BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

DUKE ENERGY OHIO'S MEMORANDUM CONTRA APPLICATIONS FOR REHEARING

May 14, 2015

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I. Introduction

On May 29, 2014, Duke Energy Ohio, Inc., (Duke Energy Ohio or the Company) filed an application (Application) with the Public Utilities Commission of Ohio (Commission), seeking approval of a standard service offer (SSO), pursuant to R.C. 4928.141, in the form of an electric security plan (ESP), as set forth in R.C. 4928.143. Following a full hearing and the submission of briefs, the Commission issued its Opinion and Order (Order), on April 2, 2015.

Ohio law, in R.C. 4903.10, allows any party that has entered an appearance in a Commission proceeding to apply for rehearing in respect to any matters determined in the proceeding, within thirty days after the issuance of the order. Such applications for rehearing (AFRs) were, therefore, due on May 4, 2015.[1] Pursuant to Commission rule, replies to AFRs are due ten days after the applications were filed.[2] On May 11, 2015, the Attorney Examiners granted the Company's request for an extension of time such that all of its replies to AFRs would be due at the same time, on May 14, 2015.

The Company's failure to attribute an issue to any particular intervenor should not be interpreted as consent. Given that limited themes dominate the intervenors' AFRs, Duke Energy Ohio has organized its reply by topic.

II. Rider PSR and OVEC Issues

A. The Commission Properly Allowed for the Creation of Rider PSR, Even Though Set at Zero.

1. The Commission was correct that Rider PSR is permissible and supports state policy.

a. Rider PSR is allowable in an ESP.

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[1] As the thirtieth day fell on a Saturday, when Commission offices were closed for the entire day, the deadline was extended to the first subsequent day that was not a Sunday or holiday, pursuant to Revised Code (R.C.) 1.14. Entry (May 11, 2015).

[2] Ohio Administrative Code (O.A.C.) 4901-1-35.

In order for it to conclude that Rider PSR is an allowable component of the ESP, the Commission found that it must (1) be a term, condition, or charge; (2) relate to one of the types of terms, conditions, or charges enumerated in the applicable statute; and (3) have the effect of stabilizing or providing certainty regarding a retail electric service.[3] As correctly explained in the Order, Rider PSR meets each one of these requirements. Several intervenors, however, disagree.

First, the intervenors claim that Rider PSR does not relate to one of the categories enumerated in the statute. The categories identified by the Commission as being addressed by Rider PSR are bypassability and limitations on customer shopping.[4] The Office of the Ohio Consumers' Counsel (OCC) claims that there is no record evidence for this conclusion, as it was only discussed on brief.[5] It is an absurd notion to suggest that there is no record evidence of the fact that customers would still purchase their generation supply from the market or that their total bills would also include a small portion that is based on the Ohio Valley Electric Corporation's (OVEC) cost of service. And, further, the Ohio Energy Group (OEG) brief that made this particular argument **did** cite to the record evidence in the case.[6] OCC contends that the provided citations are insufficient, as the witnesses did not testify as to the **conclusion**. OCC fails to recognize that the witnesses provide evidence and conclusions can be drawn from that evidence. The Commission need not find its conclusions in testimony. An applicant may meet its burden of proof through any means that provides the Commission with the necessary facts.[7] That the

[3] Order, at pg. 43; R.C. 4928.143(B)(2)(d).
[4] *Id.*, at pg. 45.
[5] OCC Application for Rehearing, at pp. 19-20.
[6] OEG Brief, at pg. 5.
[7] *See also* R.C. 4928.143(C)(1), stating that the burden of proof is on the electric distribution utility but, critically, not that the burden can be satisfied only through direct testimony offered by the utility.

argument that was ultimately accepted by the Commission was made in an intervenor's brief does not make it any less valid.[8]

OCC also claims that the legislative intent behind the words used in R.C. 4928.143(B)(2)(d) makes the Commission's reading incorrect. OCC's argument starts with the Commission's determination that a "limitation on customer shopping" could be either physical or financial. OCC believes that, by referencing a financial limitation, the Commission is adding the word "financial" into the statute; OCC wants the statutory language to be read as referring only to a physical limitation.[9] Does that not mean that it is OCC that is adding language to the statute? OCC reads it to say "physical limitation on customer shopping." The Commission reads "limitation," without a modifier, to refer to whatever types of limitations may exist. The legislature could have included the word "physical," but it did not.

OCC then goes on, astonishingly, to propose that the real intent behind the statute can be gleaned by substituting "customer switching" for "customer shopping" – terms that OCC deems equivalent. The irony of this line of arguments should not be lost on the Commission: OCC complains that the Commission has "added" a word to the statute and then turns around and blatantly revises a word to one that is more to its liking. Furthermore, OCC ignores the fact that a customer who investigates competitive offers may choose to remain with the SSO of the electric distribution utility (EDU). This is certainly "shopping," even though it did not lead to "switching."

IGS Energy (IGS) argued that a non-bypassable rider may not be approved under R.C. 4928.143(B)(2)(d).[10] Although the word "non-bypassable" does not appear in this specific subsection but does appear elsewhere in the statute, there is also nothing to suggest that a

[8] *See* IEU-Ohio Application for Rehearing, at pp. 16-21; OPAE Application for Rehearing, at pp. 7-8.
[9] *See also* City of Cincinnati Application for Rehearing, at pp. 3-4.
[10] IGS Application for Rehearing, at pp. 21-24. *See also* OMA Application for Rehearing, at pp. 5-6.

provision under that subsection must be bypassable. The issue was simply not addressed by the legislature; however, it has been addressed by the Commission. As the Commission has consistently found, non-bypassability is the corollary to bypassability and must, therefore, fall within R.C. 4928.143(B)(2)(d).[11]

The Retail Energy Supply Association (RESA) asserts that Rider PSR is not allowable under R.C. 4928.143(B)(2)(d), as it is a generation service and thus cannot fall under one of the enumerated categories.[12] RESA is incorrect. The law specifically designed ESPs as a mechanism through which the EDU may provide generation service. To the extent that Rider PSR is generation-related, it is only through a generation-related proceeding that it could possibly exist.

The Sierra Club (Sierra) argues that the proposed Rider PSR is neither a limitation on customer shopping for retail electric generation service nor would it have the effect of stabilizing or providing certainty regarding such service. Sierra proposes that, because OVEC capacity and generation would be sold into the market, it is unrelated to the supply of electricity to consumers. That approach, however, ignores the impact that the OVEC interest would have as a financial hedge against electricity price volatility. And, with regard to limitations on shopping, Sierra refuses to see that there can be more than simple physical restraints. Although Rider PSR would not physically restrain shopping, it would restrain shopping from a financial standpoint, as the Commission correctly concluded. Finally, Sierra suggests that any hedging effect of Rider PSR

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[11] *In the Matter of the Application of the Dayton Power and Light Company for Approval of its Electric Security Plan*, Case No. 12-426-EL-SSO, *et al.*, Opinion and Order, at pp. 21-22 (Sept. 4, 2013). *See also In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order, at pp. 31-32 (Aug. 8, 2012).

[12] RESA Application for Rehearing, at pp. 18-20.

would not impact retail electric rates. However, Sierra fails to explain the logic of this conclusion.[13]

b. Rider PSR does not create a subsidy.

The Commission was correct in its conclusion that approval of Rider PSR will not create a subsidy. Nevertheless, several intervenors disagree, based on a variety of arguments. Industrial Energy Users-Ohio (IEU-Ohio) and IGS describe the problem as distribution ratepayers subsidizing a service other than a retail electric service. The Environmental Law and Policy Center and the Ohio Energy Council (ELPC/OEC) propose, first, that funds from a noncompetitive service support OVEC's competitive generation service. They also point to "plants that would otherwise have to compete in the free market as a source of generation for retail customers," even though generation from the OVEC plants is not provided to retail customers.[14] OCC focuses on the premise that Rider PSR would be a generation-related charge, since it charges for the cost of OVEC generation. None of these arguments is accurate.

Rider PSR, as proposed, would provide a counter-cyclical hedge. It is simply a charge that is non-bypassable. However one categorizes Rider PSR, it certainly does not relate to retail generation service; it is simply a financial hedge against price volatility. As it relates to generation services provided to SSO customers and customers of competitive retail providers, it is entirely irrelevant that the OVEC business relates to generation. The same financial hedge could be used with an investment in a banana business, if that business were counter-cyclical to electric generation and capacity prices. And it is critically important to remember that Duke Energy Ohio is a party to a contract with OVEC, along with the other shareholders in OVEC, obligating the Company to bear the its share of costs related to OVEC's generation facilities,

[13] Sierra Application for Rehearing, at pp. 4-7.
[14] ELPC/OEC Application for Rehearing, at pp. 4-5.

among other things. That contractual responsibility continues, regardless of the existence or non-existence of Rider PSR. Therefore, it is undeniable that approval of Rider PSR would change absolutely nothing, from OVEC's perspective, or the perspective of any of OVEC's competitors in the wholesale generation market. And, furthermore, the funds that would be collected from ratepayers through Rider PSR would not be funneled to OVEC; the OVEC contract is – and will remain – with Duke Energy Ohio. OVEC will receive no more or less revenue from Duke Energy Ohio as a result of any funds flowing through Rider PSR.

In attempting to create a basis for rehearing, intervenors blatantly ignore the uniqueness of the OVEC contractual entitlement, which prevents improper subsidies. The OVEC-owned generating assets underlying Duke Energy Ohio's contractual entitlement are not subject to PJM Interconnection, L.L.C.'s (PJM) minimum offer price rule and, consequently, need not exceed any monetary threshold in order to participate in PJM's base residual auctions (BRAs).[15] Furthermore, for the term of this ESP, the applicable BRAs have already occurred; there is no relevant capacity market that could possibly be subsidized.[16] And there is no evidence to suggest that the bidding strategies related to the day-ahead and real-time energy markets afford an illegal advantage to the OVEC-owned generating units. These assets are also equipped with the requisite environmental controls and are not at risk for retirement. Thus, approval of Rider PSR will not, contrary to intervenors' intimations, enable the continuing operation of generating assets that should otherwise be retired.

[15] Duke Energy Ohio Ex. 41 (Rebuttal Testimony of Kenneth J. Jennings), at pg. 5.
[16] Tr. Vol. XII, at pg. 3452.

c. Rider PSR does not create an anticompetitive subsidy prohibited under R.C. 4928.02(H).

Some intervenors argue that Rider PSR would require all of Duke Energy Ohio's customers to "guarantee" that OVEC's generation assets are profitable.[17] Such an assertion can only reflect a misunderstanding of the law and an unwillingness to accept the facts.

Initially, the alleged anticompetitive effect that these intervenors posit is entirely outside of the Commission's jurisdiction. For example, OCC suggests that Rider PSR would require "ratepayers to guarantee that OVEC generation earns a profit by covering the difference in the revenues from the sale of the power and the cost of generation."[18] It concludes that Rider PSR would benefit both Duke Energy Ohio and OVEC; "it is a benefit that other competitive retail or wholesale generation providers do not enjoy, and thus is anticompetitive."[19] The Commission has no jurisdiction over wholesale generation providers; it cannot dictate the terms, conditions, or prices of transactions in the competitive **wholesale** market. And regardless of the words that OCC chose to use, neither Duke Energy Ohio nor OVEC is a competitive retail generation provider.

