawful and reasonable provision of an ESP. Duke sought to implement the PSR for a period that was to last as long as it is taking power from OVEC. *In the Matter of the 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 Nos. 14-841-EL-SSO, *et al.*, Opinion and Order at 15 (Apr. 2, 2015) ("*Duke ESP III*"). Customers and generation competitors urged the Commission to reject the request on grounds that the rider unlawfully and unreasonably shifted the price risk of the OVEC facilities to retail customers, that the Commission lacked authority to approve the rider under both state and federal law, that the rider unlawfully collected transition charges from

customers, and that Duke had failed to show that the rider provided any customer benefits. *Id.*, Opinion and Order at 15-42.

Although the Commission found the inaptly named PSR was a permissible term of Duke's ESP and authorized a placeholder rider for the term of the ESP, it rejected Duke's request to saddle retail customers with the wholesale losses Duke incurred because of its retained interest in OVEC. *Id.*, Opinion and Order at 46-47. The Commission found that "the rider may result in a net cost to customers, with little offsetting benefit from the rider's intended purpose" over the rider's proposed three-year term. *Id.* at 46. Underlying the Commission's conclusions was its concern that there was great uncertainty and speculation in projecting the net impact of the proposal. *Id.* Based on the record before it, the Commission was not "persuaded that the PSR proposal put forth by Duke in the present proceedings would, in fact, promote stability, as Duke claims, or that it is in the public interest." *Id.*

In response to the Commission's ESP Order, customers and competitors filed applications for rehearing challenging the Commission's authorization of the rider. Likewise, Duke sought rehearing of the Commission's decision to set the rider at zero. In two related assignments of error concerning the PSR, Duke argued that the Commission erred because it failed to allow Duke to offer a "hedge" that Duke claimed was fully supported by the record. The Commission granted rehearing of the applications for rehearing of both the customers and Duke for the purpose of further consideration. *Id.*, Entry on Rehearing at 2-3 (May 28, 2015).

The Commission has not issued a final appealable order addressing the applications for rehearing. Nonetheless, in this proceeding, Duke seeks to implement the

PSR rider again based on a new legal theory. Under this new theory, it alleges the Commission has authority to implement the PSR outside of an ESP. In support of that end, Duke invokes the Commission's general jurisdiction and rate setting statutes as the basis for Commission approval of the PSR. Duke also seeks amendments to its PSR including the removal of a requirement that the rider be severable from the current ESP, and seeks authorization to defer and then bill and collect from customers an undisclosed amount through 2040. Application, *passim*.

Although Duke invokes the Commission's general rate making authority as the legal basis for its requested relief, *id.* at 2,<sup>2</sup> the outcome that Duke seeks is the same one that it sought in 2014. Authorization would permit Duke to collect from distribution customers through 2040 the difference between the cost Duke is incurring because of its management's decision to retain an interest in OVEC and the revenue Duke receives from liquidating the generation attributes of its OVEC interest in the wholesale markets of PJM Interconnection, LLC ("PJM"). Application at 5. As Duke freely admits, the revenue it seeks to collect is generation-related, and the relief, if granted, will shift the price risk associated with the OVEC facilities from Duke's stockholder to retail ratepayers. Wathen Testimony at 7 & 11-12.

**III. THE COMMISSION SHOULD DISMISS AN APPLICATION WHEN THE APPLICATION AND SUPPORTING MATERIALS DEMONSTRATE THAT THE COMMISSION IS WITHOUT AUTHORITY TO GRANT THE RELIEF REQUESTED**

---

<sup>2</sup> The Application and supporting testimony are not wholly consistent concerning the legal authority that Duke is invoking. In supporting testimony, for example, Mr. Wathen points to the Commission's authorization of the PSR in Duke's prior electric security plan case as the authority for the collection proposed in this case. Direct Testimony of William Don Wathen, Jr. on Behalf of Duke Energy Ohio, Inc. at 5 (Mar. 31, 2017) ("Wathen Testimony").

The General Assembly has afforded the Commission broad authority to manage its docket. R.C. 4901.13 provides that the "commission may adopt and publish rules to govern its proceedings and to regulate the mode and manner of all ... hearings relating to parties before it." "Under R.C. 4901.13 the commission has broad discretion in the conduct of its hearings." *Duff v. Pub. Util. Comm'n of Ohio*, 56 Ohio St.2d 367, 379 (1978). "It is well-settled that pursuant to R.C. 4901.13, the commission has the discretion to decide how, in light of its internal organization and docket considerations, it may best proceed to manage and expedite the orderly flow of its business, avoid undue delay and eliminate unnecessary duplication of effort." *Toledo Coalition for Safe Energy v. Pub. Util. Comm'n of Ohio*, 69 Ohio St.2d 559, 560 (1982) (internal citation omitted).

In practice, the Commission has frequently granted motions to dismiss without hearing when an applicant has sought relief that the Commission could not lawfully authorize.

In a 2009 case, the Commission granted a motion to dismiss filed by several intervenors of an EDU's application for inclusion of certain projects in its energy efficiency and peak demand reduction ("EE/PDR") compliance plan because the application demonstrated that the projects did not meet statutory requirements. *In the Matter of the Energy Efficiency and Peak Demand Reduction Program Portfolio of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case Nos. 09-384-EL-EEC, *et al.*, Entry at 2-3 (Dec. 16, 2009).

In a 2011 case, the Commission granted a motion to dismiss a request by the Office of the Ohio Consumers' Counsel ("OCC") for a show cause order against AT&T Ohio because an intervening change of law rendered the request for the show cause

order moot. *In the Matter of the Application of AT&T Ohio for Approval of an Alternative Form of Regulation of Basic Local Exchange Service and Other Tier 1 Services Pursuant to Chapter 4901:1-4, Ohio Administrative Code*, Case Nos. 06-1013-TP-BLS, *et al.*, Entry at 4 (May 19, 2011).

In a 2004 case, the Commission granted a motion filed by a railroad track owner seeking dismissal of an application for an exemption of the requirement for school buses and carriers of hazardous materials to stop at a railroad crossing. The dismissal was granted after the Commission Staff submitted a letter demonstrating that the crossing did not meet the statutory requirements for an exemption. *In the Matter of a Request for an Exemption from Stopping for School Buses and Other Motor Vehicles at the Highway/Railroad Grade Crossing Located at U.S. Route 6 (477-636E), Village of Napoleon, Henry County*, Case No. 03-2524-RR-RCP, Entry at 1 (June 2, 2004).

In a 1989 case, the Commission granted a motion to dismiss an application seeking a boundary change for a telephone exchange because the application failed to state sufficient facts to support a finding that service was inadequate as required by the applicable statutes. *In the Matter of the Petition of Thelma Penwell and Other Subscribers of the Amanda Exchange of GTE North Inc., Requesting a Boundary Change*, 1989 Ohio PUC LEXIS 818 (Aug. 9, 1989).

This litany of cases demonstrates that the Commission has frequently and properly exercised its authority to dismiss an application without hearing when the application and supporting materials demonstrate that the Commission is without authority to grant the relief requested in the application.<sup>3</sup>

---

<sup>3</sup> In one instance, a former Commissioner chastised the Commission for failing to summarily dismiss a Duke application that parties moved to dismiss because the relief Duke sought would violate terms of an approved

**IV. DUKE'S APPLICATION SHOULD BE DISMISSED BECAUSE THE COMMISSION LACKS AUTHORITY UNDER STATE AND FEDERAL LAW TO GRANT THE RELIEF REQUESTED**

To support its request for authorization of a generation-related charge, Duke foregoes seeking relief under R.C. 4928.143, the provision under which the Commission authorized the PSR as a term of the current ESP. *Duke ESP III*, Opinion and Order at 46-47. Duke instead invokes the Commission's general jurisdiction, R.C. 4905.04 through 4905.06, the Commission's general authority over utility accounts, R.C. 4905.13, and the traditional rate setting statute, R.C. 4909.18. Application at 2. According to Duke, "[its] Application completely disassociates Rider PSR from the current ESP, thereby ensuring 'that all other provisions of its ESP will continue.'" Wathen Testimony at 10. See, also, Application at 8 (requested relief "disassociates the rider proceeding from the [Duke] ESP III proceeding").

The Commission, however, is not authorized by the general jurisdiction or traditional rate making statutes to provide the relief Duke requests. Additionally, authorization of the rider would violate statutory prohibitions of orders authorizing an EDU to bill and collect transition revenue or its equivalent and unlawful subsidies. Authorization of the charge is also preempted by federal law. Further, Duke's application to modify terms of the PSR approved in the *Duke ESP III Case* is an untimely application for rehearing. For several reasons, therefore, the Commission should dismiss the Application.

---

stipulation. *In the Matter of the Application of Duke Energy Ohio, Inc., for the Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case Nos. 12-2400-EL-UNC, *et al.*, Concurring Opinion of Commissioner Lynn Slaby (Feb. 13, 2014).

**A. The Commission is without authority to establish a mechanism for the recovery of Duke's above-market generation-related wholesale costs of OVEC**

The Commission is a creature of statute and may exercise only that authority granted to it by statute. *Lucas County Commissioners v. Pub. Util. Comm'n of Ohio*, 80 Ohio St.3d 344, 347 (1997). R.C. 4905.04, 4905.05, and 4905.06 and R.C. Chapters 4909 and 4928 all apply to public utilities as that term is defined in R.C. 4905.02 and 4905.03. As defined by these statutes, the authority of the Commission does not extend to the authorization of a mechanism to protect Duke from wholesale price risk because it retained an interest in OVEC. This conclusion holds even under the Commission's reading of the jurisdictional statutes in the *AEP-Ohio Capacity Charge Case*.<sup>4</sup>

**1. The general jurisdiction and traditional rate setting statutes do not extend the Commission's jurisdiction to the pricing of wholesale electric generation services**

Under R.C. 4905.02, "every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in Section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit," is a public utility. As identified by R.C. 4905.03, a public utility includes a company "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*." R.C. 4905.03(C) (emphasis added). (These definitions also expressly exempt from Commission jurisdiction a regional transmission organization. *Id.*) The functional definitions thus specify that Commission regulation is

---

<sup>4</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 & 22 (July 2, 2012) ("*AEP-Ohio Capacity Charge Case*")



confined to persons engaged in the business of performing the provision of supplying electricity to end-use customers in Ohio.

Although Duke states it is offering retail customers something it refers to as “price mitigation,” Application at 8, the Application and supporting materials demonstrate that the true nature of the rider is to assure that Duke is held harmless from the wholesale contract costs associated with its decision to retain its interest in OVEC. As Duke itself explains, the generation it receives from OVEC is not and will not be used to provide any generation supply to retail customers. Wathen Testimony at 4. Rather, Duke is seeking to bill and collect the difference between the costs and revenue related to its interest in OVEC. Application at 2 n.1. The costs are determined by a wholesale contract, the FERC-approved Inter-Company Power Agreement (“ICPA”). Application at 4. The revenue is determined by the wholesale energy and capacity auctions established under the FERC-approved PJM tariffs. Application at 5 & Wathen Testimony at 4.<sup>5</sup> To insulate Duke from the price risk it has because of its interest in OVEC, Duke would bill and collect the difference under the PSR from retail customers. Application at 5 & Wathen Testimony at 7 (rider subject to true up).

Retail customers do not receive any service for their payments because the “price mitigation” that Duke is offering its retail customers is wholly illusory both in the immediate and extended term. In the near term, as the Commission already has determined, Duke failed to show that the rider would be anything other than a cost to retail customers during the term of the ESP. *Duke ESP III*, Opinion and Order at 47. [REDACTED]

[REDACTED]

---

<sup>5</sup> According to Duke, neither of these wholesale arrangements is subject to Commission review. Wathen Testimony at 6-7.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Rather than providing customers a “service,” the PSR would reassign the market risk of OVEC to customers. As Duke itself explains, “[a]s long as Rider PSR is active, Duke Energy Ohio’s shareholders [sic]<sup>6</sup> gain nothing and lose nothing related to the Company’s participation in the ICPA.” Wathen Testimony at 12.