Even more dramatic are the statements in the Ohio Partners for Affordable Energy's (OPAE) application for rehearing. OPAE believes that Rider PSR "would subsidize the rates Duke can charge for power from OVEC . . .."[20] But the Company is not charging any rates for power from OVEC. Power from OVEC is sold into the wholesale market.[21] OPAE goes on to suggest that Rider PSR "is actually a guarantee that the OVEC plants will produce a guaranteed profit for Duke."[22] It is not. Under the proposed PSR hedge, Duke Energy Ohio would retain no

[17] *See, e.g.*, OPAE Application for Rehearing, at pp. 16-17; OCC Application for Rehearing, at pg. 34.
[18] OCC Application for Rehearing, at pg. 34
[19] *.Id.*
[20] OPAE Application for Rehearing, at pg. 16.
[21] Duke Energy Ohio Ex. 6 (Direct Testimony of William Don Wathen Jr.), at pg. 13.
[22] OPAE Application for Rehearing, at pp. 16-17.

ability to make a profit or suffer losses as a result of its interest in OVEC, as the profit or loss would be in the ratepayers' hands. Nevertheless, OPAE concludes, from this incorrect identification of a guaranteed profit, that there must be "a subsidy flowing from the noncompetitive distribution service to the competitive generation service."[23] Presumably the "noncompetitive distribution service" is the Company's service, as an EDU, to the ratepayers. But what is the "competitive generation service" that supposedly receives this subsidy? OPAE does not explain. Finally, OPAE sums up this general argument with yet another nonsensical statement: "The PSR is anticompetitive as it clearly puts some electric generators on a different level if one generator's profits are guaranteed by distribution ratepayers."[24] OPAE points to R.C. 4928.02(H) as support for this assertion. However, that subdivision is specifically limited to matters relevant to the "provision of retail electric service." If OPAE is concerned about the impact of Rider PSR on OVEC's business, it should note that OVEC does not and will not provide any retail electric service. Its business is non-jurisdictional in this forum.

d. Rider PSR is distinguishable from the *Sporn* decision.

Intervenors Constellation NewEnergy, Inc., and Exelon Generation Company, LLC, (collectively, Constellation) and RESA maintain that Rider PSR is barred by the Commission's prior holding in an AEP Ohio case wherein that utility sought recovery of closure costs associated with its Sporn Unit 5.[25] Constellation and RESA rely upon this prior decision for the proposition that the recovery of generation-related costs through distribution rates is impermissible. Constellation and RESA, however, ignore the facts specific to the *Sporn* decision, as well as their prior, express agreement to the recovery of generation-related costs on a non-bypassable basis. In this regard, it is apparent that Constellation and RESA hope to engage the

[23] *Id.*, at pg. 17.
[24] *Id.*
[25] Constellation Application for Rehearing, at pp. 16-17, and RESA Application for Rehearing, at pp. 23-24.

Commission in a game of semantics, contending that certain generation-riders improperly implicate distribution rate recovery while others do not. As Constellation and RESA assert no new arguments here, their applications must be denied. Briefly, however, Duke Energy Ohio responds to their contentions.

In *Sporn*, AEP Ohio requested authority to recover costs associated with the early retirement of Unit 5 of the Sporn Generating Plant – a unit that it owned and for which it had authority to make retirement decisions. In addition to seeking cost recovery under R.C. 4928.143, AEP Ohio sought Commission authority to retire Unit 5. In rejecting the request, the Commission first discussed that which is and is not within its jurisdiction:

> Pursuant to Sections 4928.03 and 4928.05(A)(1), Revised Code, retail electric generation service is a competitive retail electric service and, therefore, not subject to Commission regulation, **except as otherwise provided in Chapter 4928, Revised Code**. Just as the construction and maintenance of an electric generating facility are fundamental to the generation component of electric service, we find that so too is the cost of an electric generating facility.[26]

The Commission then examined whether the requested costs were within R.C. 4928.143 and, therefore, subject to its regulation. Significantly, the Commission focused on the provision relied upon by AEP Ohio in bringing its application – R.C. 4928.143(B)(2)(c) – and concluded that there was no statutory basis on which to grant recovery. As the Commission reasoned:

> Although [AEP Ohio] implies that a broad interpretation of Section 4928.143(B)(2)(c), Revised Code, is warranted, that section provides for the establishment of a non-bypassable surcharge for the life of an electric generating facility, only if certain criteria are met. . . . Sporn Unit 5 was constructed long ago and, therefore, was not newly used and useful on or after January 1, 2009, as required by the statute. Neither was Sporn Unit 5 sourced through a competitive bid process or subject to a determination of need by the Commission, which are additional criteria found in Section 4928.143(B)(2)(c), Revised Code.[27]

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[26] *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 pg. 16 (January 11, 2012)(emphasis added, citations omitted)(hereinafter referred to as *Sporn*).

[27] *Sporn*, Finding and Order, at pg. 18.

The Commission's decision in *Sporn* is factually inapposite the circumstances here. Duke Energy Ohio is not seeking cost recovery for any component of generation service and it has not invoked R.C. 4928.143(B)(2)(c) as relevant to these proceedings. Rather, as proposed by the Company and approved by the Commission, Rider PSR is authorized under R.C. 4928.143(B)(2)(d) for purposes of enabling stability or predictability regarding retail electric service.

In *Sporn*, the Commission did note that the company's request was contrary to the state policy set forth in R.C. 4928.02(H) because it would enable recovery of generation-related costs through distribution rates.[28] But this conclusion must be read in context, and not in the broad manner suggested by Constellation and RESA. As the Commission found in *Sporn*, plant closure costs were one aspect of the larger component of generation service. Here, however, the OVEC-owned generating units are not providing generation service to Duke Energy Ohio's retail customers and, therefore, Rider PSR will not recover costs for the generation component of electric service.

Further, Rider PSR is a discrete rider through which costs would be recovered from, or charges remitted to, customers. The proposal does not, in any way, blur the distinction with those costs that are recovered through distribution rates. And the designation of Rider PSR does not, as Constellation and RESA suggest here, alter this conclusion. Rather, as the Commission succinctly found, Rider PSR is a generation rate.[29] And the creation of generation rates, on a non-bypassable basis, has been embraced by both Constellation and RESA in the past.[30]

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[28] *Sporn*, Finding and Order, at pg. 19.

[29] Opinion and Order, at pg. 48.

[30] *See, e.g., In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.* (*ESP 2*), Stipulation and Recommendation (ESP 2 Stipulation), at Section VII, Para. A, wherein a non-bypassable generation charge was

There is no prohibition in Ohio against non-bypassable generation-related charges.[31] The Commission's decision in *Sporn* does not alter this conclusion or otherwise render its approval of a hedging mechanism such as Rider PSR unlawful.

e. Rider PSR does not recover transition revenues, as that term is defined under Ohio law.

Despite consistent pronouncements from the Commission to the contrary, IEU-Ohio, along with OCC and OPAE, continue to assert that any charge (or, as could be the case with Rider PSR, any credit) that bears any relationship to generation is an impermissible transition revenue.[32] In doing so, they fail to assert any arguments that were not previously before the Commission when it concluded that Rider PSR would not "permit Duke to collect untimely transition revenues in violation of R.C. 4928.38."[33] This procedural deficiency, alone, is sufficient reason to reject these claims. But the claims also fail on substantive grounds.

R.C. 4928.39 defines transition revenues as costs that meet specific criteria. Importantly, such costs must "legitimate, net, verifiable, and directly assignable or allocable to retail electric generation service provided to electric consumers in the state."[34] Here, it is undisputed that the costs to be collected from, or credits to be returned to, customers via Rider PSR are not directly assignable or allocable to retail electric generation service. Rather, as the evidence in these proceedings confirms, Duke Energy Ohio's rate base has never included OVEC and Rider PSR,

established with the affirmative consent of Constellation and RESA, and Section VII, Para. J, wherein the non-bypassable load factor adjustment was established with the affirmative consent of Constellation and RESA.

[31] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No. 11-346-EL-SSO, *et al.*, Opinion and Order, pg. 21 (August 8, 2012); *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer*, Case No. 12-426-EL-SSO, *et al.*, Opinion and Order, pg. 29 (September 4, 2013); *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 (July 2, 2012).

[32] IEU-Ohio Application for Rehearing, at pp. 30-35; OCC Application for Rehearing, at pg. 64; OPAE Application for Rehearing, at pg. 17.

[33] Opinion and Order, at pg. 48. *See also id.*, at page 33, wherein the Commission summarizes the arguments of IEU-Ohio related to transition revenues, arguments that clearly concern the Company's electric transition plan.

[34] R.C. 4928.39(B).

as structured, would not result in the direct supply to Duke Energy Ohio's retail customers of any generation from the OVEC-owned units.[35] Rider PSR, as the Commission rightfully found, does not function to remit transition revenues to Duke Energy Ohio. It is, similar to other proposals approved by the Commission; riders intended to provide stability or predictability regarding retail electric service. [36]

IEU-Ohio attempts to manufacture a basis for rehearing by arguing that the Commission failed to address the contention that the Company's electric transition plan (ETP Case),[37] together with the stipulation resolving that case, bar approval of Rider PSR. As noted above, there is nothing novel about this argument. It was previously presented to and then rejected by the Commission. But lest there be any doubt as to the fallacies with this argument, they are addressed here.

In the ETP Case, Duke Energy Ohio sought recovery of transition revenues associated with the "balance of its Ohio retail jurisdictional generation-related regulatory assets on its books and records as of December 31, 2000."[38] This request, therefore, did not extend to Duke Energy Ohio's investment in OVEC or its contractual entitlement to the output of OVEC's owned generation. Furthermore, the Commission's order in the ETP Case confirmed that recoverable transition revenues must meet the definition of R.C. 4928.40.[39] Thus, the scope of the Company's ETP Case was confined to transition revenues, as defined by law, that related to

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[35] Duke Energy Ohio Ex. 6, at pg. 12. *See also* Tr. Vol. II, at pg. 436.
[36] *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 11-346-EL-SSO, *et al.*; *In the Matter of the Application of Ohio Power Company for Authority to Establish and Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan,* Case No. 13-2385-EL-SSO, *et al.*; *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Market Rate Offer,* Case No. 12-426-EL-SSO, *et al.; 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.
[37] *In the Matter of the Application of The Cincinnati Gas and Electric Company for Approval of its Electric Transition Plan and for Authorization to Collect Transition Revenues,* Case Nos. 99-1958-EL-ETP, *et al.*
[38] *Id.*, Application, at pg. 15 (December 29, 1999).
[39] *Id.*, Opinion and Order, at pg. 22 (August 31, 2000).

jurisdictional generating assets owned by the Company. The ETP Case did not – nor could it – extend to contractual entitlements in generating assets owned by another entity and not otherwise included in Duke Energy Ohio's rate base. Nothing about the ETP Case precluded Duke Energy Ohio from proposing a mechanism intended to provide stability and predictability regarding retail electric service. That the Commission was presented with these claims in initial post-hearing briefs and rejected them does not render its findings unlawful. The Commission found that Rider PSR is permissible under R.C. 4928.143(B)(2)(d) and, in doing so, necessarily explained why the reliance on the theory of impermissible transition revenues was misplaced.

f. Rider PSR provides stability regarding retail electric service that cannot otherwise be achieved through other measures.

OPAE argues that Rider PSR is not necessary, as it does not mitigate volatility and, in the off-chance customers are exposed to volatility in the admittedly uncertain wholesale market, the Commission has other mitigating measures at its disposal.[40] The OCC makes a similar claim. These suggestions, however, cannot be reconciled with the evidence in these proceedings or the law.

OPAE's and the OCC's contentions are based on the erroneous premise that retail customer are insulated from the unpredictability of wholesale market prices. This protection, in the view of these intervenors, comes from a staggered auction format. But this format is of short duration, lasting no longer than the ESP term, and it can only smooth out pricing effects. Because the SSO retail rates are a product of the wholesale prices, any short-term blending cannot and does not insulate customers from the unpredictability of the market. Thus, for example, if PJM's efforts at reforming the capacity market are successful, wholesale capacity prices are likely to spike dramatically. And this price spike would be reflected in SSO auction

[40] OPAE Application for Rehearing, at pp. 12-14. *See also* OCC Application for Rehearing, at pp. 30-31, wherein the OCC argues that customers are already sufficiently protected from the volatility of the wholesale market.

clearing prices. Blending such high prices does not render SSO customers immune from having to pay them. It just tempers the impact slightly. Rider PSR, on the other hand, would afford tangible benefit in that, as market prices rise, so, too, would the net revenues available under the rider. And all of these net revenues would be flowed back to customers in the form of a credit.