The Commission’s jurisdiction is limited to the regulation of electric services provided by electric light companies to retail customers. This Application has nothing to do with the provision of retail electric service; OVEC-related generation is not part of the package that Duke is proposing to provide its retail customers. Rather, Duke is seeking to transfer its wholesale price risk to retail customers. Based upon the well-understood statutes defining the types of entities and transactions over which the Commission may exercise authority, the Commission is without jurisdiction to approve a transfer of wholesale price risk unrelated to any retail service to Duke’s retail customers.

**2. The Commission’s assertion of jurisdiction to price capacity service of AEP-Ohio does not provide a rationale for the Commission to assert jurisdiction to protect Duke from the losses it incurs under the ICPA**

The Commission’s approval of a price for capacity service used by competitive retail electric service providers of AEP-Ohio does not alter the conclusion that the Commission is without authority to insulate Duke from the price risk arising from its

---

<sup>6</sup> Because Duke is a wholly-owned subsidiary of Duke Energy Corporation, it has only one shareholder. Duke Energy Corporation, Form 10-K for Year Ended Dec. 31, 2016 at 38 (viewed Apr. 13, 2017: [https://www.duke-energy.com/\\_/media/pdfs/our-company/investors/2016-duke-energy-form-10-k.pdf](https://www.duke-energy.com/_/media/pdfs/our-company/investors/2016-duke-energy-form-10-k.pdf)).

interest in OVEC. Although the Commission in the *AEP-Ohio Capacity Case* claimed jurisdiction under its general jurisdiction and traditional rate making statutes to set a price for wholesale capacity service,<sup>7</sup> it limited that claim to setting a state compensation mechanism under a provision of the PJM Reliability Assurance Agreement (“RAA”). *AEP-Ohio Capacity Charge Case*, Opinion and Order at 13 & 22 (July 2, 2012). According to the Commission, “the RAA acknowledges the authority of a state regulatory jurisdiction, such as the Commission, to establish a state compensation mechanism.” *Id.* The assertion of jurisdiction over capacity prices, however, did not go any further than what the Commission claimed arose under the RAA. To the contrary, the Commission recognized “that, pursuant to the [Federal Power Act], electric sales for resale and other wholesale transactions are generally subject to the exclusive jurisdiction of FERC.” *Id.*

Insensitive to the limits of the Commission’s jurisdiction outlined in the *AEP-Ohio Capacity Case*, Duke asserts that the Commission can increase or decrease the amounts that Duke will be compensated for wholesale generation. Duke’s Application, however, does not present a request that falls within the narrow extension of jurisdiction the

---

<sup>7</sup> The Commission’s authority to assert jurisdiction under the RAA was questioned. See *AEP-Ohio Capacity Charge Case*, Industrial Energy Users-Ohio’s Application for Rehearing of the July 2, 2012 Opinion and Order and Memorandum in Support (Aug. 1, 2012). Although the Commission’s decision was affirmed on appeal, the Court did not address the Commission’s jurisdiction under the general jurisdiction statutes or R.C. Chapter 4909. The Court affirmed that the Commission properly applied R.C. 4905.26 as a procedural matter, but did not address whether that statute was applicable to a wholesale transaction. *In re Comm. Rev. of Capacity Charges of Ohio Power Co.*, 147 Ohio St.3d 59, 2016-Ohio-1607 (2016). Likewise, the Court did not address the Commission’s authority under the general jurisdiction or traditional rate setting statutes in the related appeal addressing the deferral and recovery of the above-market portion of the capacity costs through a term of an electric security plan. *In re Application of Columbus S. Power Co.*, 147 Ohio St.3d 439, 2016-Ohio-1608 (2016) (“*Columbus Southern Case*”). The latter case is of no relevance to the Application since Duke has invoked only the general jurisdiction and traditional rate making statutes as a basis for relief. Application at 2. The real import of the Court’s decision in *Columbus Southern Case* was its reversal of the Commission’s order authorizing above-market generation-related revenue because it afforded AEP-Ohio transition revenue or its equivalent. That decision serves as an additional basis for dismissing the application, discussed below.

Commission asserted in the *AEP-Ohio Capacity Charge Case*. In particular, Duke has not pointed to any provision in a FERC-approved tariff or a FERC order that acknowledges a state commission's authority to hold Duke harmless from the costs of the ICPA.

**3. Duke's Application fails to demonstrate a basis for the Commission to assert jurisdiction to increase Duke's compensation to cover its losses associated with OVEC**

Ohio law limits the Commission's jurisdiction to entities supplying electricity for light, heat, or power purposes to consumers within this state. Under these jurisdictional statutes, the Commission is without jurisdiction to address Duke's Application because the proposed rider is designed solely to protect the shareholder of Duke from wholesale price risk from its retained interest in OVEC. Protection from price risk has no relation to any service provided to retail customers in Ohio. Moreover, the Commission's recent sally into pricing wholesale capacity service does not change the conclusion that Commission is without authority to increase Duke's compensation to cover its wholesale generation-related losses. In the *AEP-Ohio Capacity Charge Case*, the Commission asserted jurisdiction to price capacity service because the RAA acknowledged the authority of a state to establish a state compensation mechanism. No similar "acknowledgement" in the ICPA or other FERC-approved tariff provides the Commission with a similar basis to assert jurisdiction to protect Duke from the wholesale price risk it has because it retains an interest in OVEC.