OPAE also implies that shopping customers would not benefit from Rider PSR, as CRES providers "securing their own stability."[41] This statement ignores the very nature of fixed-priced contracts. As was confirmed in these proceedings, the terms and conditions associated with fixed-priced contracts are not designed to protect customers. Indeed, Direct Energy admitted that, upon the expiration of a short, fixed-priced contract, a residential customer will automatically move to market-based pricing, plus an adder, unless or until that customer affirmatively renegotiates a new contract.[42] Although this arrangement may very well protect CRES providers such as Direct Energy, is clearly affords no protection to a residential customer, who will be exposed to the then-prevailing market prices by virtue of existing or new contract terms.

Ignoring an accurate reading of the law, OPAE further maintains that Rider PSR is not needed as the Commission already possesses the tools necessary to stabilize rates. Specifically, OPAE believes that the Commission can compel an EDU to build new generation or to competitively bid for additional generation.[43] Not surprisingly, OPAE cites to no provision of the Revised Code as supporting either of these alleged tools. And none exists. Indeed, R.C. 4928.143 speaks only to the ability of an EDU, in the context of an ESP proceeding, to propose a non-bypassable charge for generation that is newly used and useful after 2009.[44] Such a request first

[41] OPAE Application for Rehearing, at pg. 14.
[42] Tr. Vol. IX, pp. 2634-2639; Duke Energy Ohio Ex. 24.
[43] OPAE Application for Rehearing, at pg. 14.
[44] R.C. 4928.143(B)(2)(c).

requires a showing of need based upon the integrated resource planning (IRP) process, as mandated by the General Assembly.[45] Thus, even if Duke Energy Ohio were to propose new generation, with at least one goal being to stabilize generation prices, such a proposal would be years in the making and would no doubt be subject to extensive litigation by many of the same parties participating in the present proceedings. That is, Duke Energy Ohio would first have to submit an IRP that includes new generation, the Commission would have to determine that a need for such new generation exists, the Company would need to prosecute its next SSO filing through to final judgment in order to avoid a risk of reversal and non-recovery of construction costs, and then Duke Energy Ohio would need to initiate construction efforts. All the while, customers would be deprived of the benefits of Rider PSR.

OPAE also contends that Duke Energy Ohio can merely competitively bid for new generation. OPAE, however, provides no evidentiary basis for this proposal. For that reason alone, it must be rejected as the Commission must base its decisions on the record. The proposal further merits rejection as it is speculative, given the lack of details offered by OPAE. And without such detail, one can fairly conclude that under OPAE's unrealistic proposal, for-profit generators would engage in a competitive procurement process through which they would not recover their costs or a earn a margin. It further assumes that for-profit generators would be willing to enter into a long-term agreement pursuant to which they would not record any profits. The only rationale aspect of OPAE's broad-brushed proposal is that the wholesale market is not distorted by all generation-related arrangements. But this single aspect is not sufficient to cure the shortcomings otherwise existing with OPAE's suggestion.

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[45] *Id.*

g. Intervenors' assertions regarding federal preemption are incorrect.

Certain intervenors criticize the Commission for declining to address constitutional issues in these proceedings; issues that concern the misplaced claims of federal preemption.[46] But in so doing, intervenors merely restate the legal arguments previously advanced in their post-hearing briefs, urging the Commission to conclude that it is without authority to approve a retail rider intended to provide stability regarding retail electric service. Because these intervenors failed to provide any new argument or evidence to the Commission, their request for rehearing on this issue must be denied.

Relying on two factually inapposite decisions, IEU-Ohio, OCC, IGS, OPAE, and Sierra contend that Rider PSR is preempted by the Federal Power Act. But as the cited cases confirm, the claims of preemption are meritless.

As an initial matter, it is necessary to understand precisely the scope of the jurisdiction of the Federal Energy Regulatory Commission (FERC) over the electric industry, as it is not so absolute as to eliminate the Commission's authority to approve Rider PSR.

As the Third Circuit Court of Appeals succinctly stated:

> Electric energy generation and transmission occur in a complex regulatory environment populated by multiple private and public actors operating under the supervision of both state and federal agencies. The Federal Power Act embodies Congress's attempt "to reconcile the claims of federal and of local authorities and to apportion federal and state jurisdiction over the industry."[47]

With the Federal Power Act, Congress placed "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" under

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[46] See, *e.g.*, IGS Application for Rehearing, at pp. 17-21; IEU-Ohio Application for Rehearing, at pp. 35-44.

[47] *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 246 (3d Cir.2014)(internal citations omitted)(hereinafter referred to as *Solomon*).

federal control.[48] And this federal control is vested with the FERC, which "regulates the sale of electricity at wholesale in interstate commerce."[49] Importantly, however, "Congress preserved state authority over many aspects of the electric energy industry."[50] States, therefore, retain jurisdiction over local energy matters. Indeed, as the federal court recently confirmed, the "FERC's authority over interstate rates does not carry with it exclusive control over any and every force that influences interstate rates. Unless and until Congress determines otherwise, the states maintain a regulatory role in the nation's electric energy market."[51]

Preemption concerns a comparison between federal and state laws.[52] "[A]ny state law that 'interferes with or is contrary to federal law . . . must yield.'"[53] A preemption analysis also mandates recognition of "the basic assumption that Congress did not intend to displace state law."[54] And "[o]nly a clear and manifest conflict with federal law, or clear and manifest Congressional intent to override state choices, will override the presumption against preemption."[55] As a result of this required analysis, it follows that not every state statute that has an indirect effect on wholesale rates or that incidentally affects federal markets is preempted.[56] "Such an outcome 'would thoroughly undermine precisely the division of the regulatory field that Congress went to so much trouble to establish . . . , and would render Congress' specific grant of power to the States . . . meaningless."[57] As the federal courts have confirmed, "FERC's

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[48] *Id.*
[49] *Id*, at pg. 247.
[50] *Id*, at pg. 246.
[51] *Id*, at pg. 255.
[52] *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2570, 180 L. Ed. 2d 580 (2011).
[53] *Solomon, supra*, at pg. 250, citing *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct.1089, 8 L.Ed.2d 180 (1962).
[54] *Farina v. Nokia, Inc.*, 625 F.3d 97, 116 (3d Cir. 2010). See also, *State, ex rel. Celebrezze v. Environmental Enterprises, Inc.*, 53 Ohio St. 3d 147, 152-153 (1990) and *PNH, Inc. v. Alfa Laval Flow, Inc.*, 130 Ohio St. 3d 278, 281-282 (2010).
[55] *Solomon, supra*, at pg. 117.
[56] *See, e.g., Schneidewind v. ANR Pipeline Company*, 485 U.S. 293, 308, 108 S. Ct. 1145 (1988). See also, *PPL EnergyPlus LCC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014)(hereinafter referred to as *Nazarian*).
[57] *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 515, 109 S. Ct. 1262 (1989).

reach 'extends only to those matters which are not subject to regulation by the States' and States retain exclusive authority to regulate the retail market."[58]

And when the facts of *Nazarian* and *Solomon* are considered, it necessarily follows that those decisions have no bearing on the outcome of this **retail** matter as the FERC does not have sole and exclusive jurisdiction over all matters related to electricity. Indeed, an examination of the facts confirms that Rider PSR bears no similarity to the state statutory schemes at issue in either *Solomon* or *Nazarian*. And this point is critical, given the limited nature of the holdings in these respective federal cases.

In *Nazarian*, the Maryland Public Service Commission initiated efforts to address a perceived problem; namely, its belief that PJM's reliability pricing model for capacity resources was not sufficiently incentivizing new generation. The state commission solicited offers to construct a new power plant. Through a formalized Generation Order, the Maryland commission set forth the following terms associated with its initiative:

- The successful bidder would be awarded a contract pursuant to which it received a fixed revenue stream for a new generating asset that it would construct.
- The contract required the successful bidder, after plant construction, to sell the energy and capacity from that plant into future PJM wholesale markets.
- If the energy and capacity cleared the wholesale markets and the clearing prices were less than the contracted-for revenue, the local distribution company would be compelled to remit the difference to the bidder.

[58] *Electric Power Supply Ass'n. v. FERC*, 753 F.3d 216, 221 (D.C. Cir. 2014).

- If the energy and capacity cleared the wholesale markets and the clearing prices were higher than the contracted-for revenue, the bidder would be compelled to remit the difference to the local distribution company.

The Fourth Circuit Court of Appeals found that the Generation Order was preempted by federal law because it effectively set the price that a generator, participating in PJM's wholesale markets, would receive. As the court found, "the contract price guaranteed by the Generation Order supersedes the PJM rates that [the bidder] would otherwise earn – rates established through a FERC-approved market mechanism."[59] In so concluding, however, the court acknowledged the limited nature of its holding and, by extension, the FERC's jurisdiction:

> [I]t is important to note the limited scope of our holding, which is addressed to the specific program at issue. We need not express an opinion on other state efforts to encourage new generation, such as direct subsidies or tax rebates, that may or may not differ in important ways from the Maryland initiative. It goes without saying that "not every state statute that has some indirect effect" on wholesale rates is preempted.[60]

The factual circumstances in *Solomon* are not materially different. In that case, the New Jersey legislature adopted the Long Term Capacity Pilot Program Act, an act that "instructed New Jersey's Board of Public Utilities to promote the construction of new power-generating facilities in the state."[61] Under the law, new generators were given fifteen-year contracts to supply a set amount of capacity for a set price. These contracts were forced upon the local distribution utility and the generator. Similar to the contractual scheme in Maryland, new generators in New Jersey, after entering into a fixed-price contract, were required to participate in and clear PJM's capacity auction. In exchange, the generators were guaranteed the fixed contract price established by the state for its cleared capacity. The contracts, therefore, "offered

[59] *Nazarian*, *supra*, pg. 477.
[60] *Id*, pg. 478.
[61] *Solomon*, *supra*, pg. 246.

financial assurance to [the new] generators: for a fixed amount of capacity, generators would receive a fixed price."[62] The federal circuit court found that the state law attempted to regulate that which was regulated by the FERC, through PJM's reliability pricing model. In so doing, the court distinguished the New Jersey law, and resultant contract for differences, from a hedging arrangement:

> New Jersey misses the mark when it argues that each [contract] represents "a contract for differences, functioning like a hedge" and, therefore, does not transact in capacity. . . . The Agreements provide more than risk-hedging; they provide for the supply and sale of capacity, as well. [The law] commands generators to sell capacity to PJM. In return, New Jersey's statute ensures that the generators receive the [fixed contract price] for each quantity of capacity offered at auction and not solely the auction price they would have otherwise received.[63]

The Third Circuit Court of Appeals confirmed the limited nature of its holding, just as was done by its brethren in Maryland. As the court confirmed, "New Jersey does have authority over local energy matters[.]"[64] Indeed, the federal court opined that it would be permissible for the state to "directly subsidize generators so long as the subsidies do not essentially set wholesale prices."[65] And such a recognition by the court is consistent with the current market structure, in which vertically integrated utilities, receiving cost-based state rates, permissibly participate in PJM's competitive auction process.

And setting the price for wholesale capacity via a state-sponsored program was detrimental to New Jersey's efforts. That the state law had an incidental effect on wholesale prices by increasing supply and thus lowering prices, was irrelevant. As the court concluded:

> [T]he law of supply-and-demand is not the law of preemption. When a state regulates within its sphere of authority, the regulation's incidental effect on interstate commerce does not render the regulation invalid. Accordingly, we do not view [the state law's] incidental effects on the interstate wholesale price of

[62] *Id*, pg. 252.
[63] *Id*, pp. 252-253.
[64] *Id*, pg. 253.
[65] *Id*, pg. 254, footnote 4.

> electric capacity as the basis of its preemption problem. Indeed, were we to determine otherwise, the states might be left with no authority whatsoever to regulate power plants because every conceivable regulation would have some effect on operating costs or available supply. That is not the law.[66]

The salient facts in *Nazarian* and *Solomon* confirm that a state law that predetermines the price for capacity of a new generator – that is subject to PJM's minimum offer price rule – impermissibly intrudes on the jurisdiction of the FERC. As the *Solomon* court succinctly stated, the New Jersey law "interfered with PJM's method of determining the price of capacity" and was thus "conflict preempted."[67]

Applying these authorities to these proceedings, it is readily apparent that a claim of preemption necessitates a comparison of federal and state law. As to the latter, the only law at issue is that codified under Title 49 of the Ohio Revised Code, which vests the Commission with broad authority of public utilities and, more specifically, Chapter 4928, which pertains to the requirements for an SSO.[68] Chapter 4928 does not run afoul of the Federal Power Act or the FERC's jurisdiction over the wholesale electricity market. Rather, Title 49 is limited in its scope to retail energy matters. The Federal Power Act limits the FERC's jurisdiction to wholesale transactions and that jurisdiction is not disturbed or threatened by Ohio's Title 49 or, specifically, Chapter 4928. The co-existence of the FERC's jurisdiction over wholesale matters and the

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[66] *Id*, at pg. 255.

[67] *Solomon*, *supra*, pg. 249. Conflict preemption mandates a determination that "it is impossible to comply with both state and federal law; state regulation prevents attainment of FERC goals; and that a state regulation's impact on matters within federal control is not an incident of efforts to achieve a proper state purpose." *Northwest Central Pipeline*, *supra*, at pp. 515-516 (internal citations omitted).

[68] See, *e.g.*, R.C. 4905.04 (Commission vested with power and jurisdiction to supervise and regulate public utilities) and R.C. 4928.141 (an electric distribution utility is to apply to the Commission for approval of a standard service offer of all competitive retail electric services).

Commission's jurisdiction over retail matters was expressly contemplated by, and endorsed under, the Federal Power Act.[69]

Moreover, Rider PSR does not – and cannot – set wholesale capacity prices. Indeed, as discussed herein, Rider PSR, as structured, will have no impact on clearing prices for new, wholesale capacity, the amounts paid by Duke Energy Ohio under a FERC-approved agreement, or other market participants' motivation to add new or retire old generation. These matters, even if at issue, which they are not, remain exclusively under FERC's jurisdiction. And the facts that were fatal to the state-ordered programs compelling the construction of new generation simply do not exist in respect of Rider PSR.

Rider PSR, as discussed in these proceedings, relies upon the Company's existing contractual entitlement in OVEC, which, together with its wholly owned subsidiary, the Indiana Kentucky Electric Corporation, own two generating plants known as Kyger Creek and Clifty Creek.[70] These plants, in operation prior to the creation of PJM's reliability pricing model in approximately 2006,[71] are not owned by Duke Energy Ohio. And the Company does not operate these plants; rather, OVEC has its own employees who manage and run the plants on a daily basis.[72] Consequently, Duke Energy Ohio, a mere 9 percent shareholder in OVEC, cannot control the management of these two plants and their resultant costs. Rather, Duke Energy Ohio, pursuant to the terms of an Inter-Company Power Agreement, approved by the FERC,[73] is contractually obligated to pay OVEC for defined costs in connection with the Company's contractual entitlement to a small portion – 9 percent – of the energy and capacity from the two

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[69] *Electric Power Supply Association, supra*, at 221, citing 16 U.S.C. Section 824(a)("FERC's reach extends only to matters that are not subject to regulation by the States." And "[States retain exclusive authority to regulate the retail market.)

[70] Tr. I, pg. 84.

[71] Tr. XV, pg. 4064.

[72] *See* IEU Exhibit 5 (ICPA), at Section 4.01, establishing the OVEC shall operate and maintain the plants. *See also* Tr. XV, pg. 4065.

[73] Tr. II, pg. 403.

plants.[74] Critically, therefore, unlike the new generating assets at issue in *Solomon* and *Nazarian*, the generation underlying Rider PSR has been in existence and is not controlled by Duke Energy Ohio.[75]

Thus, should the Commission revisit the claims of federal preemption, it must find that the Company's request is not preempted by the Federal Power Act and, instead, that the Commission has jurisdiction to decide retail ratemaking issues.

B. The Commission did not err in requiring Rider PSR to be severable without requiring collections subject to refund.

The OCC claims that the Commission erred in providing a "severability provision" such that if Rider PSR is invalidated, all other provisions of the ESP remain in effect. The OCC objects to this provision because customers would be required to pay for Rider PSR and if the rider is subsequently invalidated, payments are not subject to refund. OCC fails to recognize that the Commission may, after due hearing and consideration, approve an application and implementation of a rider. Likewise, OCC has a statutory remedy. To the extent OCC believes a particular order from the Commission is unlawful, it may take an appeal and seek a stay pursuant to R.C. 4903.16. Thus OCC neglects to recognize the natural order of the appellate process. The Commission's provision for severability is administratively economic and sound.

C. The Commission did not err in identifying guidelines pursuant to which a request under the established Rider PSR would be considered and any attempt to influence of the outcome of such a subsequent proceeding through prescriptive measures must fail.

In its Opinion and Order, the Commission approved a placeholder Rider PSR, allowing Duke Energy Ohio the opportunity to initiate a subsequent proceeding for purposes of addressing recovery under such a mechanism. Duke Energy Ohio addressed this aspect of the Commission's

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[74] *Id.*

[75] IGS's reliance on *New York System Operator, Inc.*, 150 FERC ¶ 61,208 is also wrong as that case concerned an "offer floor" for non-exempt, new generation. The OVEC-owned assets are not new generation.

ruling in its Application for Rehearing and will not repeat those arguments here. Rather, notwithstanding Duke Energy Ohio's contention that there was sufficient evidence on which the Commission could have relied in setting initial rates under Rider PSR, Duke Energy Ohio responds here to the claims of certain intervenors that that subsequent proceeding must be dictated by a litany of prescriptive factors that are clearly intended to defeat the rider.

As an initial matter, Duke Energy Ohio observes that the Commission is afforded broad discretion in setting rates and relevant to the determination of the lawfulness of a Commission decision is its conformity with applicable law.[76] Here, there is nothing in R.C. 4928.141, *et seq.*, that precludes the Commission from establishing guidelines for future consideration of Rider PSR. Indeed, the very provision pursuant to which Rider PSR was approved does not restrict the Commission from identifying considerations that may be relevant to a future proceeding. And this guidance from the Commission sufficiently informs prospective parties as to what may be relevant considerations.

Further, Duke Energy Ohio notes that the guidelines articulated by the Commission reflect what, at a minimum, is to be addressed in a subsequent Rider PSR proceeding[77] and thus reserve to the Commission the ability to examine other considerations that may be relevant by virtue of the circumstances existing when the subsequent proceeding is initiated. They do not, therefore, reflect a bias toward approving rider recovery[78] and they certainly will not function to disregard the resulting benefits to, or impact upon, customers. Such resulting benefits underlie the Commission's approval of Rider PSR.[79] In stark contrast to what the Commission has

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[76] *Ohio Consumers' Counsel v. Public Utilities Commission of Ohio*, 111 Ohio St.3d 384, 2006-Ohio-5853, at ¶ 44 ("A PUCO order is unlawful if it is inconsistent with relevant statutes or with the state or federal constitutions.").
[77] Opinion and Order, at pg. 47.
[78] OCC Application for Rehearing, at pp. 38-39.
[79] Opinion and Order, at pp. 46-47 (Commission's recognition that a properly structured PSR proposal has the potential to protect customers from price volatility in the wholesale market).

thoughtfully outlined, certain intervenors seek to convince the Commission that it must be more rigid now, by demanding application of, collectively, almost thirty specific criteria.[80] These onerous criteria are undeniably designed to force defeat of Rider PSR[81] and are inappropriate. Duke Energy Ohio thus opposes their adoption, in their entirety, by the Commission. And in further registering its objection, Duke Energy Ohio discusses here the primary themes that dominate the intervenors' list.

Hoping to reign in the Commission's broad discretion, intervenors propose that the plants proposed for inclusion in Rider PSR reflect the lowest cost alternative, as determined by competitive bidding or requests for proposal (RFP).[82] But mandating an RFP undermines the very nature of the Company's proposal, the merits of which have been accepted by the Commission. Under Rider PSR, Duke Energy Ohio proposed to pass through to customers the net revenues associated with its contractual entitlement to the output of the OVEC-owned generating stations. This approach results in Duke Energy Ohio being held flat; it will realize no profit.[83] And the net revenues to be passed along to customers are based upon costs and revenues in the wholesale market and nothing to do with the competitive retail market.[84] But if an RFP or competitive bidding process is required, the starting point of any competitive offer would be market rates. Then, as those responding to a solicitation would be for-profit generators, it must also be conceded that a profit margin would be factored into the proposals or

[80] Constellation Application for Rehearing, at pp. 10-14 (identifying four factors); OMA Application for Rehearing, at pg. 12 (identifying eleven factors); Environmental Group Application for Rehearing, at pp. 11-18 (identifying two primary factors, one having four subparts); OCC Application for Rehearing, at pp. 39-42 (identifying nine factors); and IEU-Ohio Application for Rehearing, at pp. 54-58 (identifying three factors).

[81] *See, e.g.*, OCC's Application for Rehearing, at pp. 40 and 41 (requiring proof as to what Duke Energy Ohio's approximately 700,000 customers would be willing to pay and incentives to control costs where Duke Energy Ohio possesses a minor, 9 percent interest in OVEC, which, in turn, owns and operates the two generating stations incorporated into Duke Energy Ohio's Rider PSR proposal.

[82] Constellation Application for Rehearing, at pg. 10; Environmental Group Application for Rehearing, at pp. 11-18; and IEU-Ohio Application for Rehearing, at pp. 55-56.

[83] Tr. Vol. III, at pp. 656, 674-676.

[84] Duke Energy Ohio Ex. 6, at pp. 13, 47.

bids. Such profit margins, or premiums, would be passed along to customers. And given the duration over which the Company has offered the benefits of its contractual entitlement in the OVEC-owned units to its Ohio customers,[85] there exists the probability of even higher premiums being incorporated into long-term RFPs. Competitive procurements or RFPs are not viable considerations when assessing the merits of Duke Energy Ohio's Rider PSR. Instead, they would undermine the stabilizing effect of Rider PSR and expose customers to needless risk premiums.

Another primary theme emerging from the intervenors' attempts to constrain the Commission's review of Rider PSR concerns costs (*e.g.*, proof of total costs; proof of all environmental compliance costs; proof of all operational and maintenance costs).[86] These suggested factors are misplaced and evidence the intervenors' misunderstanding of the very nature – and value – of the hedging mechanism forming the basis of Rider PSR.

As detailed in its post-hearing filings, Duke Energy Ohio has proposed Rider PSR as a hedging mechanism to temper the volatility in the wholesale market and its resulting unstable prices, which prices form the basis for retail rates. The Commission recognized the intended structure of Rider PSR, finding that it has the potential "to protect customers from price volatility in the wholesale market."[87] The value of the proposal, therefore, is in its ability to function as hedge; it is not in guaranteed savings, as implied by the intervenors' demands. Because the criteria espoused by the intervenors reflect their misunderstanding of the rider, they should not now be adopted by the Commission.

A final primary theme to have emerged from the intervenors' list of unwarranted factors concerns the impact of Rider PSR on the wholesale market. More specifically, intervenors

[85] Duke Energy Ohio Ex. 6, at pp. 11-12, 14.; Tr. Vol. III, pg. 679.
[86] OCC Application for Rehearing, at pg. 39; OMA Application for Rehearing, at pg. 12.
[87] Opinion and Order, at pp. 46-47.

demand a discussion of the impacts of alleged subsidized generation on the wholesale market.[88] This request must be rejected, as it ignores the evidence in this case. Duke Energy Ohio will continue to honor its obligations under the Intercompany Power Agreement, which creates its contractual entitlement to the output of the two generating stations owned by OVEC.[89] Duke Energy Ohio has disclosed in these proceedings its bidding strategies related to this contractual entitlement[90] and, as admitted by Staff and intervenor witnesses, there is no evidence to suggest that Rider PSR could influence the competitive market.[91] Despite this uncontroverted evidence, certain intervenors now plead for the proverbial second bite at the apple by hoping to convince the Commission to impose criteria designed to revive this already settled issued.

Furthermore, intervenors ignore the undeniable fact that the OVEC-owned generating stations do not, under Ohio law, reflect affiliate-owned generation. Thus, despite the intervenors' constant, and consistently misplaced and misinformed, reliance upon corporate separation principles, there is nothing about the Company's Rider PSR that can result in unfair and anticompetitive subsidies flowing to an affiliate.