**B. The Commission is without authority under its general jurisdiction or its traditional rate making authority to establish a recovery mechanism for a service that has been declared competitive**

While Duke initially sought authority to bill and collect the PSR under the Commission's authority to approve an ESP, this Application asserts that the Commission

can grant Duke relief under the Commission's general jurisdiction and traditional rate setting statutes. Application at 2. Under R.C. 4928.01,<sup>8</sup> R.C. 4928.03,<sup>9</sup> and R.C. 4928.05(A)(1),<sup>10</sup> however, the Commission may not lawfully supervise or regulate any

---

<sup>8</sup> “‘Retail electric service’ means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following service components: generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.” Section 4928.01(A)(27), Revised Code.

“Competitive retail electric service” means a component of retail electric service that is competitive as provided under division (B) of Section 4928.01, Revised Code.

<sup>9</sup> R.C. 4928.03 provides:

Beginning on the starting date of competitive retail electric service, retail electric generation, aggregation, power marketing, and power brokerage services supplied to consumers within the certified territory of an electric utility are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. In accordance with a filing under division (F) of section [4933.81](#) of the Revised Code, retail electric generation, aggregation, power marketing, or power brokerage services supplied to consumers within the certified territory of an electric cooperative that has made the filing are competitive retail electric services that the consumers may obtain subject to this chapter from any supplier or suppliers. Beginning on the starting date of competitive retail electric service and notwithstanding any other provision of law, 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 within its certified territory for the purpose of satisfying the consumer's electricity requirements in keeping with the policy specified in section [4928.02](#) of the Revised Code.

<sup>10</sup> R.C. 4928.05(A)(1) provides:

On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric utility or electric services company shall not be subject to supervision and regulation by a municipal corporation under Chapter 743. of the Revised Code or by the public utilities commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except sections [4905.10](#) and [4905.31](#), division (B) of section [4905.33](#), and sections [4905.35](#) and [4933.81](#) to [4933.90](#) ; except sections [4905.06](#), [4935.03](#), [4963.40](#), and [4963.41](#) of the Revised Code only to the extent related to service reliability and public safety; and except as otherwise provided in this chapter. The commission's authority to enforce those excepted provisions with respect to a competitive retail electric service shall be such authority as is provided for their enforcement under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code and this chapter. Nothing in this division shall be construed to limit the commission's authority under sections [4928.141](#) to [4928.144](#) of the Revised Code. On and after the starting date of competitive retail electric service, a competitive retail electric service supplied by an electric cooperative shall not be subject to supervision and regulation by the commission under Chapters 4901. to 4909., 4933., 4935., and 4963. of the Revised Code, except as otherwise expressly provided in sections [4928.01](#) to [4928.10](#) and [4928.16](#) of the Revised Code.

service involved in supplying or arranging for the supply of electricity to ultimate consumers in Ohio, from the point of generation to the point of consumption, once such service is declared competitive, except in certain statutorily defined circumstances that are not applicable to Duke's Application.

“‘Retail electric service’ means any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption.” As provided by R.C. 4928.03, retail electric generation service is a competitive service. The declaration that retail electric generation service is competitive substantially limits the Commission's authority to regulate that service because R.C. 4928.05(A)(1) specifically precludes the Commission from regulating such a service under Chapter 4909 of the Revised Code, its traditional rate setting statutes, and provides that a competitive retail electric service is not subject to the Commission's price regulation except as may be allowed in R.C. 4928.141 to 4928.144.

R.C. 4928.05(A)(1) does provide that the Commission retains authority over a competitive service under R.C. 4905.06, but that authority is limited to supervising “the adequacy or accommodation afforded by [the] service, the safety and security of the public and [the utility's] employees, and [the utility's] compliance with all laws, orders of the commission, franchises, and charter requirements.” R.C. 4905.06 does not include rate setting authority, and such authority cannot be implied because the Commission's ability to regulate competitive retail electric rates is limited to the Commission's authority under R.C. 4928.141 to 4928.144. As the Supreme Court of Ohio has held, when the General Assembly enacts ratemaking statutes, the Commission cannot usurp those

statutes by relying on its general supervisory authority. *Columbus S. Power Co. v. Pub. Util. Comm.*, 67 Ohio St.3d, 535, 620 N.E.2d 835, 840 (1993).

Although Duke has invoked the Commission's general jurisdiction and traditional rate making authority to support its request for relief, Application at 2, the Commission is without authority to establish prices or set rates for a retail electric generation service under Chapters 4905 or 4909. R.C. 4928.05(A)(1). Accordingly, the relief that Duke is seeking is unavailable under the general jurisdiction and rate setting statutes.

**C. The Commission is without authority to authorize transition revenue or its equivalent**

After the Commission granted rehearing in the *Duke ESP III Case*, the Supreme Court of Ohio reversed Commission orders authorizing EDUs to increase their revenue based on lost generation revenue calculations because R.C. 4928.38 prohibits the authorization of transition revenue or its equivalent except as provided in an electric transition plan. Despite the Court's rejection of such authorizations, Duke's Application in this case seeks a similar unlawful result.

The statutory procedures for asserting a claim for transition revenue specifically limited Duke to one claim in an electric transition plan. R.C. 4928.31 to R.C. 4928.40. Any lawful recovery of either generation-related transition revenue or regulatory assets could not continue after they were scheduled to terminate under that plan. R.C. 4928.141 & R.C. 4928.40(A). 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." R.C. 4928.38. "With the termination of that approved revenue source, the utility shall be fully on its own in the competitive market." *Id.*

In 2016, the Supreme Court of Ohio applied R.C. 4928.38 twice to reverse orders of the Commission on the basis that the Commission had unlawfully authorized an EDU to bill and collect transition revenue or its equivalent. In the *Columbus Southern Case*, the Court looked at the true nature of the challenged Retail Stability Rider (“RSR”) to determine if the authorization of the rider violated R.C. 4928.38. The Court found that AEP-Ohio “proposed the RSR as a means to ensure that the company was not financially harmed during its transition to a fully competitive generation market over the three-year ESP period.” *Columbus Southern Case* at ¶ 23. To achieve this result, AEP-Ohio requested that the Commission “guarantee recovery of lost revenue” related to three sources of generation revenue through the RSR: retail nonfuel generation revenues, decreased capacity revenue, and revenue lost due to customer switching. *Id.* at ¶ 23-24. “According to [AEP-Ohio’s] witnesses, the RSR was designed to generate enough revenue for the company to achieve a certain rate of return on its generation assets as it transitions to full auction pricing for energy and capacity by June 2015.” *Id.* at ¶ 23.