The Commission's stated guidelines do not violate applicable law or the state or federal constitutions and there exists no plausible justification for impeding the Commission's subsequent review through adoption of factors negating the very purpose for Rider PSR.

1. The discussion of factors to be considered in the future is not the equivalent of rulemaking.

IEU-Ohio equates the Commission's list of factors with a rulemaking proceeding, finding fault with the Commission's issuance of this "rule" without complying with rulemaking

[88] OCC Application for Rehearing, at pg. 39; OMA Application for Rehearing, at pg. 12.
[89] *See, e.g.*, Tr. Vol. V, at pg. 1229; Tr. Vol. X, at pg. 2691.
Duke Energy Ohio Exhibit 41, at pp. 7-9; Tr. Vol. XVI, at pp. 4291-4292.
[91] Tr. Vol. XII, at pg. 3473; Tr. Vol. XV, at pp. 4065-4068.

requirements under R.C. Chapter 119. IEU-Ohio, however, is confusing rules and factors to be used in a future analysis.

If the list of factors provided in the Order were actually a rule, compliance would be mandatory. The Commission could simply reject, on its face, an application failing to abide by the "requirements." The Commission made it extremely clear that its list of factors is not a list of filing requirements: "In its filing, Duke should, at a minimum address the following factors, which the Commission will balance, but not be bound by, in deciding whether to approved Duke's request for cost recovery . . ..."[92] The Commission thus explained that the indicated categories of information were items that it currently believes would be important to its analysis. The Commission said nothing about rejecting an application that does not address each item. Correspondingly, in the pending proceeding that is considering an ESP proposed by the FirstEnergy utilities, the Attorney Examiner has allowed additional time for the parties "to address whether and how the Commission's findings in the AEP Ohio Order should be considered in evaluating FirstEnergy's application in this proceeding . . .."[93] If the list of factors were the equivalent of a rule, the parties in that case would not have been invited to consider whether to comply with it.

It is common practice for the Commission, as it is for courts, to develop approaches to common issues, to be followed in analogous proceedings. For example, shortly after passage of Senate Bill 255 in 2002, enacting Chapter 4939 of the Revised Code, the Commission was presented with its first public way complaint. After substantial analysis, the Commission set

[92] Order, at pg. 47.

[93] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 14-1297-EL-SSO, Entry, at pg. 2 (March 23, 2015).

forth a list of ten "tests [that] must be met."[94] That list of tests formed the basis for each subsequent public way complaint that was resolved following an evidentiary hearing.[95]

Undeniably, the enumeration of matters that the Commission will consider in future proceedings is not without precedent and is not the equivalent of ratemaking.

2. IEU-Ohio incorrectly asserts constitutional challenges to the Commission's guidelines, characterizing them as a statute or rule that is void for vagueness.

IEU-Ohio criticizes the Commission's delineated guidelines as unconstitutional, suggesting that they reflect a statute or rule that is void for vagueness.[96] IEU-Ohio's criticism, however, is as desperate as it is incorrect.

The void for vagueness doctrine has precise application, barring "enforcement of, 'a specific **statute** which either forbids or requires the doing of any act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"[97] The void for vagueness doctrine, therefore, cannot be applied to any pronouncement from an administrative body, but, instead, concerns statutes or laws. Furthermore, in assessing a void for vagueness claim, there is presumption of constitutionality. As the Ohio Supreme Court has repeatedly found:

> A court's power to invalidate a statute 'is a power to be exercised only with great caution and in the clearest of cases.' Laws are entitled to a 'strong presumption of constitutionality,' and the party challenging the constitutionality of a law 'bears

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[94] *In the Matter of the Complaint of WorldCom, Inc.; AT&T Corp./ KMC Telecom III, LLC; and LDMI Telecommunications, Inc., v. City of Toledo*, Case No. 02-3207-AU-PWC, *et al.*, Opinion and Order, at pp. 30-31 (May 14, 2003).

[95] *In the Matter of the Complaint of WorldCom, Inc., AT&T Corp., and Time Warner Telecom of Ohio, L.P. v. City of Dayton*, Case No. 03-324-AU-PWC, Opinion and Order, at pp. 4-5 (June 26, 2003); *In the Matter of the Complaint of Cincinnati Gas & Electric Company, now known as Duke Energy Ohio, Inc. v. The City of Forest Park*, Case No. 05-75-EL-PWC, Opinion and Order, pp. 3-5 (March 7, 2006), Second Opinion and Order, *at* pp. 3-4 (Jan. 10, 2007).

[96] IEU-Ohio Application for Rehearing, at pp. 52-54.

[97] *State of Ohio v. Quinones*, 2003-Ohio-6727, 2003 Ohio App. LEXIS 6015, at ¶ 11, *citing United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219 (1997)(emphasis added).

> the burden of proving that the law is unconstitutional beyond a reasonable doubt.'[98]

Indeed, the void for vagueness doctrine "permits a statute's certainty to be ascertained by application of commonly accepted tools of judicial construction, with courts indulging every reasonable interpretation in favor of finding the statute constitutional.[99]

Moreover, the standards for evaluating a void for vagueness claim are not to be mechanically applied. Rather, as the United State Supreme Court has instructed:

> The degree of vagueness that the Constitution tolerates – as well as the relative importance of fair notice and fair enforcement – depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.[100]

And as the Ohio Supreme Court has found, statutes are not required "to be drafted with scientific precision."[101]

Considering IEU-Ohio's constitutional challenges against this backdrop, it is undeniable that they fail. As an initial matter, the Commission's guidelines relevant to a subsequent Rider PSR proceeding are not codified; they are not the law. Further and even assuming, *arguendo*, that IEU-Ohio is correct in this first, gatekeeping matter, the Commission's guidelines must be presumed valid and subject to a less strict vagueness test as they concern economic considerations. Finally, the guidelines are not unintelligible. Significantly, Constellation understood them and recognized them as a fair foundation.[102] And no other intervenor

[98] *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, at ¶ 41 (internal citations omitted).
[99] *Perez v. Cleveland*, 78 Ohio St.3d 376, 378-379, 1997-Ohio-33.
[100] *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S. Ct. 1186 (1982)(internal citations omitted).
[101] *Perez, supra*, at pg. 378.
[102] Constellation Application for Rehearing, at pg. 9.

complained that they were incomprehensible. The intervenors, clearly having understood them, simply did not agree with the guidelines.

IEU-Ohio has not demonstrated, beyond a reasonable doubt, that the Commission's guidelines are unconstitutional. Significantly, it has made no showing at all, failing to identify, with any degree of specificity, which of the guidelines is so vague that it cannot be interpreted. Rather, IEU-Ohio merely criticizes the Commission and its anticipated review and rate-setting, discretionary functions that have long since been vested in the Commission.

D. The Commission Should Ignore Arguments that the Company's Interest in OVEC Must Be Transferred.

In response to the arguments of several intervenors,[103] the Commission's Order in these proceedings includes a brief discussion, in *dicta*, of the "intent" behind the stipulation in Duke Energy Ohio's current ESP (ESP 2)[104] relating to the transfer of the Company's contractual entitlement in OVEC. In their AFRs, some intervenors continued this argument, even though the Commission wrongly ordered Duke Energy Ohio to attempt to transfer its OVEC interest and even though the Stipulation and Recommendation in the ESP 2 case (ESP 2 Stipulation) was considered and approved, as modified, more than three years ago.

In the Order, the Commission notes that both sides have raised arguments concerning the intent of the stipulating parties. It concludes that it need not determine the parties' intent but states that "it was not the Commission's intent in adopting the stipulation in the *ESP 2 Case* to exempt Duke from pursuing the divestiture or transfer of the OVEC contractual entitlement."[105]

[103] *See* Initial Briefs of IGS, OPAE, GCHC, Staff, IEU, OMA, OCC, and OEC.
[104] *In the Matter of the Application of Duke Energy Ohio, Inc., for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.*, Stipulation and Recommendation, Sec. II. F, fn. 4 (October 24, 2011).
[105] Order, at pg. 48.

It therefore "directs" the Company "to pursue transfer of the OVEC contractual entitlement or to otherwise pursue divesture of the OVEC asset."[106]

Noting that the order in the ESP 2 case required the Company "to fully separate its generation assets from its distribution assets by the end of 2014,"[107] RESA baldly asserts that "[n]othing in that decision reflected that Duke could not divest/transfer its OVEC entitlement . . . ."[108] RESA also complains that the Company did not submit a purchased power agreement with OVEC to the Commission, for approval, thinking that such approval was needed in light of OVEC being the Company's affiliate.[109] IGS, in a similar vein, discusses OVEC as the "generation assets of an affiliate" and describes the ESP 2 Stipulation as a "previous commitment to divest itself of its OVEC Entitlement assets."[110]

The Commission's Order was in error, and the intervenors' arguments on rehearing should be discarded.

1. ESP Stipulation said nothing about transferring contractual rights and obligations relating to generating assets that are not owned by Duke Energy Ohio.

The signatory parties to the ESP 2 Stipulation were extremely clear in their definition of the assets that the Company was agreeing to transfer prior to the end of 2014. The assets were specifically defined and the parties spent multiple pages detailing the requirement. Charles R. Whitlock, then the President, Midwest Commercial Generation Business and a witness for Duke Energy Ohio, further discussed the breadth and applicability of the divestiture promise. Absolutely nothing in the stipulation, the testimony, the cross-examination, the parties' briefs or reply briefs, or the Commission order in that case even mentioned the possibility that the

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[106] *Id.*
[107] RESA Application for Rehearing, at pg. 21.
[108] *Id.*
[109] *Id.*, at pp. 21-22.
[110] IGS Application for Rehearing, at pg. 29. *See also id.*, at pg. 30 (calling OVEC an "unregulated generation asset" and an "unregulated internal business division").

stipulation should be read to include contracts with other corporations that, in turn, owned generating assets.

Neither the intervenors nor the Commission can legitimately claim, three years after its execution and approval, that the ESP 2 Stipulation required Duke Energy Ohio to take an action that was not addressed in that document.

2. Duke Energy Ohio has no ownership interest in OVEC generating facilities.

There is no record evidence that Duke Energy Ohio has any ownership interest in the two generating plants held by OVEC. Indeed, all record evidence on this subject is in concord: the two plants in question are owned, in total, by OVEC.

Importantly, Ohio law does not prohibit an EDU from owning generating facilities. It would be an even more extreme position to assert that the law prohibits an EDU from owning stock in a company that owns generating facilities. Transfers of generating assets are addressed by R.C. 4928.17, in division (E). As most recently amended, by Amended Substitute Senate Bill 221, that division prohibits an EDU from selling or transferring any "generating assets" without prior Commission approval. That is certainly not a requirement to transfer. Prior to that amendment, the section stood as it was originally enacted at the start of the competitive market in Ohio, having been approved by the General Assembly as part of Amended Substitute Senate Bill 3. In that incarnation, the division allowed – but did not require – divestiture of a "generating asset" without prior Commission approval, subject to certain conditions. Again, this could hardly be read as a mandate to transfer. And, importantly, the critical term, "generating asset," is not defined.

Thus, there is neither a law nor a stipulated provision that would require Duke Energy Ohio to transfer its ownership of stock in OVEC or its contractual rights and obligations under the contract with OVEC and its various stockholders.

3. OVEC is not an affiliate of Duke Energy Ohio under Ohio law.

The intervenors that address the OVEC transfer issue on rehearing refer to OVEC as an affiliate. But not one of them provides an explanation of how it could possibly fit within the definition of "affiliate" in the Commission's rules. The reason why they fail to do so is crystal clear: There is no rational explanation.

As discussed in the Company's AFR,[111] affiliates are entities that are "related to each other due to common ownership or control." Neither of these tests is met in this situation.

There is no common ownership. Duke Energy Ohio is a wholly owned subsidiary of Cinergy Corp.; it has no other owners. Cinergy Corp. owns no interest in OVEC. And Cinergy Corp.'s sole owner, Duke Energy Corporation, similarly owns no interest in OVEC. The only entity in Duke Energy Ohio's corporate family that does own an interest in OVEC is Duke Energy Ohio itself. Common ownership simply does not exist.