Based on the nature of AEP-Ohio’s RSR, the Court held that the record supported a finding that the Commission unlawfully authorized AEP-Ohio to collect transition revenue or its equivalent. *Id.* at ¶ 22. The Court found that the nature of the RSR served the same purpose as transition revenue: both were designed to aid in transitioning to a competitive market. *Id.* at ¶ 22-23. The Court also noted that transition revenue represented costs that would not be recovered in a competitive market and the RSR provided AEP-Ohio with revenue lost in the competitive market. *Id.* at ¶ 22-23. “Based on [this] record,” the Court concluded that AEP-Ohio’s RSR “recovers the equivalent of transition revenue.” *Id.* at ¶ 25.



In a review of an order approving an ESP for Dayton Power and Light Company (“DP&L”), the Court again reversed the Commission. In the DP&L ESP order, the Commission had authorized the Service Stability Rider (“SSR”), a rider that permitted DP&L to replace revenue DP&L was not receiving in the competitive generation market primarily related to “increased [customer] switching, declining wholesale prices, and declining capacity prices.”<sup>11</sup> Reversing the order approving the SSR, the Court held that “[t]he decision of the Public Utilities Commission is reversed on the authority of [*Columbus Southern*].” *In re Application of Dayton Power & Light Co.*, 147 Ohio St.3d 166, 2016-Ohio-3490, ¶ 1.

In its Application in this case, Duke seeks a charge to recover the difference of the OVEC costs and the PJM revenue. The difference is the amount that Duke would be unable to recover in the competitive wholesale generation market. The charge to recover the difference would thus insulate Duke from market risk and guarantee it revenue that would otherwise be lost. If approved, therefore, the rider will permit Duke to bill and collect transition revenue or its equivalent. Accordingly, authorization of such a charge is prohibited by R.C. 4928.38.

**D. The Commission is prohibited from authorizing Duke to recover an anticompetitive subsidy or generation-related revenue through a distribution-like rate in violation of R.C. 4928.02(H)**

---

<sup>11</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 17 (Sept. 4, 2013) (“DP&L ESP II Order”). This description is largely similar to that describing the charge the Court rejected in *Columbus Southern*, at ¶ 24 (in calculating a revenue requirement for AEP-Ohio’s charge, the Commission focused on three generation-related factors: nonfuel generation revenue, capacity revenues, and customer switching). DP&L also confirmed during the hearing that the SSR charge was driven solely by its generation business as it admitted that its revenue from its other two utility lines of business, transmission and distribution, were adequate and would remain so. *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan*, Supreme Court Case No. 2014-1505, First Merit Brief of Appellant Industrial Energy Users-Ohio at 17-18 (*citing* DP&L Ex. 1 at 13 (Supp. at 2); Tr. Vol. I at 118 (Supp. at 73); Tr. Vol. I at 150 (Supp. at 81)).

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 competitive retail electric service or to a product or service other than retail electric service, and vice versa. The second clause prohibits the recovery of any generation-related costs through distribution or transmission rates.<sup>12</sup>

If approved, the PSR 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. 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 violates the first clause of R.C. 4928.02(H). See, also, *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 at 19 (Jan. 11, 2012).

The authorization of the PSR also would violate the purpose of the second clause of R.C. 4928.02(H) that prevents the recovery of generation-related costs through a distribution rate. Though generation-related, the charge for which Duke seeks authorization would be nonbypassable. Wathen Testimony at 11. Because the charge would be unavoidable, it would operate in the same manner as a distribution charge: all

---

<sup>12</sup> See *Elyria Foundry Co. v. Pub. Util. Comm'n of Ohio*, 114 Ohio St.3d 305 (2007).

distribution customers of Duke would be required to pay the charge. Accordingly, the charge would violate the express prohibition of such charges in R.C. 4928.02(H).

**E. A Commission order authorizing a wholesale rate other than that approved by FERC is preempted by federal law**

Under the Supremacy Clause, the second clause of Article VI of the United States Constitution, federal law “shall be the supreme Law of the Land” and “and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Under this authority, 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; and (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. *Marketing Research Services, Inc. v. Pub. Util. Comm’n of Ohio*, 34 Ohio St.3d 52, 54 (1987).

In *Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288 (2016), the United States Supreme Court affirmed decisions finding that a state commission’s order guaranteeing a “cost-based” wholesale price is preempted by the Federal Power Act (“FPA”). In *Talen*, the Maryland Public Service Commission (“Maryland Commission”) had required the incumbent utilities to enter into 20-year contracts with a company (“generator”) proposing to construct a new generation plant in the state. *Id.* at 1294-95. The contract guaranteed that the generator would receive the contract price for capacity

and not the wholesale price. *Id.* at 1295. If the wholesale price “[fell] below the price guaranteed in the contract,” the utilities would pay the generator the difference and then “pass the costs of these required payments along to Maryland consumers in the form of higher retail prices.” *Id.* If the wholesale capacity price “exceed[ed] the price guaranteed in the contract,” the generator would pay the utilities the difference and the utilities would “then pass the savings along to consumers in the form of lower retail prices.” *Id.*

The Court found that the contract “guarantees [the generator] a rate distinct from the clearing price [in the PJM capacity auction] for its interstate sales of capacity to PJM” and thus concluded that the Maryland Commission had “set[] an interstate wholesale rate.” *Id.* at 1297. Because the Maryland Commission had set the wholesale rate, the Court affirmed lower court decisions finding that the Commission’s order was preempted by the FPA. “States interfere with FERC’s authority by disregarding interstate wholesale rates FERC has deemed just and unreasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation.” *Id.* at 1299.