There is similarly no common control of Duke Energy Ohio and OVEC. Duke Energy Ohio is controlled by its directors. OVEC is controlled by its directors. And it must be remembered that Duke Energy Ohio itself owns only a nine percent interest in OVEC – not enough to control anything about its operations.

III. Rider DCI

OCC, OPAE, and the Ohio Manufacturers Association (OMA) seek rehearing on matters related to the Commission's approval of Duke Energy Ohio's Distribution Capital Investment Rider (Rider DCI). Each of the arguments advanced by these parties was considered and

[111] Duke Energy Ohio Application for Rehearing, at pg. 14.

addressed by the Commission in its Opinion and Order. As recognized by OCC in its Initial Brief, Rider DCI is statutorily provided for in R.C.4928.143(B)(2)(h). The statute permits a utility to request an infrastructure modernization plan that includes recovery of costs, "including lost revenue, shared savings, and avoided costs, and a just and reasonable rate of return on such infrastructure modernization."[112]

Despite not addressing the matter in either its Initial Brief or its Reply Brief, OCC now argues that the Commission neglected to address OCC's recommendation regarding Rider DCI and property taxes, and that the Commission should have adopted the positions argued by its witnesses. However, OCC merely refuses to accept that its arguments at hearing were given their due weight and rejected. Having not addressed this argument in Initial or Reply Briefs, OCC cannot now fault the Commission for not discussing an argument that OCC itself neglected to address.

OCC's witness Mierzwa argued that the Company not be permitted to recover property taxes in Rider DCI until they are actually incurred, or when placed in service.[113] However, the Company uses the accrual method of accounting. Ohio property taxes are expensed on the Company's books in the year they are assessed, since they are a known legal liability at that point in time. This accepted accounting methodology should be applied consistently and OCC's witness Mierzwa has not set forth any reason why these taxes should be treated differently in this rider. The Commission should deny OCC's request for rehearing on this issue.

OPAE merely reiterates arguments made by OCC and fails to provide any legal analysis or support for its contentions. OPAE restated OCC witness Mierzwa's contentions about riders

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[112] OCC Initial Post-Hearing Brief, at pg. 74.
[113] OCC Application for Rehearing, at pg. 62.

generally and again asserts that Rider DCI should not have been approved. OPAE fails to provide any legal rationale to support a rehearing.

Additionally, OPAE demonstrates a lack of understanding with respect to much of the testimony provided by the Company at hearing. For example, OPAE argues that Duke Energy Ohio did not claim a reliability benefit to customers associated with Rider DCI. This is incorrect. In fact, Duke Energy Ohio witness Marc Arnold testified on cross-examination repeatedly that it is probable to address reliability on a proactive basis and on a reactive basis, and that the Company was seeking approval of Rider DCI in order to improve reliability on a proactive basis. In doing so, it is not possible to measure improvement as the Company is actually making repairs prior to problems occurring and not after.[114] Thus OPAE's argument that the Company did not "demonstrate that it is necessary to increase rates through these riders to maintain the present level of service reliability"[115] fails to recognize the need to address reliability systems proactively.

OPAE argues further: "Duke presented no evidence that reliance on a base rate proceeding as authorized under Ohio law would impact the reliability of its distribution system to the detriment of its customers."[116] Although it is difficult to parse this statement and glean what was intended, it is apparent from the remaining portion of the paragraph following this statement that OPAE means to argue that Duke Energy Ohio should only seek approval of a reliability investment rider in a base rate case. However, despite OPAE's obvious opposition to even the concept of a rider such as Rider DCI, as set forth in briefs, such a rider is clearly provided for in R.C.4928.143(B)(2)(h). OPAE adds nothing new to its already stated and rejected arguments, thus its Application for Rehearing fails to provide any persuasive value.

[114] Tr. Vol. VIII, pp. 2136, 2138, 2145, 2156.
[115] OPAE Application for Rehearing, at pg. 27.
[116] *Id.*

OMA likewise opposed Rider DCI in its initial and reply briefs and, on seeking rehearing, has provided no new arguments. OMA's application for rehearing argues simply that the Commission should not have approved the Rider DCI investment at the levels it did. OMA provides a table showing the proposed investment and simply states that it is significant and was unsupported by the record.[117] OMA, like OCC and OPAE, simply restates the same arguments advanced previously and provides no legal or factual support for rehearing. For these reasons, OMA's arguments carry no weight and rehearing on these issues should be denied.

IV. Rider DSR

OPAE and OCC included claims in their AFRs that the Commission erred with regard to Rider DSR. OCC suggests that it was a violation of R.C. 4903.09 for the Commission not to address how storm costs would be allocated, as between residential and non-residential customers, under Rider DSR. This was an issue raised by OCC's witness Yankel, but was not addressed in the Order.

OCC's concern is unfounded. The statute requiring a complete discussion of the rationale for the Commission's orders does not require that every single sub-issue be covered. As it is, the Order is 100 pages long. It clearly spells out the detail behind its decision. Under OCC's rationale, there is no end to the level of detail that could be mandated. This claim of error should be rejected.

OPAE takes a different approach to attacking Rider DSR (which it inexplicably renames as Rider SD – or Storm Damage). Latching on to an approach used by OCC's witness,[118] OPAE attempts to legislate nonexistent parameters for consideration of riders. OPAE apparently disagrees with the Ohio General Assembly, as it entirely disregards not only the plain letter of

[117] OMA Application for Rehearing , at pg. 14.
[118] OPAE Application for Rehearing, at pg. 26.

the law but also the legislative intent behind the inclusion of distribution-related riders among the cost-recovery categories that may be included in an ESP. Nevertheless, OPAE proceeds, for several pages, to point out the Company's "failure" to address the nonexistent parameters that OPAE advocates. The legitimacy of OPAE's argument in this regard is as nonexistent as the parameters on which it is based.

V. Rider RC

OPAE is the sole intervenor to challenge the Commission's approval of Rider RC, including the allocation of costs thereunder. OPAE contends that the rider is unnecessary and, as structured, results in a premium for residential customers.[119] OPAE is incorrect.

As an initial matter, Duke Energy Ohio observes that Rider RC is not new – it was a rider first approved by the Commission on November 22, 2011, in connection with Duke Energy Ohio's current ESP.[120] Notably, OPAE was a party to the stipulation and recommendation slightly modified and approved by the Commission in 2011 – a stipulation pursuant to which Rider RC was created for the purpose of recovering capacity costs from SSO customers. Now, however, OPAE contends that circumstances have changed such that allocating capacity costs to SSO customers and recovering such costs via Rider RC is borderline fraud.[121] And in attempting to support its brazen claim of deception, OPAE relies upon unsubstantiated statements and limited testimony offered by the OCC. But when the totality of the evidence is considered, it is readily apparent that OPAE's arguments are misplaced.

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[119] *Id.*, at pp. 21-24 (May 1, 2015).

[120] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.*, Opinion and Order, at pg. 50 (approving Stipulation and Recommendation, which included Rider RC for recovery of capacity costs from non-shopping customers)(November 22, 2011).

[121] OPAE Application for Rehearing, at pp. 22-23.

OPAE contends that generation supply – energy and capacity – for SSO customers is sold on the basis of energy alone and that, because Duke Energy Ohio does not incur direct capacity costs, Rider RC is unnecessary.[122] However, the very witness on whose testimony OPAE relies for purposes of its rehearing request, admitted that wholesale suppliers/auction winners will be obligated to provide capacity for SSO customers[123] and, to do so, they will purchase capacity from PJM. Further, OCC witness Yankel acknowledged that PJM will charge those suppliers based upon the 5CP method.[124] Finally, it is undisputable that there exists a readily available and transparent price for wholesale capacity: the final zonal capacity price. There is thus a capacity component inherent in SSO supply – a charge for which suppliers will be billed by PJM based upon the 5CP method – and Duke Energy Ohio must reimburse suppliers for the capacity they provide. With this fact in mind, Duke Energy Ohio proposed to perpetuate Rider RC under this ESP, with a slight modification to rate design and cost allocation; modification intended to align with recognized cost causation principles and to provide customers with greater transparency into the pricing components for SSO supply.[125] OPAE, however, now seeks to evade this principal, shifting costs that should be properly allocated to residential customers to non-residential customers.

OPAE maintains that this proper allocation of costs results in an alleged "premium" charged to residential customers. But to prove such a claim, OPAE must first demonstrate that, under Rider RC as approved by the Commission, residential customers will pay more than the costs incurred to serve them. Otherwise, no alleged wrongful "premium" exists. But there is no evidence substantiating OPAE's allegations. Indeed, OCC witness Kahal could not articulate

[122] *Id.*, at pg. 22.
[123] Tr. Vol. XII, at pg. 3522.
[124] Tr. Vol. XII, at pp. 3519-3520.
[125] Duke Energy Ohio Ex. 18 (James E. Ziolkowski Direct Testimony), as supplemented by Duke Energy Ohio Ex. 19 and Duke Energy Ohio Ex. 20, at pp. 7-8. *See also* Duke Energy Ohio Ex. 6, at pp. 18-20.

whether the 5CP cost allocation results in a "premium" compared to the current allocation as he has no understanding of how the current allocation was derived.[126] Further, Mr. Kahal acknowledged that the size of the SSO residential class would affect the percentage of capacity assigned to it.[127] And such an assignment would undeniably result in a higher allocation of the capacity costs incurred. The allocation of costs under Rider RC, as approved by the Commission, properly recognizes cost causation principles and enables parity between the manner by which suppliers are charged by PJM for capacity and retail rates. There was no error in the Commission's decision and OPAE's request for rehearing on this issue must be denied.

VI. Certified Supplier Tariff

IGS and RESA coordinated the submission of nearly identical arguments concerning the Commission's correct decision to set parameters around bill-ready billing. As discussed herein, the Commission's decision was lawful and reasonable.

In evaluating the objections of IGS and RESA, it is important to put them in their proper perspective. These proceedings concern the approval of Duke Energy Ohio's third SSO, as is required to be offered under R.C. 4928.141, *et seq.* The relevant statutory provisions and Commission regulation make clear the requirements pursuant to which SSO's will be considered. Insofar as it concerns corporate separation, Duke Energy Ohio must provide a description of its existing corporate separation plan, including its status, a list of previously issued waivers, and a timeline of then-anticipated revisions.[128] The only other requirement regarding corporate separation concerns a showing that the existing corporate separation plan conforms to the law, state policy, and certain Commission regulation.[129]

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[126] Tr. Vol. VII, at pp. 1756-1758.
[127] Tr. Vol. VII, at pg. 1757.
[128] O.A.C. 4901:1-35-03(C)(4).
[129] O.A.C. 4901:1-35-03(F).

Here, the Commission correctly found that Duke Energy Ohio met its burden and fully complied with filing requirements relevant to these proceedings.[130] As the Commission has informed IGS in this and other dockets, to the extent it and RESA claim to have been aggrieved by Duke Energy Ohio's practices, they are entitled to pursue redress under R.C. 4905.26.[131] In such an instance, IGS and RESA would bear the burden of proof – a element that they undeniably hope to avoid by lodging accusations in an SSO proceeding.

The Commission correctly established parameters around bill-ready billing – parameters that recognize existing system configurations and ensure that the scope of the Company's purchase of accounts receivable program is limited to commodities. Despite this justified and reasonable finding, IGS and RESA contend – with incomplete citations to the record – that the Commission's decision violates state law and its own regulation. These intervenors are wrong.

IGS and RESA invoke R.C. 4905.35 and 4928.17, as well as O.A.C. 4901:1-37-04, arguing that these provisions preclude Duke Energy Ohio from granting preferential treatment to any market participant, including an affiliate. Importantly – and likely with intention – IGS and RESA failed to reference the complete prohibition set forth R.C. 4905.35. This provision prohibits an **undue or unreasonable** preference or advantage. Thus, the analysis requires first an assessment of whether any preference or advantage exists and then, if so, whether it is undue or unreasonable.

As admitted by IGS witness White, Duke Energy Ohio had not affirmatively refused any competitive retail electric service (CRES) provider access to its utility billing system.[132] Rather, as of the time Mr. White testified in these proceedings, IGS had not been refused. Accordingly,

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[130] Opinion and Order, at pp. 82-83.

[131] *See, e.g., In the Matter of the Application of Duke Energy Ohio for Approval of the Fourth Amended Corporate Separation Plan under Section 4928.17, Revised Code, and Chapter 4901:1-37, Ohio Administrative Code,* Case No. 14-689-EL-UNC, *et al.*, Finding and Order (June 11, 2014).

[132] Tr. Vol. XI, at pp. 3286-3287.

IGS and RESA have not demonstrated the existence of **any** preference or advantage and, consequently, they cannot argue an undue or unreasonable preference has been afforded an affiliate because of its affiliate status.

IGS witness White attempted to rehabilitate himself in this regard, claiming that Duke Energy Ohio was engaging in discriminatory conduct as of the time its witness, Daniel L. Jones, offered live testimony in these proceedings.[133] But such a contention cannot be reconciled, as Mr. White's direct testimony in which such accusations were made, was filed **before** Mr. Jones testified orally.[134]

IGS and RESA further seek to sway the Commission – and avoid their affirmative obligations in a complaint proceeding – by suggesting that customers do not want separate bills but, instead, "want a bundled all in price."[135] In the first instance, such a statement ignores the law in that distribution utilities were directed more than a decade ago to unbundle the pricing components of their bill. Additionally, this notion of one bundled price is counterintuitive to the Commission's efforts, most notably over the last four years, to establish transparency in prices for competitive generation supply so that customers could make informed decisions in respect of choice. Finally, and contrary to their assertions, IGS and RESA are not advocating for an outcome that will, in fact, enable customer convenience and meet customer demands. Indeed, IGS and RESA are not advocating for every provider of a competitive, non-commodity product or service to have access to Duke Energy Ohio's utility bill. Rather, they want to enable access only for CRES providers, knowing, however, that more than just CRES providers offer such

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[133] Tr. Vol. XI, at pp. 3287-3288.
[134] IGS Ex. 10 (Direct Testimony of Matthew White)(Sept. 26, 2014); Tr. Vol. IV, at pp. 1028 *et seq.* (October 27, 2014).
[135] IGS Application for Rehearing, at pg. 12; RESA Application for Rehearing, at pg. 10.

products and services.[136] In short, IGS and RESA want to create a paradigm in which they, alone, are advantaged.

IGS and RESA hope to bait the Commission into accepting their arguments by claiming that protracted litigation should be avoided.[137] Such an attempt must be dismissed out of hand, as the Commission has repeatedly stressed to IGS the manner in which it may pursue relief. It must be presumed, therefore, that the Commission would not find a complaint proceeding to be unnecessary and one that should be avoided at all cost. Indeed, to accept IGS's and RESA's argument, every rate proceeding is at risk for being transformed into a proceeding in which entities are encouraged to intervene for the sole purpose of lodging accusations and sidestepping their burden of proof in a complaint case. The Commission, which manages its dockets, has not expressed concern over the potential for having to decide complaint cases and, understandably so, as the law allows such cases to be filed.

Here, IGS and RESA maintain that the record has been fully developed such that the Commission can find Duke Energy Ohio to have engaged in illegal conduct. This is simply false, as confirmed by the testimony of IGS's witness. But even if the Commission were to be persuaded by the prodding of IGS and RESA, it must dismiss their allegations, with prejudice to refiling.

IGS and RESA argue that the Commission's Order did not rely upon credible evidence with regard to Duke Energy Ohio's ability to separate non-commodity charges from its Purchase of Receivables (POR) program. Both seem to have overlooked the relevant testimony and are mistaken. Duke Energy Ohio witness Daniel L. Jones, Senior Account Manager for Customer Choice, has participated in the Ohio EDI Working Group, organized by the Commission, since

[136] *See, e.g.*, Tr., Vol. IX, at pp. 2582-2583.
[137] IGS Application for Rehearing, at pg. 13; RESA Application for Rehearing, at pg. 12.

its inception. Mr. Jones has extensive experience with matters involving customer choice in both the gas and electric businesses. Indeed, Mr. Jones has worked on the transition team that developed the operational support plan for electric choice in the Duke Energy Ohio service territory since January 1, 2001.[138] Mr. Jones testified at length in response to questions from IGS and RESA with respect to what can and cannot be included in a bill and what format restrictions apply.[139] In particular Mr. Jones explained that including CRES non-commodity charges on a bill would involve additional cost, has not been vetted by the Ohio EDI Working Group, and that including such charges would be a misuse of the EDI transaction since the existence of something other than an electric service cannot be parsed from non-electric service. As Mr. Jones explained, "It would take revamping of a lot of things to be able to accomplish what you are talking about there."[140] Although IGS and RESA may prefer otherwise, there is not a more knowledgeable witness available than Mr. Jones when it comes to the history of electric customer choice and the capabilities of Duke Energy Ohio's systems to manage customer choice and billing. Thus, Mr. Jones explained that non-commodity services do not inter-mix well with electric commodity services in the Duke Energy Ohio billing system, and such a statement should be credited with a great deal of weight, given his many years of experience and his knowledge of the Company's billing system.

RESA and IGS argue that the Commission's decision is arbitrary and against the manifest weight of the evidence, as not all CRES providers may participate in the purchase of accounts receivable program. RESA and IGS – both consistent supporters of the purchase of accounts receivable program – therefore submit that certain CRES providers should be able to include

[138] Duke Energy Ohio Ex. 13 (Direct Testimony of Daniel L. Jones), at pg.2.
[139] Tr. Vol. IV, at pp. 1045-1047 and 1066 to 1067.
[140] *Id.*

non-commodity charges on the utility bill.[141] Such a claim, however, is a mere regurgitation of what these two intervenors have previously asserted. Moreover, it ignores the power of the Commission, as the trier of fact, to weigh the evidence, assess the credibility of the witnesses, and render a decision. That RESA and IGS do not agree with the result does not render it arbitrary or against the manifest weight of the evidence. As long as there is evidence upon which the Commission relied, its decision will stand.

Curiously, RESA and IGS seek here to force an outcome that undermines their constant refrain of "fairness." They suggest that, in limited circumstances, some CRES providers should be permitted to include non-commodity charges on the utility bill. Such an outcome is not viable. It invites confusion for customers; it does not enable the "one bundled rate" that IGS and RESA tout; it does not address cost responsibility; and it sets up an automatic disparity between CRES providers. Indeed, all CRES providers would be forced to choose between participation in the purchase of accounts receivable program and access to the utility bill for purpose of billing non-commodity charges. There is no evidence here that CRES providers welcome such a forced decision or the financial consequences associated with it. RESA and IGS continue to grasp at straws, while ignoring the directives of the Commission.

Finally, RESA asks the Commission to impose restrictions upon Duke Energy Ohio, solely in an effort to enable RESA's member CRES providers to include their non-commodity charges on Duke Energy Ohio's utility bills. As an alternative, RESA demands that CRES provider affiliates that do not provide CRES should be allowed to include their charges on the Duke Energy Ohio utility bill.[142] But RESA offers no new discussion on this point and, in fact,

[141] RESA Application for Rehearing, at pg. 13; IGS Application for Rehearing, at pp. 14-15.
[142] RESA Application for Rehearing, at pp. 14-15.

offers no evidence whatsoever on which its contentions are based. Its request, therefore, must be denied.

As discussed previously, Duke Energy Ohio is not now engaging in discriminatory practices. And the exclusion of non-commodity charges from the utility bill is to ensure the integrity of the Company's purchase of accounts receivable program. RESA ignores these undisputed facts and instead posits that it, if systems limitations were found to exist, it would accept the Commission giving "Duke a reasonable amount of time to effectuate the changes needed so that all providers of non-commodity products and services have a fair and equal ability to include their charges on the utility bill."[143] Notwithstanding RESA's purported benevolence, its claims are not supported by the record in these proceedings.

Again, RESA is not asking that **all** suppliers of non-commodity products and services have access to the regulated bill. RESA wants only to compel such access for CRES providers and their affiliates. This limited focus renders false RESA's claims of fairness. Further, RESA does not cite to any evidence as to exactly who would pay for the work needed to enable countless providers unlimited access to utility bills. Ironically, RESA does not propose that suppliers absorb these costs. Thus, one can only assume that, despite any evidentiary showing from RESA, it believes that all customers should pay for information technology changes being advocated by just two entities.

The Commission rightfully limited the scope of this SSO proceeding to matters that are both ripe for decision and relevant to the approval of Duke Energy Ohio's proposed ESP. It further informed RESA that there exist other forums through which RESA may pursue claims of discrimination and alleged corporate separation violations. RESA's reluctance to avail itself of

[143] *Id.*, at pg. 14.

this opportunity, coupled with its failure to provide any new arguments here, warrants rejection of its rehearing request.

VII. Amendment of Declaration of Authority

Constellation contends that it was unjust and unreasonable for the Commission to approve, in its entirety, Section 3.9 of the Master Standard Service Offer Supply Agreement (MSA), claiming that such a provision vests too much discretion in Duke Energy Ohio.[144] Constellation, however, ignores the purpose for such revisions and the practical efficiencies related to same.

The Declaration of Authority reflects a process through which certain, identified PJM billing line items are transferred between the load serving entities customarily allocated such charges and Duke Energy Ohio.[145] The designated billing line items must uniformly apply to all suppliers, lest there be discrepancies in the costs ultimately borne by customers and inconsistencies in the competitive market. The revisions to Section 3.9 of the MSA properly ensure that changes to the Declaration of Authority are accepted by all suppliers in a timely manner and that a recalcitrant supplier cannot force inconsistencies by refusing to agree to modifications. That such an outcome is not supported by Constellation demonstrates the very reason for which the revisions to Section 3.9 are appropriate.

Further, Duke Energy Ohio has no intentions of arbitrarily revising the billing line items included in the Declaration of Authority process and Constellation cites to no evidence of such mal-intent. Rather, as confirmed by the Company, any amendments or revisions will be made consistent with good business practices and with an eye toward protecting customers.

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[144] Constellation Application for Rehearing, at pp. 18-19.
[145] Application Volume 1, Attachment F Master Supply Agreement, Article 3, pg. 14 (May 29, 2014).

The Commission rightfully approved the Company's revisions to Section 3.9 of the MSA. Deleting portions thereof, as proposed by Constellation, will not enable Duke Energy Ohio to retain flexibility. Instead, such deletion would force Duke Energy Ohio to unnecessarily expend resources to ensure uniformity and equity among suppliers and, ultimately, customers from whom costs are recovered.

VIII. Load Factor Adjustment

No intervenor in these proceedings contests the gradual phasing out of the Load Factor Adjustment. And OEG alone seeks clarification on the Commission's ruling as to the LFA. Specifically, OEG seeks clarification that credits under the LFA will persist through the term of the ESP, with a final true up occurring after May 31, 2018.[146] Duke Energy Ohio submits that the Commission's instruction in respect of the phasing out of the LFA is unambiguous and results in a consistently declining trajectory, as contemplated in the Commission's Order.[147] OEG's proposal would not only have the effect of an uneven trend in phasing out the rider but it will also leave the rider at a rate above zero when the ESP 3 period ends, leaving the Commission with yet another decision on how to deal with this adjustment between low-load factor customers and high-load factor customers at that time.

IX. The "MRO v. ESP" Test

Ohio law requires the Commission to approve an ESP if, and only if, "it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under R.C. 4928.142 [148] (MRO test). In the Order, the Commission explained that, as it typically does based on its reading of

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[146] OEG Application for Rehearing, at pp. 2-3.
[147] *Id*, at pg. 3, Option 1. *Cf.*, Option 1, which would result in larger rate reductions in year four.
[148] R.C. 4928.143(C)(1).

the statute and guidance provided by the Ohio Supreme Court, it would consider both quantitative and qualitative factors in its analysis.[149]

After reviewing the arguments, the Commission concluded that the proposed ESP 3, as modified by the Commission, would be more favorable than a market rate offer (MRO) under R.C. 4928.142. It based this conclusion on several underlying findings:

- The ESP so approved will be more favorable than an MRO on **quantitative** bases:
  - Generation rates will be equal to an MRO, as they are based on wholesale auctions.
  - Rider PSR has no impact on the test, as it is set at zero.
  - Other distribution-related riders will be equal to an MRO, as they could be approved in identical form through a distribution rate case.
  - Rate design improvements are more favorable than they would be under an MRO, as the MRO would provide no ability to phase in the changes.
- The ESP so approved will be more favorable than an MRO on **qualitative** bases:
  - The ESP will advance state policy more than would an MRO.
  - The ESP continues to allow movement toward full market pricing faster than would occur under an MRO.
  - The approval of distribution-related riders will allow the Company to hold base distribution rates constant – an outcome that would not be available under an MRO.[150]

OMA, OCC, and OPAE disagree with the Commission's conclusion.