Like the “contract for differences” the United States Supreme Court held was preempted by the FPA, Duke’s request seeks to augment Duke’s revenue for the difference between its wholesale costs and its wholesale revenue and bill that difference to retail customers. Application at 2 n.1. In years in which the OVEC costs exceed the PJM revenue, the PSR would be a nonbypassable retail charge and increase Duke’s compensation for its share of the wholesale capacity and energy it receives from OVEC. In years in which the OVEC costs are less than the PJM revenue, the PSR would be a nonbypassable retail credit and decrease Duke’s compensation. By indirectly setting the revenue for wholesale capacity and energy that Duke receives for its interest in OVEC,

the revenue that Duke is seeking in this Application is effectively “tethered” to the wholesale rate. *Talen*, 136 S.Ct. at 1299. As a result, the Commission would interfere with and invade a field that is within the exclusive authority of FERC.

Duke cannot sidestep federal law by claiming that the Commission’s authorization of the PSR would not affect the OVEC contract rate that assigns costs to Duke or alter the prices paid by PJM to Duke. Wathen Testimony at 6 and 11-16. As in *Talen*, the retail revenue that would be produced by the PSR would supplement the stream of revenue Duke would receive from PJM for the OVEC generation. “The [Federal Power Act] leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.” *Talen*, 136 S.Ct. at 1297 (citing *FERC v. EPSA*, 577 U.S. \_\_\_, \_\_\_, slip op., at 26 (2016)).

Nor can Duke sidestep federal law by pointing to the alleged positive effects of the continuing operation of the OVEC facilities. Wathen Testimony at 11-17 (arguing that the rider will assist in maintaining employment at the plants, sustaining local tax revenue, and supporting coal-fired resources). However legitimate the positive effects of the rider may be (and each of these claims is likely to be contested if the Commission fails to dismiss the Application), the Commission may not disregard the rates established by FERC and supplement them with above market revenue. *Talen*, 136 S.Ct. at 1298.

**F. Duke seeks an untimely rehearing of the *Duke ESP III* Opinion and Order**

Under R.C. 4903.10, any party may seek rehearing with respect to any matter determined in a proceeding in a Commission order. The application for rehearing, however, must be filed within thirty days of that order. Failure to file a timely application

for rehearing bars any further “cause of action arising out of any order of the commission, other than in support of the order.” R.C. 4903.10.

In the *Duke ESP III Case*, the Commission approved a placeholder PSR for a three-year term as part of Duke's ESP with zero costs being collected from customers, but denied Duke's request to collect above-market generation-related costs it is incurring as a result of its interest in OVEC. The Commission also specified the terms and conditions under which it would consider an application seeking to implement the rider. *Duke ESP III*, Opinion and Order at 46-47.

Duke sought rehearing of the Commission's Opinion and Order in the *Duke ESP III Case*. In its application for rehearing, it presented two assignments of error concerning the PSR. The first complained that the Commission's decision to set the rider at zero “prohibits [Duke] from offering its customers a hedge against volatile wholesale prices.” *Duke ESP III*, Application for Rehearing of Duke Energy Ohio, Inc. at 2 (May 4, 2015). The second complained that setting the rider at zero was unreasonable because there was “sufficient record ... available” to support a charge. *Id.* Duke did not seek rehearing concerning the legal authority on which the Commission could approve the PSR; it did not seek rehearing of the length of the PSR; and it did not seek rehearing of the requirement that the PSR be severable from the ESP. In this Application, however, it seeks all three modifications. Application at 2, 7, and 9.

Duke's attempt to rewrite the terms and conditions of the *Duke ESP III* Opinion and Order is an untimely application for rehearing, and another example of Duke's efforts to rewrite prior Commission orders affecting it. Previously, Duke filed an application for increased compensation for capacity service after the Commission's decision approving

a price for capacity used to serve competitive retail electric service providers for AEP-Ohio. *In the Matter of the Application of Duke Energy Ohio, Inc., for Establishment of a Charge Pursuant to Section 4909.18, Revised Code*, Case Nos. 12-2400-EL-UNC, *et al.*, Application (Aug. 29, 2012). Several parties moved to dismiss the application based on the claim that the application was an untimely application for rehearing of the Commission's order approving a prior ESP settlement. The Commission agreed. Finding that Duke had settled the ESP that set capacity compensation with full knowledge of and involvement in other proceedings seeking a cost-based capacity charge, the Commission held "that Duke's application should be denied and dismissed as it is a late-filed application for rehearing of our November 22, 2011 Order in the Duke ESP Case, in contravention of the requirements mandated by R.C. 4903.10." *Id.*, Opinion and Order at 32 (Feb 13, 2014).

The Application in this case suffers from the same infirmity that led to the prior case's dismissal. In the *Duke ESP III Case*, Duke sought a long term PSR but received authorization of a PSR for the three-year term of the ESP under R.C. 4928.143(B)(2)(d), conditioned on the severability of the rider. Through its application for rehearing, it did not seek to alter the legal basis for the rider, the term of the rider, or the requirement that the rider be severable. In this Application, however, it in effect seeks reconsideration, or rehearing, of both the legal basis and the terms and conditions of the rider. It is too late for such reconsideration. Because the Application is a late-filed application for rehearing, the relief that Duke seeks is barred by R.C. 4903.10.

**G. Because the Application and supporting materials fail to demonstrate a basis for relief from the Commission, the Commission should dismiss the Application**

Duke seeks authorization to shift the price risk associated with its continued interest in OVEC to retail customers. As the legal basis for this transfer of risk to customers, Duke invokes the Commission's general jurisdiction and traditional rate making authority. The Application is both an untimely application for rehearing and unwarranted under Ohio law. The Commission has no authority to approve such a rider based on either its general jurisdiction or its traditional rate authority. R.C. 4905.02, 4905.03, and 4928.05(A)(1). Moreover, the Commission may not authorize an unlawful subsidy of Duke's interest in generation facilities or the receipt of transition revenue or its equivalent. R.C. 4928.02(H) and 4928.38. The Commission also may not directly or indirectly interfere with federally-approved wholesale rates for generation services. U.S. Const., Art. VI, cl. 2. Because Duke cannot demonstrate that the Commission has authority to grant the relief Duke has requested, the Commission should dismiss the Application.

**V. DUKE'S APPLICATION SHOULD BE STAYED UNTIL THE COMMISSION AND THE SUPREME COURT OF OHIO HAVE REVIEWED THE COMMISSION'S ORDER AUTHORIZING THE PSR AS A TERM OF DUKE'S ESP**

For the convenience of the Commission and the parties, the Commission may stay a proceeding while matters affecting the outcome of the proceeding are the subject of an application for rehearing in a related proceeding. *In the Matter of the Application of Ohio Edison Company to Amend its Residential Tariff Nos. 10, 12, and 17, 1990 Ohio PUC LEXIS 974 (Aug. 30, 1990) ("Edison Tariff Case")*. The stay affords the Commission the opportunity "to re-evaluate" its decision in the related case "prior to the staff's devoting what might prove to be wasted or unnecessary time and effort in reviewing [an] application in this proceeding." *Id.* at \*5-\*6. A stay is particularly appropriate if the prior case and the case in which a stay is sought present related issues and common parties. *In the Matter*



*of the Complaint of Columbus Southern Power Company v. Consolidated Electric Cooperative, Inc.*, 2007 Ohio PUC LEXIS 372 at \*1 (May 16, 2007); *In the Matter of the Complaint of Pravin V. Shah v. The Cleveland Electric Illuminating Company*, 2004 Ohio PUC LEXIS 252 at \*1-\*2 (July 21, 2004); *In the Matter of the Complaint of The Ohio Home Builders Association and Medina Builders, LLC v. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, 2001 Ohio PUC LEXIS 917 at \*2 (Dec. 18, 2001).

The issues and parties in this proceeding are common with those in the *Duke ESP III Case*. In this case, Duke is seeking, again, to implement the PSR to transfer the price risk of OVEC to its retail customers. Once again, the Joint Movants are contesting Duke's efforts to transfer that risk. At issue in both cases is the lawfulness of the authorization of a rate to collect above-market generation-related wholesale costs under both state and federal law.

The *Duke ESP III Case* remains pending under an entry granting rehearing. In the interim since the Commission granted rehearing, moreover, the Supreme Court of Ohio has twice reversed the Commission's attempts to authorize electric distribution utilities to collect above-market generation-related revenue from retail customers.

Under these circumstances, a decision reversing the authorization of the PSR in the *Duke ESP III Case* may also end Duke's ambitions in this case. At the very least, the Commission's entry on rehearing in the ESP case may serve to frame the issues that parties and the Commission Staff should address in this proceeding. Accordingly, the Commission should stay this proceeding to prevent wasted time and effort if it does not dismiss the Application. *Edison Tariff Case*, at \*5-\*6.

Moreover, the stay should remain in effect until the Supreme Court of Ohio has completed review of the *Duke ESP III* Case decisions. If the Commission does not reverse its authorization of the PSR, customers have already signaled with their applications for rehearing in the ESP case that they will seek judicial review. Likewise, Duke has signaled its intention to pursue the review of a decision reversing the authorization of rider by filing this Application. Moreover, the Commission itself has deferred the federal law issue presented by the authorization of the PSR to the Court. *Duke ESP III*, Opinion and Order at 48. To assure that time and effort are not wasted in this proceeding, any action on this case should not advance until the Court has addressed the issues raised by the PSR, and in particular the federal issue that the Commission deferred.

## **VI. CONCLUSION**

For the reasons discussed above, the Commission should dismiss the Application. In the alternative, the Commission should stay this proceeding while the *Duke ESP III* Case remains under review by the Commission and the Court.

Respectfully submitted,

/s/ Frank P. Darr

Frank P. Darr (Reg. No. 0025469)  
(Counsel of Record)  
Matthew R. Pritchard (Reg. No. 0088070)  
MCNEES WALLACE & NURICK LLC  
21 East State Street, 17<sup>TH</sup> Floor  
Columbus, OH 43215  
Telephone: (614) 469-8000  
Telecopier: (614) 469-4653  
fdarr@mwncmh.com  
(willing to accept service by e-mail)  
mpritchard@mwncmh.com  
(willing to accept service by e-mail)

**ON BEHALF OF INDUSTRIAL ENERGY USERS-OHIO**

Bruce Weston (Reg. No. 0016973)  
Ohio Consumers' Counsel

/s/ William J. Michael

---

William J. Michael (Reg. No. 0070921)  
Counsel of Record  
Jodi Bair (Reg. No. 0062921)  
Kevin Moore (Reg. No. 0089228)  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
Telephone [Michael]: (614) 466-1291  
Telephone [Bair]: (614) 466-9559  
Telephone [Moore]: (614) 387-2965  
[william.michael@occ.ohio.gov](mailto:william.michael@occ.ohio.gov)  
[Jodi.bair@occ.ohio.gov](mailto:Jodi.bair@occ.ohio.gov)  
[Kevin.moore@occ.ohio.gov](mailto:Kevin.moore@occ.ohio.gov)  
(all will accept service via email)

**ON BEHALF OF THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

/s/ Colleen L. Mooney

---

Colleen L. Mooney (Reg. No. 0015668)  
PO Box 12451  
Columbus, OH 43212-2451  
Telephone: 614-488-5739  
[cmooney@ohiopartners.org](mailto:cmooney@ohiopartners.org)  
(will accept service via email)