A. The MRO test properly includes qualitative factors.

Initially, OCC debated the proper application of the MRO test, arguing that qualitative factors are not to be considered. As support for this position, OCC points to a 2011 Ohio Supreme Court opinion (*Columbus Southern II*) that found that ESPs may not include categories

[149] Order, at pg. 96.
[150] *Id.*, pp. 96-97.

of cost recovery other than those specifically listed in the applicable law.[151] Thus, OCC argued, nothing other than cost-related aspects of an ESP may be considered in the test.[152]

OCC's error is based on its merging of two entirely different concepts: what costs may be recovered through an ESP and how to evaluate the favorability of the ESP compared to an MRO. The Court's decision in *Columbus Southern II* related only to what **cost-recovery** categories could be addressed through an ESP.[153] That case included no decision concerning the MRO test. Rather, the MRO test was addressed in the earlier, *Columbus Southern I*, case.[154] There, the Court left no doubt that both pricing and other terms and conditions are to be factored into the Commission's consideration of the MRO test.[155]

OCC's misapplication of these two holdings is most clearly seen in its statement that the MRO test "does not permit an EDU to include **other provisions** in its ESP that do not fall within the nine listed 'categories of cost recovery' in R.C. 4928.143(B)(2). The later-decided *Columbus Southern II* is controlling. It was error to include in the ESP v. MRO test factors . . . not listed in R.C. 4928.143(B)."[156] But, contrary to OCC's assertion, *Columbus Southern II* did not prohibit the inclusion of "other provisions;" it prohibited the inclusion of other "categories of cost recovery." Other provisions that are not cost-recovery provisions are not addressed. On the other hand, *Columbus Southern I* talked directly about the MRO test, concluding that such other provisions **must** be considered. The two issues are not, as portrayed by OCC, analogous.

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[151] OCC Application for Rehearing, at pp. 45, 52-53, *citing In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788.
[152] OCC Application for Rehearing, at pg. 53.
[153] *Columbus Southern II*, at ¶ 31.
[154] *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 402, 2011-Ohio-958.
[155] *Columbus Southern I*, at ¶ 27.
[156] OCC Application for Rehearing, at pg. 53 (emphasis added).

B. The ESP, as approved, is quantitatively more favorable than an MRO.

There appears to be no dispute that the ESP's auction-based generation rates are identical to the rates that would be charged under an MRO. OMA and OCC do, however, suggest that various other aspects of the ESP, as approved, are not more favorable.

With regard to Rider PSR, OCC claims it was an error for the Commission to conclude that the placeholder Rider PSR has no quantitative impact on customers, even though it is set at zero, as it thinks costs under that rider "can be reasonably expected to reach $22 million."[157] Similarly, OMA contends that "the Commission must consider future recovery of costs under all riders that are explicitly established as a provision of an ESP" and that it also must "consider the level of those future costs or the potential of costs to be recovered under the authorized riders for purposes of the MRO test."[158] Likewise, OPAE proposes that an ESP that includes an above-market Rider PSR cannot be more favorable than an MRO.[159] These parties are wrong. The recovery of any costs whatsoever under Rider PSR is entirely illusory. The Commission – although wrongly – rejected the Company's proposal. While the rider exists in theory, there is no way to predict whether any rate will ever be assigned to it, to say nothing about the total dollar amount that might thereby be recovered. As even admitted by OCC, Rider PSR must therefore be treated as having no quantitative impact for purposes of the MRO test.[160]

OCC and OMA also complain that the distribution-related riders do not actually provide the advantage of allowing the Company to "hold base distribution rates constant" through the term of the ESP, as the Company has not "committed to refrain from filing a distribution rate

[157] *Id.*, at pg. 48.
[158] OMA Application for Rehearing, at pp. 16-17.
[159] OPAE Application for Rehearing, at pp. 10-11.
[160] Tr. Vol. XII, pg. 3615.

case" during that period.[161] There is nothing in the MRO test that requires an EDU to make a "commitment" in order for the Commission to find an advantage. The Commission's analysis properly recognized that a utility is likely to spend its resources on a base rate case only if its return has fallen. With the approval of distribution-related riders, that is less likely to happen; thus giving rise to the benefit identified by the Commission.

Continuing its discussion of these riders, OCC argues against the Commission's consideration of the actions that could be taken in a rate case, together with an MRO. And, if the results of a rate case are included, then OCC contends that the "extra" recovery – resulting from avoidance of regulatory lag – through the rider must also be considered.[162] Unfortunately, OCC's discussion fails to account for the fact that faster recovery of the costs in question will also result in lower carrying costs.

The logic of OCC's arguments also fails when considered thoroughly. OCC argues that the Commission cannot consider the effect of a rate case in conjunction with an MRO. If the effect of a rate case could not be included, than a distribution-related rider, added on top of auction-based rates, would **necessarily** result in an ESP that is **less** favorable than an MRO that is similarly market based and has no such distribution-related rider. But the Ohio General Assembly clearly approved the inclusion of such riders. For an EDU to offer a beneficial distribution-related rider, in recognition of state policy in this regard, it would have to offer the generation itself at **less than market rates**. It is entirely illogical to assume that the legislative intent requires the EDU to suffer a loss in order to comply with state policy.

The Commission was absolutely correct.

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[161] OMA Application for Rehearing, at pg. 15. *See also* OCC Application for Rehearing, at pp. 57-58.
[162] OCC Application for Rehearing, at pp. 49-51.

C. The ESP, as approved by the Commission does not violate the state's policy of protecting at-risk populations.

In a further attempt to convince the Commission to reject Riders DCI and DSR,[163] OPAE incorrectly concludes that "nothing in the ESP as approved by the Commission addresses the affordability of electric service or the protection of at-risk populations."[164] OPAE's argument is predicated upon inaccurate references to the record and a disregard of Ohio Supreme Court and Commission precedent.

As this Commission has routinely expressed, state policy as set forth in R.C. 4928.02 does not dictate any Commission decision. Rather, as the Ohio Supreme Court has confirmed, state policy functions as a guide for the Commission.[165] Despite the undeniable purpose of state policy considerations, OPAE maintains that the approved ESP is unlawful. OPAE's incorrect interpretation of the law alone merits rejection of its argument. But even when state policy considerations are elevated to the status preferred by OPAE, it must be concluded that the ESP does not run afoul of same.

OPAE posits that, under the new ESP, Duke Energy Ohio's rates for electric service will become "even higher and more unaffordable for customers."[166] To accept OPAE's premise first requires the concession that current electric service rates for Duke Energy Ohio's customers are unaffordable. But to do so compels the illogical conclusion that the Commission has approved unaffordable electric rates for **all** Ohio electric distribution companies, as Duke Energy Ohio's rates are, and will continue to be, the lowest in the state.[167] Further, to accept OPAE's contention

[163] OPAE Application for Rehearing, at pp. 30-33.
[164] *Id.*, at pp. 30-31.
[165] *In re Application of Columbus Southern Power Company*, 128 Ohio St.3d 512, 2011-Ohio-1788, at ¶ 62.
[166] OPAE Application for Rehearing, at pg. 32.
[167] Duke Energy Ohio Ex. 2 (James P. Henning Direct Testimony), at pg. 13. *See also* Tr. Vol. XII, at pp. 3555-3557 (OCC witness Williams admits that rates for Cincinnati customers are the lowest in the state and that, while he has done so in other instances, he did not compare Duke Energy Ohio's rates to those of other Ohio distribution utility companies).

that Duke Energy Ohio's current rates are too high, the Commission must ignore OPAE's consent to stipulations resolving the Company's current ESP and its most recent base distribution rate case.[168] And, finally, to accept OPAE's allegation mandates that the complete evidentiary record in this case be ignored.

OCC witness Williams, on whose testimony OPAE relies, admitted that, when ascertaining the reasonableness of rates, consideration must be given to the fact that the Company is entitled to recover its costs and earn a return.[169] Further, Mr. Williams conceded that affordability – or the reasonableness of pricing – is not defined under R.C. 4928.02.[170] And such an omission appropriately reserves in the Commission the broad authority that it has in setting rates and assessing the reasonableness thereof in the context of the utility company's right to recover its costs and earn a return.

In its continued opposition to Riders DCI and DSR, OPAE does not dispute that such costs are recoverable. As for Rider DCI, OPAE disputes the manner in which such costs are to be recovered and, as for Rider DSR, it misunderstands the recovery mechanism. As to the former rider, the recovery of costs incurred to proactively maintain and improve the distribution system will occur through a rider that is adjusted quarterly, thereby avoiding rate shock for all distribution customers. And this recovery mechanism, as the Commission rightfully found, avoids detrimental effects to the state's economy – effects realized when utilities merely react to adverse circumstances. As even OPAE must concede, recovery mechanisms that promote the state's economy benefit all customers, including those at risk due to their financial situation. The

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[168] *In the Matter of the Application of Duke Energy Ohio, Inc., for Approval of a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan, Accounting Modifications, and Tariffs for Generation Service*, Case No. 11-3549-EL-SSO, *et al.*, Stipulation and Recommendation (October 24, 2011); *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates,* Case No. 12-1682-EL-AIR, *et al.;* Stipulation and Recommendation (April 2, 2013).
[169] Tr. Vol. XII, at pg. 3553.
[170] Tr. Vol. XII, at pp. 3551-3552.

Commission, in approving Rider DCI, also imposed revenue caps in order to ensure "that spending is prudent and not too onerous for customers."[171] The Commission thus considered the impact to all customers – including at-risk populations – when approving Rider DCI.

With regard to Rider DSR, OPAE incorrectly implies that such costs will be recovered almost instantaneously.[172] Rider DSR is structured as a tracking mechanism. As Company witness Laub clearly described, Duke Energy Ohio will defer storm costs that are greater or less than the amount of storm costs included in base rates, with adjustment in the next base rate proceeding.[173] Only when the annual balance of the deferral exceeds $5 million would the Company initiate efforts to recover or return the excess.[174] Thus, it is incorrect to state that Rider DSR will be adjusted with the frequency that OPAE implies or even that it will ultimately result in a net cost to customers. Rather, it is probable that recovery of deferred balances will occur in the context of a rate case, just as OPAE argues must be done.

In modifying and approving the Company's ESP, the Commission did not fail to protect at-risk populations. There is thus no justification for exempting this subset of customers from Riders DCI and DSR. Whether recovered through base rate proceedings, a tracking mechanism, or a rider, the costs associated with these riders relate to the provision of safe, efficient, and reliable distribution service. It is consistent with well-settled regulatory principles that customers be responsible for the costs incurred to serve them.

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[171] Order, at pg. 72.
[172] OPAE Application for Rehearing, at pg. 33 ("Commission approved Rider SD (sic) when storm damage costs should be recovered through base distribution rates" and "[t]he riders will increase costs… .").
[173] Opinion and Order, at pg. 73.
[174] *Id.*

X. Conclusion

Duke Energy Ohio respectfully submits that the Commission should deny intervenors' rehearing on the grounds discussed above.

Respectfully submitted,

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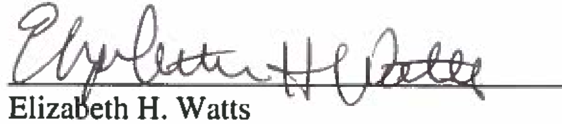
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was delivered by U.S. mail (postage prepaid), personal, or electronic mail, on this 14th day of May 2015, to the parties listed below.



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