**ON BEHALF OF OHIO PARTNERS FOR  
AFFORDABLE ENERGY**

/s/ Kimberly W. Bojko

---

Kimberly W. Bojko (Reg. No. 0069402)  
(Counsel of Record)  
James D. Perko, Jr. (Reg. No. 0093312)  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
(614) 365-4100  
[Bojko@carpenterlipps.com](mailto:Bojko@carpenterlipps.com)  
[Perko@carpenterlipps.com](mailto:Perko@carpenterlipps.com)  
(will accept service via email)

**ON BEHALF OF OHIO MANUFACTURERS'  
ASSOCIATION ENERGY GROUP**

/s/ Angela Paul Whitfield

---

Angela Paul Whitfield (0068774)  
(Counsel of Record)  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300  
Columbus, Ohio 43215  
Telephone: (614) 365-4100  
Email: [paul@carpenterlipps.com](mailto:paul@carpenterlipps.com)  
(will accept service via email)

**ON BEHALF OF THE KROGER Co.**

## CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO'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 *Motions of Industrial Energy Users-Ohio, the Office of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy, The Kroger Co., and Ohio Manufacturers' Association Energy Group for an Order Dismissing the Application or in the Alternative Staying the Proceeding* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio to the following parties of record this \_\_\_ day of \_\_\_\_\_ 2017, via electronic transmission.

/s/ Frank P. Darr

Frank P. Darr

Amy B. Spiller  
Deputy General Counsel  
Jeanne W. Kingery  
Elizabeth H. Watts  
Rocco D'Ascenzo  
139 E. Fourth Street  
1303-Main  
Cincinnati, OH 45202  
Amy.spiller@duke-energy.com  
Jeanne.kingery@duke-energy.com  
Elizabeth.watts@duke-energy.com  
Rocco.d'ascenzo@duke-energy.com

### **COUNSEL FOR DUKE ENERGY OHIO, INC.**

William Wright  
Public Utilities Section  
Attorney General's Office  
30 East Broad Street, 16<sup>th</sup> Floor  
Columbus, Ohio 43215  
William.wright@ohioattorneygeneral.gov

### **COUNSEL FOR THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO**

Kimberly W. Bojko (0069402)  
Counsel of Record  
James D. Perko, Jr. (0093312)  
Carpenter Lipps & Leland LLP  
280 Plaza, Suite 1300  
280 North High Street  
Columbus, Ohio 43215  
Bojko@carpenterlipps.com  
Perko@carpenterlipps.com

### **COUNSEL FOR THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

Angela Paul Whitfield (0068774)  
Counsel of Record  
Carpenter Lipps & Leland LLP  
280 North High Street, Suite 1300  
Columbus, Ohio 43215  
paul@carpenterlipps.com

### **COUNSEL FOR THE KROGER CO.**

Michael L. Kurtz, Esq.  
Kurt J. Boehm, Esq.  
Jody Kyler Cohn, Esq.  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
mkurtz@BKLawfirm.com  
kboehm@BKLawfirm.com  
jkylercohn@BKLawfirm.com

**COUNSEL FOR THE OHIO ENERGY GROUP**

Colleen L. Mooney  
Ohio Partners for Affordable Energy  
P.O. Box 12451  
Columbus, Ohio 43212-2451  
[cmooney@ohiopartners.org](mailto:cmooney@ohiopartners.org)

**COUNSEL FOR THE OHIO PARTNERS FOR  
AFFORDABLE ENERGY**

BRUCE WESTON (0016973)  
OHIO CONSUMERS' COUNSEL

William J. Michael  
Counsel of Record  
Jodi Bair (0062921)  
Kevin Moore (0089228)  
Assistant Consumers' Counsel  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485  
[William.michael@occ.ohio.gov](mailto:William.michael@occ.ohio.gov)  
[Jodi.bair@occ.ohio.gov](mailto:Jodi.bair@occ.ohio.gov)  
[Kevin.moore@occ.ohio.gov](mailto:Kevin.moore@occ.ohio.gov)

**COUNSEL FOR THE OFFICE OF THE OHIO  
CONSUMERS' COUNSEL**

Richard L. Sites  
Regulatory Counsel  
Ohio Hospital Association  
155 East Broad Street, 3<sup>rd</sup> Floor  
Columbus, Ohio 43215-3620  
[rick.sites@ohiohospitals.org](mailto:rick.sites@ohiohospitals.org)

Dylan F. Borchers  
Devin D. Parram  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215-4291  
[dborchers@bricker.com](mailto:dborchers@bricker.com)  
[dparram@bricker.com](mailto:dparram@bricker.com)

**COUNSEL FOR THE OHIO HOSPITAL  
ASSOCIATION**

Mark A. Whitt (0067996)  
Andrew J. Campbell (0081485)  
Rebekah J. Glover (0088798)  
Whitt Sturtevant LLP  
The KeyBank Building, Suite 1590  
88 East Broad Street  
Columbus, Ohio 43215  
[whitt@whitt-sturtevant.com](mailto:whitt@whitt-sturtevant.com)  
[campbell@whitt-sturtevant.com](mailto:campbell@whitt-sturtevant.com)  
[glover@whitt-sturtevant.com](mailto:glover@whitt-sturtevant.com)

**COUNSEL FOR RETAIL ENERGY SUPPLY  
ASSOCIATION**

**ATTORNEY EXAMINER:**  
[Nicholas.Walstra@puc.state.oh.us](mailto:Nicholas.Walstra@puc.state.oh.us)

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**5/9/2017 12:45:15 PM**

**in**

**Case No(s). 17-0872-EL-RDR, 17-0873-EL-ATA, 17-0874-EL-AAM**

Summary: Motion of Industrial Energy Users-Ohio, the Office of the Ohio Consumers' Counsel, Ohio Partners for Affordable Energy, The Kroger Co., and Ohio Manufacturers' Association Energy Group for an Order Dismissing the Application or in the Alternative Staying the Proceeding and Memorandum in Support electronically filed by Mr. Frank P Darr on behalf of Industrial Energy Users-Ohio